San Dieguito Union High School District
PERSONNEL COMMISSION

Special Meeting

4:00 P.M., January 6, 2015
District Office Board Room 101

PUBLIC COMMENTS
If you wish to speak regarding an item on the agenda, please complete a "Request to Address the Personnel Commission" slip located at the sign-in table and present it to Personnel Commission staff prior to the start of the meeting. When the Personnel Commission Chair invites you to speak, please state your name and the name of your organization before making your presentation. In the interest of time and order, presentations from the public should be focused and on topic. The Commission Chair will curtail public comments that become repetitive, unfocused or off topic.

Public comments in a Special Meeting must pertain to the items on the agenda.

It is preferred that complaints or charges against an employee be submitted in writing to the Commission through the Classified Personnel Office.

AGENDA POSTING REQUIREMENTS:
In accordance with the Brown Act and Personnel Commission Rules, agenda for Regular Personnel Commission Meetings will be posted at least 72 hours prior to the meeting. Agendas for Special Meetings will be posted at least 24 hours prior to the meeting.

PUBLIC INSPECTION OF DOCUMENTS
A copy of this agenda with all the supporting documents is available for review in the Classified Personnel Office between 8:00 AM and 4:30 PM, and is available on the district website, www.sduhsd.net. In addition, a copy of the Personnel Commission Rules and Regulations may be found on the district website.

CELL PHONES/ELECTRONIC DEVICES
As a courtesy to all attendees, please silence all electronic devices to silent mode and engage in conversations outside the meeting room.

In compliance with the Americans with Disabilities Act, if you need special assistance, disability-related modifications, or accommodations including auxiliary aids or services, in order to participate in the public meetings of the Personnel Commission, please contact the Classified Personnel Office at (760) 753-6491. Notification 72 hours prior to the meeting will enable staff to make reasonable arrangements to ensure accommodation and accessibility to this meeting. Upon request, the Commission shall also make available this agenda and all other public records associated with the meeting in appropriate alternative formats for persons with a disability.

San Dieguito Union High School District
PERSONNEL COMMISSION

Special Meeting

4:00 P.M., January 6, 2015
District Office Board Room 101

REGULAR MEETING/OPEN SESSION

1. CALL TO ORDER ..... Commission Chair

2. PLEDGE OF ALLEGIANCE

3. APPROVAL OF THE AGENDA

   Motion by _____, second by _____, to approve the agenda for the January 6, 2015 Personnel Commission Special Meeting.

ACTION ITEMS

4. APPEAL OF RULE APPLICATION BY DIRECTOR OF CLASSIFIED PERSONNEL (RULE 2.15.C.)

   Motion by _____, seconded by _____, to uphold the Director's application of Rule 8.2.B in the dismissal of a classified probationary employee as meeting the requirements of the Personnel Commission Rules.

DISCUSSION/INFORMATION ITEMS (See Supplements)

6. CORRESPONDENCE

7. PUBLIC COMMENTS
   The Public Comments Section of the meeting provides the opportunity for individuals to address items that are not on the agenda. In accordance with the Brown Act, Personnel Commissioners may not engage in a discussion of non-agenda items or issues raised during public comments except to 1) acknowledge receipt of the information, 2) refer to staff for further study, or 3) refer the matter to the next agenda.

   A. California School Employees Association
   B. San Dieguito Union High School District
   C. Public Comments

8. NEXT PERSONNEL COMMISSION MEETING
   The next regular meeting of the Personnel Commission is scheduled for Tuesday, January 13, 2015, at 4:00 PM in the District Office Large Board Room 101, 710 Encinitas Boulevard, Encinitas, CA 92024.

9. CLOSED SESSION (As Required)
   Closed session to consider personnel issues pursuant to Government Code Sections 11126 and 54957 (for consideration of litigation, the appointment, employment, evaluation for performance, discipline/release, dismissal of a public employee or to hear complaints or charges brought against such employee by another person or session).

10. REPORT FROM CLOSED SESSION (As Necessary)

11. ADJOURNMENT

San Dieguito
Union High School District

710 Encinitas Boulevard, Encinitas, CA 92024
Telephone (760) 753-6491
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December 29, 2014

TO: Personnel Commission

FROM: Corrie Amador
Director of Classified Personnel

Report: **Personnel Commission Consideration and Action on Appeal of Director's Decision Regarding Chapter 8 and Chapter 13 Application to Probationary Employees (Rule 2.15.C)**

Personnel Commission Rule 2.15.C

The Director of Classified Personnel is tasked with interpreting the Rules on behalf of the Personnel Commission. According to Rule 2.15.C., "where two or more rules appear to be in conflict, or when no rules provide a clear-cut answer to a problem, the matter shall be decided by the Personnel Director subject to appeal to the Commission. (EC 45266)." In the matter before the Personnel Commission, the Director of Classified Personnel took actions based on past practice and understanding of dismissal procedures of probationary employees. This action was challenged by Mr. Scott Hendries, Labor Relations Representative for CSEA, in an email dated November 20, 2014, and a letter dated December 10, 2014. Mr. Hendries asked the Director to place his correspondence on the November 16 agenda for action, but did not state what action he was requesting. His email and letter were submitted to the Personnel Commission as discussion, and Mr. Hendries presented CSEA's position at the December 16 meeting. It is therefore assumed, Mr. Hendries is appealing the Director's actions based on Personnel Commission Rule 2.15.C., and is placed on the agenda as such for the Personnel Commissioner's consideration.

Background

Education Code 45301 affords the District six months or 130 days, whichever is longer, to determine whether an employee should be granted permanent status in a classification. Following the selection process, the probationary period is the continuing evaluation of a candidate's fit for the assignment, and is an opportunity for the district and the employee to determine if it is a good match. Commission staff for the SDUHSD has historically followed the progress of employees during their probationary period, monitored the completion of probationary evaluations, and assisted the hiring administrator throughout the process to retain, demote (when applicable) or dismiss the probationary employee.

The decision to terminate probation is taken seriously by administration, and it is unfortunate when this action becomes necessary. However, in certain instances, the actions of the probationary employee require this severe response by the District. The decision to terminate employment of a probationary employee is made by District

Administration. Procedurally, the probationary employee is given their evaluation with areas of deficiency noted, as well as a "Recommendation for Permanent Status" document indicating they are not being recommended by their supervisor (see attached). The employee is then given a letter from the Director of Classified Personnel outlining the District's decision in accordance with Rule 8.2.B.

Commission staff strives to establish lists of eligibles that provide the District excellent choices for final selection. It is important for the Director of Classified Personnel to be involved in the probationary evaluation process, first, for clarity purposes in order to communicate with the employee the District's administrative decision, and secondly to determine if any changes are needed in future processes such as in examination development. The Director's involvement is not to make a determination as to any employment action, but to assist and advise the hiring administrator in the process.

Dismissal of Probationary Employee – Chapters 8 and 13, and Definition of "Regular" Employee:
On December 4, 2014, the District took action to dismiss a probationary employee for inappropriate conduct. The dismissal meeting was scheduled by the Director of Classified Personnel, and all parties were asked to meet in Human Resources. The supervisor provided the employee with a probationary evaluation document and the decision not to recommend for permanent status document. The employee was also given a letter stating the District's decision. Copies of the letter and all documents were then mailed to the employee's address.

As outlined in Education Code 45305 and Personnel Commission Rule 8, a probationary employee does not have the right to appeal the District's decision. The District obtained a legal opinion on the matter of due process rights being extended to probationary employees by Personnel Commission Rules. According to legal counsel, the Personnel Commission does not have the authority to impose due process for probationary employees.

In *Skelly V. State Personnel Bd.*(1975) 15 Cal.3d 194, the Court repeatedly references the "permanent" and "nonprobationary" employee's rights to due process, excluding probationary employees as not having property rights (see document attached). Further, the CSEA position on due process as outlined on their website recognizes the exclusion of probationary employees:

> The court decisions, including Skelly and later decided cases, have long established that public employees who may be terminated only for cause (i.e., not on probation and not specifically at-will) have a property interest in their continued employment. Therefore, a public employer must satisfy the procedural due process requirements before depriving a permanent employee of his/her property interest through disciplinary action.

Rule 8.2.B is clear and specific in its direction regarding dismissal of probationary employees. It also clearly states the probationary employee does not have the right to appeal (45305). As such, the Director's involvement in assisting the hiring administrator is not in conflict with the work of the Personnel Commission, but supports the goal of the Commission to select and retain employees to "ensure the efficiency of the service" (EC 45260).

Given the specific language in Rule 8.2.B regarding the dismissal of probationary employees, the understanding that probationary employees are not entitled to due process, and the fact the Personnel Commission is not authorized to impose such measures as due process for probationary employees, it is recommended the Personnel Commission uphold the Director's application of Rule 8.2.B to probationary employees as meeting the requirements of the Personnel Commission Rules.

In addition, it is acknowledged the term "regular employee" as used in 13.2.B is inarticulate and inappropriate. It is recommended this rule be revised to clarify its application to permanent employees only, and a draft be provided for first read at the January 13, 2015 Regular Meeting of the Personnel Commission.

Attachments:
Legal Opinion from Tony DeMarco dated 12/29/14
SDUHSD Probationary Evaluation document
SDUHSD Recommendation for Permanent Status document
Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194
"What is Skelly?" – CSEA Website
Letter, Email and attachments from Mr. Scott Hendries dated December 10, 2014

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

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OUR FILE NUMBER:

December 29, 2014

VIA EMAIL
MEMORANDUM

TO: Corrie Amador, Director of Classified Personnel
San Dieguito Union High School District

FROM: Tony De Marco and Cathie Fields
District's Legal Counsel

RE: Former Classified Employee [redacted]

Corrie:

Pursuant to a request by the San Dieguito Union High School District, please accept this correspondence as the District's position with respect to the above-referenced probationary classified employee. It is our understanding that at the Personnel Commission meeting of December 16, 2014, you orally presented your determination that Chapter 8 of the Personnel Commission Rules ("PCR") applies to dismissal of probationary classified employees, and that PCR 13 applies to dismissal of permanent classified employees. We further understand that the Personnel Commission will consider this issue at its meeting on January 6, 2015.

CSEA requested that the Personnel Commission review this matter for several reasons, including allegations the District failed to accord due process to [redacted] in accordance with PCR 13, the District failed to properly evaluate [redacted] and because of your participation in an investigation of [redacted] misconduct and statement that the District had "determined to end your probationary period."

As is described in more detail below, the District's positions are as follows:

1. PCR 13 does not apply to probationary classified employees; dismissal of probationary classified employees is governed exclusively by PCR 8.

2. Even if the Personnel Commission attempted to require a showing of "cause" or application of "due process" for the dismissal of probationary classified employees, that Rule would be an inappropriate attempt to divest the District of the right to dismiss probationary

employees. This same issue was resolved in the matter of the termination of another District employee during his probationary period. The Commission concluded at that time that an employee serving a new classification after exercising rights as a laid off employee to "*Tucker*" into the position under Education Code section 45298 was a probationary employee who could be returned to the reemployment list without due process afforded to permanent classified employees.

3. The evaluation of classified employees is a contractual matter and the Personnel Commission does not have jurisdiction to either interpret the collective bargaining agreement ("CBA") between the District and CSEA, or grant relief for an alleged violation of the CBA.

4. The Education Code and past practice support the Director of Classified Personnel participating with the District in all aspects of hiring, investigation, and dismissal of probationary classified employees.

The District requests this memo be provided to the Personnel Commission as part of its review of the matter. The District also requests that it be allocated sufficient time to address the Personnel Commission at its January 6, 2015 meeting.

1. <u>PCR 13 does not apply to probationary classified employees; dismissal of probationary classified employees is governed exclusively by PCR 8.</u>

CSEA has asked the Personnel Commission to interpret PCR 13 to accord due process to the termination of probationary employees.

PCR 13.1 states "*persons* employed in the classified service may be suspended, demoted, or dismissed for any of the following causes...." The numerous causes for discipline are then listed in PCR 13.1. PCR 13.1's use of the word "persons" suggests that all classified employees of the District, whether probationary or permanent, may be dismissed only "for cause." PCR 13.1 does not distinguish between probationary or permanent employment.

PCR 13.2 provides, in relevant part:

> Before the Superintendent makes a recommendation to the Board that an *employee* be dismissed, the employee shall be given written notice of this intention to recommend dismissal to the Board by a specified date. The written notice shall contain a statement of the proposed charges, the specific causes for the disciplinary action, and the acts or omissions which establish the causes for disciplinary action. (Emphasis added.)

Again, this portion of PCR 13.2 does not distinguish between probationary or permanent employment.

Additionally, PCR 13.2 states that "When a *regular employee*" is to be suspended, demoted or dismissed, a written statement of charges shall be formulated by a member of administration and submitted to the District Superintendent for presentation to the Board of Trustees." PCR 1.2 defines "Regular Employee" as "[a] person who has probationary or permanent status in the classified service."

Therefore, PCR 13.2 can be read to continue the premise of PCR 13.1: all classified employees of the District, whether probationary or permanent, may be dismissed only "for cause," and any "for cause" dismissal may occur only after the employee receives "due process" that includes a detailed notice of intent to dismiss that lists the charges, causes, and acts or omissions which establish that cause, and a meeting with the Superintendent.

PCR 13 does not contain the word "probationary" or a specific statement applying the "for cause" dismissal process to "probationary employees." Rather, CSEA (for the first time) has argued that the use of the vague words "employee," "person," and "regular employee" should be read to require "due process" and a showing of "cause" before a probationary classified employee may be dismissed.

Historically, the District has never provided the type of notice described in PCR 13.2 to classified employees facing dismissal during the probationary period, and the District has never followed PCR 13.1 requiring a showing of cause prior to dismissing a probationary classified employee.

Instead, the District has always followed PCR 8.2(B), which clearly provides:

> New employees who are suspended or dismissed during their initial probationary period shall be notified in writing of the actions taken and the reasons therefore. They shall not have the right of appeal.

Accordingly, in PCR 8.2 there is a specific, separate Commission-approved process for the termination of probationary classified employees that (A) does not require a showing of cause as required in PCR 13.1; (B) does not require the detailed statement of acts/omissions or citations to causes for discipline as required by PCR 13.2; and (C) does not require the same "due process" generally described in PCR 13 [e.g. rights to review evidence, to "prepare a defense," to meet with the Superintendent, receive notice of Board action, etc.].

Moreover, PCR 8 relates specifically to newly hired probationary classified employees, such as [redacted]. PCR 13 does not, by express terms, attempt to apply "due process" and "for cause" to probationary employees. The question is whether these concepts should be applied, for the first time, to probationary classified employees. CSEA contends PCR 13 should be applied; the District contends PCR 8 should be applied.

When determining which statute may apply to a given set of facts, it is a well-established legal principle that when a conflict exists between a general law and a specific law, the provisions of the specific law prevail. (Cal. Code Civ. Proc. § 1859.) PCR 8.2 clearly and specifically applies only to newly hired probationary classified employees, and should control. PCR 13, which uses the general terms "employee" and "person," and which references "regular employees," should be held to apply only to permanent employees.

This position is further supported by the civil and common law rules of contract interpretation. Code of Civil Procedure section 1856, at subdivision (c), states the terms of a written agreement "may be explained or supplemented by course of dealing ... or by course of performance." Acts of the parties subsequent to the execution of the contract and before any controversy has arisen as to its effect "may reveal what the parties understood and intended those terms to mean." (*City of Hope Nat. Med. Ctr. v. Genentech Inc.* (2008) 43 Cal.4th 375, 393.) Although an agreement may be indefinite or uncertain at the time of contract, "the subsequent performance of the parties will be considered in determining its meaning for they are least likely to be mistaken as to the intent." (*Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal.App.4th 1441, 1449.) The District's consistent past practice with respect to newly hired probationary classified employees was to have the Director of Classified Personnel terminate the probationary period by simple written correspondence. Probationary classified employees have never received detailed notices of dismissal that articulate specific causes for discipline. Therefore, we conclude the past practice of the District and CSEA indicate only PCR 8.2 applies to the dismissal of probationary classified employees.

Further, as a general legal principle for interpreting provisions, "each sentence must not be read in isolation but in light of the ... scheme." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 (citing *In re Catalano* (1981) 29 Cal.3d 1, 10–11).) We believe this principle lends insight to the alleged inconsistency. Contracts are similarly interpreted, as California law holds that "particular clauses of a contract are subordinate to its general intent." (Civ. Code § 1650.)

On the one hand, PCR 13 applies concepts of "cause" and "due process" that have traditionally been reserved for permanent employees. Indeed, even the official CSEA website suggests these concepts apply only to permanent employees:

> The concept of due process should be defined at the outset. It generally means that, prior to any significant discipline, an employee must be afforded the charges against him/her and an opportunity to present his/her side of the issue in an informal setting. The court decisions, including *Skelly* and later decided cases, have long established that public *employees who may be terminated only for cause (i.e. not on probation and not specifically at-will)* have a property interest in their continued employment. Therefore, a public employer must satisfy the procedural due process requirements before depriving a permanent employee of his/her property interest through disciplinary action. (Emphasis added.)

On the other hand, when both PCRs 8 and 13 are read together, it is clear that PCR 8 applies to probationary employment, and PCR 13 applies to permanent employment. When PCR 13 is read in its entirety, it is clear the process leads to the appeal by a permanent employee to the Personnel Commission when challenging whether cause existed for their dismissal from the District. This is the type of "due process" that CSEA and the District agree does not apply to employees "on probation."

Finally, there is no authority in the Education Code for the Personnel Commission to require a showing of "cause" or for the provisions of "due process" for the dismissal of probationary classified employees. Education Code section 45302 limits "demotion and removal" for cause to persons in the permanent classified service.

Therefore, PCR 8.2 relates to the dismissal of [redacted] while PCR 13.2 relates to due process rights of permanent classified employees.

2. **Even if the Personnel Commission attempted to require a showing of "cause" or application of "due process" for the dismissal of probationary classified employees, that Rule would be found to be an inappropriate attempt to divest the District of the right to dismiss probationary employees.**

As stated above, a comprehensive reading of the Personnel Commission rules indicates that PCR 8.2 applies to newly-hired probationary classified employees.

Should the Personnel Commission determine it interprets the PCRs otherwise (or in accordance with CSEA's position), the District may argue that the Personnel Commission cannot divest the District's Board of its legal right to dismiss newly-hired probationary classified employees. Education Code section 45260 provides, at subdivision (a), that PCRs "shall be binding upon the governing board, but shall not restrict the authority of the governing board provided pursuant to other sections of this code."

The governing board will argue that the Personnel Commission does not have authority to create due process rights for probationary employees. For instance, in *Board of Education v. Round Valley Teachers Ass'n.* (1996) 13 Cal.4th 269, the California Supreme Court held that a school district could not collectively bargain due process requirements for dismissing probationary certificated employees, as the procedures for the dismissal of such employees are explicitly set forth in the Education Code.

Further, allowing the Personnel Commission to impose limitations on the governing board's authority to dismiss probationary classified employees would strip the governing board of its authority to determine which employees should attain permanency. It is well established that classified employees are employed by the governing board, rather than by the personnel commission. For instance, in *California Sch. Employees Assn. v. Personnel Commission* (1970)

3 Cal.3d 139, 142, the California Supreme Court affirmed the governing board's power to employ persons to render service in a district: "Initially we observe that the power to employ, suspend, demote and dismiss merit system classified employees is vested in the governing board of each district." (*Ibid.*; see also *Personnel Commission v. Barstow Unified School District* (1996) 43 Cal.App.4th 871, 878 [stating Education Code section 45241 specifically designates a school district, not the personnel commission, as the employer of a classified employee].) The California Court of Appeal similarly held in *Bellflower Education Association v. Bellflower Unified School District* (1991) 228 Cal.App.3d 805, 812 (regarding non-reelection of certificated employees):

> Members of local school boards are elected by the people. These boards are representative governmental bodies upon whom certain statutory duties are imposed. One of these statutory duties is the reelection or nonreelection of probationary teachers. A school board may not delegate this statutory duty to an arbitrator, because our democratic system demands that governmental bodies concerned with the employment of the teachers of our children remain accountable to the people who have elected them. Decisions relating to significant matters of policy cannot be relegated to the collective bargaining process where the people cannot participate and cannot hold actors accountable. This is the essence of representative government.

Similarly, we do not believe the governing board of a school district may delegate its responsibility to determine which classified employees should attain permanency to a personnel commission or other authority, as voters may hold only the responsible trustees accountable for such decisions.

Thus, we do not believe the Personnel Commission may lawfully divest the District's governing board of its decision to accord permanent status to any employee.

Education Code section 45301 provides guidelines regarding the probationary period for classified employees in a merit-system school district. That section states:

> A person who has served an initial probationary period in a class not to exceed six months or 130 days of paid service, whichever is longer, as prescribed by the rules of the commission shall be deemed to be in the permanent classified service, except that the commission may establish a probationary period in a class not to exceed one year for classes designated by the commission as executive, administrative, or police classes. *No employee shall attain permanent status in the classified service until he has completed a probationary period in a class.* In any case the rules of the commission may provide for the exclusion of time while employees are on a leave of absence. *The rights of appeal from disciplinary*

> *action prior to attainment of permanent status in the classified service shall be in accordance with the provisions of Section 45305.* [Emphasis added.]

Education Code section 45305 relates only to permanent classified employees who are serving a probationary period in a promotional position. Section 45305 provides:

> An employee *in the permanent classified service* who has not served the time designated by the commission as probationary for the class may be demoted to the class from which promoted without recourse to an appeal or hearing by the commission, except as otherwise provided by rules of the commission; and provided, that such demotion does not result in the separation of the employee from the permanent classified service. Nothing in this section shall operate to alter the protections guaranteed under Section 45309.[1] [Emphasis added.]

Nothing in Education Code section 45305 provides a personnel commission with authority to create due process rights for newly-hired probationary classified employees. This omission is notable given the Legislature specifically afforded personnel commissions with discretion to create due process rights for permanent employees serving in a probationary new classification.[2]

The California Court of Appeal has recognized the importance of a probationary period in public school district employment, noting that the object and purpose of statutes requiring a probationary period is to provide the "appointive power" a reasonable opportunity to observe and evaluate an employee's performance before according him or her permanent status. (*California School Employees Ass'n v. Compton Unified School Dist.* (1985) 165 Cal.App.3d 694, 699–700.)[3]

Therefore, the Personnel Commission has no authority to require "due process" for probationary employees through a written notice of intent to dismiss, a listing of acts/omissions, and a showing of "cause" for dismissal. Even if the Commission interprets PCR 13 to apply to probationary employees, the rule would be deemed an unlawful attempt to require the District to do something not required by the Education Code.

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[1] Education Code section 45309 relates to permanent classified employees who voluntarily resign then are reemployed by the governing board within 39 months after his last day of paid service as a permanent classified employee. This provision also does not apply to [redacted] as she was not previously a permanent classified employee with the District.

[2] As discussed more fully below, this is precisely what the District's Personnel Commission did in PCR 13.

[3] The governing board, not the personnel commission, is the employer and therefore the appointive power. This concept is addressed more fully below.

3. Evaluations are controlled by the Collective Bargaining Agreement.

Chapter 10 of the PCRs states, "for bargaining unit members, performance appraisals are conducted according to contract provisions." The Evaluation Article of the CBA, at Article 21, section (A)(1), provides:

> All regular employees shall be evaluated by their supervisor in accordance with the following schedule:
>
> A. Probationary Employees:
>
> 1. The second (2^{nd}) and fourth (4^{th}) months of service.

As the evaluation process is covered by the CBA, and the Personnel Commission does not have the authority to interpret the CBA or provide a remedy for an alleged violation of the CBA, this matter is outside the jurisdiction of the Commission.

4. The Director of Classified Personnel may conduct workplace investigations.

District Policy 4219.11 prohibits sexual harassment and requires the District to investigate allegations of sexual harassment. Policy 4219.11 requires sexual harassment investigations to be conducted by "principals, supervisors, or managers," and requires communication of the investigation results to the Assistant Superintendent of Human Resources. Thus, District Policy 4219.11 does not prescribe a specific manager to conduct the investigation.

Education Code section 45264 provides that employees of the Personnel Commission shall be considered part of the classified service, with the same rights and burdens as other classified employees.

> Such employees shall be appointed from eligibility lists established pursuant to the provisions of this article, be classified employees of the school district and be accorded all the rights, benefits, and burdens of any other classified employee serving in the regular service of the district, including representation by the appropriate exclusive representative, if any.

In *Hood v. Compton Community College Dist.* (2005) 127 Cal.App.4th 954, 959–960, the Court of Appeal held that a personnel director was an employee of the employing district, not an employee of the personnel commission itself. The *Hood* court relied on Education Code section 88084, which is the community college equivalent of Education Code section 45264. Thus, you are an employee of the District.

Moreover, the Director of Classified Personnel is deemed a classified manager position in the District. It is within the purview of the school district to employ, pay and otherwise control the

services of classified employees. (*Personnel Commission of the Barstow Unified Sch. Dist. v. Barstow Unified Sch. Dist.* (1996) 43 Cal.App.4th 871, 881) (quoting *Personnel Commission of the Lynwood Unified Sch. Dist.*, *supra*, 223 Cal.App.3d at p. 1467).)

In California, the law limits who is legally permitted to conduct workplace investigations. California Business & Professions Code section 7520 through 7539 provide that to investigate any workplace issue that may ultimately be presented to a Board, court, or governing body, an individual must be an employee of the agency, a duly-licensed private investigator, or an attorney-at-law. Specifically, Business & Professions Code section 7522 provides, "a person employed exclusively and regularly by any employer who does not provide contract security services for other entities or persons, in connection with the affairs of such employer only and where there exists an employer-employee relationship if that person at no time carries or uses any deadly weapon in the performance of his or her duties[,]" may conduct investigations. The above provisions in the Education Code clearly establish that you are an employee of the District.[4]

We suspect (as CSEA provides no legal authority for its positions) that CSEA bases its argument that you cannot conduct an investigation on an isolated provision in Education Code section 45266, at subdivision (a), which states the personnel director "shall be free of prejudgment or bias in order to ensure the impartiality of the commission."

Nevertheless, Education Code section 45266, at subdivision (b), recognizes that in some cases the personnel director may be the party initiating disciplinary action against an employee. That section provides that in such an instance, the personnel director "shall not advise or make recommendations to the commission regarding any disciplinary action appealed to the commission under Section 45305."

It is not unlawful for the Director of Classified Personnel to conduct workplace investigations, as long as the provisions of Education Code section 45266 at subdivision (b) are appropriately followed.

[4] Education Code section 45265 allows a school district of a specified small size to contract out for a shared personnel director; in such a circumstance, there may be an argument that the shared Director would not be able to avail himself of the provisions of B&P 7522 because s/he is not exclusively providing services to one entity.

SAN DIEGUITO UNION HIGH SCHOOL DISTRICT

Classified Probationary Evaluation

EMPLOYEE NAME		JOB TITLE	
ADMINISTRATOR/SUPERVISOR		SITE	HIRE DATE
REVIEW PERIOD	DATE DUE	PROBATIONARY	
		☐ 2nd month	☐ 4th month

PART I: SIGNATURES

ADMINISTRATOR/SUPERVISOR:

Instructions:

1. Please print and sign three copies of this evaluation.
2. Review evaluation with employee.
3. Require employee to sign all three copies at the end of the review.
4. Distribute as follows:
   - Employee Copy
   - Administrator/Supervisor Copy
   - Classified Personnel

I have discussed this evaluation with the employee.

_____ _____

Administrator/Supervisor Date

EMPLOYEE:

I certify that this evaluation has been discussed with me. I understand that my signature does not necessarily indicate agreement. I understand that I have the right to review this evaluation and return it to Classified Personnel, with my comments attached, within ten (10) working days from today's date.

_____ _____

Employee Signature Date

PART II: PERFORMANCE INDICATORS

Indicators One Through Ten Must Be Completed For All Employees In Ranges 1-6

1. KNOWLEDGE OF DUTIES

Demonstrates clear understanding and ability to perform the assigned job duties and has in-depth knowledge and technical expertise. Learns and masters applicable new skills and procedures.

☐ Outstanding	☐ Good Solid Performance	☐ Needs Improvement	☐ Unacceptable
Demonstrates a mastery of breadth and depth of knowledge. Is regarded as an expert.	Has good knowledge of job responsibilities and meets standards.	Needs to increase knowledge of job duties and has limited awareness of what needs to be done.	Lacks required knowledge to perform job. Work is consistently below standards.

Comments:

2. PRODUCTIVITY

Performs at a high level of competency, accuracy and thoroughness. Uses initiative and creativity as appropriate in providing service.

☐ Outstanding	☐ Good Solid Performance	☐ Needs Improvement	☐ Unacceptable
Demonstrates exemplary work and a high level of accuracy and creativity. Work is consistently of high quality.	Produces quality results. Work is accurate and thorough. Pays attention to detail.	Quality of work is below standard. Requires direction.	Accuracy and competency is not demonstrated. Constant supervision is required.

Comments:

3. ATTENDANCE/PUNCTUALITY

Requests and uses leave in an appropriate manner that is sensitive to the department and workload priorities. Adheres to work schedule; reports to work on time.

☐ Outstanding	☐ Good Solid Performance	☐ Needs Improvement	☐ Unacceptable
Attendance is exemplary and uses good judgment in scheduling leave.	Attendance is reliable and gives proper notice in advance of foreseeable absences.	Frequently late/absent from work and/or does not use good judgment in scheduling leave.	High absenteeism and/or ignores leave guidelines. Absenteeism adversely affects work environment.

Comments:

4. FOLLOW THROUGH/PRIORITIZE

Demonstrates good judgment in planning, organizing, and completing work.

☐ Outstanding	☐ Good Solid Performance	☐ Needs Improvement	☐ Unacceptable
Demonstrates exemplary skills in planning and organizing the completion of work.	Plans, organizes and completes work.	Insufficiently plans, is disorganized and completion of work is inconsistent.	Fails to plan, to organized and to complete work as required.

Comments:

5. COOPERATIVE/TEAM PLAYER

Works well and effectively with others; responsive, positive attitude towards work; ability and willingness to work with associates, administrators and subordinates towards common goals; accommodating and dependable.

☐ Outstanding	☐ Good Solid Performance	☐ Needs Improvement	☐ Unacceptable
Actively works with others to accomplish common tasks and reach goals.	Works well as a team member and contributes to the goal.	Reluctant to perform as team member. Resistance to work with others towards common goals.	Uncooperative and will not perform as a team member. Action is detrimental to accomplishing goals.

Comments:

6. EFFECTIVENESS/EFFICIENCY

Demonstrates the ability to use time wisely in producing the volume or quantity of work required for the position.

☐ Outstanding	☐ Good Solid Performance	☐ Needs Improvement	☐ Unacceptable
Results routinely exceed expectations in terms of time usage and quantity produced.	Completes assigned work and uses time wisely.	Needs to utilize time management skills in order to increase volume of work completed.	Fails to accomplish tasks. Fails to use time efficiently. Unable to work on multiple tasks.

Comments:

7. FLEXIBILITY

Demonstrates the ability to accommodate unexpected changes in the work routine.

☐ Outstanding	☐ Good Solid Performance	☐ Needs Improvement	☐ Unacceptable
Consistently goes above and beyond to meet the demands of the unexpected.	Appropriately modifies behavior and work methods in response to the unexpected.	Has difficulty in responding to changing conditions in the work place.	Unable or unwilling to respond to changing conditions in the work place.

Comments:

8. INTERPERSONAL/COMMUNICATION SKILLS

The ability to listen, hear and respond in a sensitive, meaningful way that enhances mutual respect with others as the employee carries out his/her responsibilities.

☐ Outstanding	☐ Good Solid Performance	☐ Needs Improvement	☐ Unacceptable
Promotes and builds excellent relationships with others.	Listens and responds effectively. Demonstrates respect for coworkers and others.	Lack of effective communication skills which negatively impacts job performance.	Insensitive communication skills that cause conflict.

Comments:

9. SAFE WORK HABITS

Understanding and application of safe practices; observes safety rules. (i.e., lifting, storing, ergonomics, etc.)

☐ Outstanding	☐ Good Solid Performance	☐ Needs Improvement	☐ Unacceptable
Models safe work habits. Identifies unsafe conditions and recommends solutions.	Practices safe work habits.	Does not pay attention to prescribed safety policies and procedures that define safe work habits.	Puts oneself, others and/or District at serious risk by failing to practice or ignoring safe work habits.

Comments:

10. JOB SPECIFIC FACTOR:

☐ Outstanding	☐ Good Solid Performance	☐ Needs Improvement	☐ Unacceptable

Comments:

SAN DIEGUITO UNION HIGH SCHOOL DISTRICT

Recommendation for Permanent Classified Status

EMPLOYEE NAME	JOB TITLE	
ADMINISTRATOR/SUPERVISOR	SITE	HIRE DATE

REVIEW PERIOD	DATE DUE	PERMANENT STATUS
		☐ YES ☐ NO

PART I: GOALS & OBJECTIVES

List goals, objectives, projects or special assignments for the coming year:

1.

2.

3.

4.

PART II: SIGNATURES

ADMINISTRATOR/SUPERVISOR:

Instructions:

1. Please print and sign three copies of this evaluation.
2. Review evaluation with employee
3. Require employee to sign all three copies at the end of the review.
4. Distribute as follows:
   - Employee Copy
   - Administrator/Supervisor Copy
   - Classified Personnel

I have discussed this evaluation with the employee.

_____ _____

Administrator/Supervisor Date

EMPLOYEE:

I certify that this evaluation has been discussed with me. I understand that my signature does not necessarily indicate agreement. I understand that I have the right to review this evaluation and return it to Classified Personnel, with my comments attached, within ten (10) working days from today's date.

_____ _____

Employee Signature Date

CITATION 15 CAL.3D 194

Skelly v. State Personnel Bd.

OPINION DOCKET

Skelly v. State Personnel Bd. , 15 Cal.3d 194

[S.F. No. 23241. Supreme Court of California. September 16, 1975.]

JOHN F. SKELLY, Plaintiff and Appellant, v. STATE PERSONNEL BOARD et al., Defendants and Respondents

(In Bank. Opinion by Sullivan, J., expressing the unanimous view of the court.) [15 Cal.3d 195]

COUNSEL

Loren E. McMaster and Allen R. Link for Plaintiff and Appellant.

Evelle J. Younger, Attorney General, and Joel S. Primes, Deputy Attorney General, for Defendant and Respondent. [15 Cal.3d 197]

OPINION

SULLIVAN, J.

Plaintiff John F. Skelly, M.D. (hereafter petitioner) appeals from a judgment denying his petition for writ of mandate to compel defendants State Personnel Board (Board) and its members to set aside his allegedly wrongful dismissal from employment by the State Department of Health Care Services (Department). fn. 1 In challenging his removal, petitioner asserts, among other things, that California's statutory scheme regulating the taking of punitive action against permanent civil service employees violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15, of the California Constitution.

In July 1972 petitioner was employed by the Department as a medical consultant. fn. 2 He held that position for about seven years and was a permanent civil service employee of the state. (See Gov. Code, § 18528.) fn. 3 About that time the Department, through its personnel officer Wade Williams, gave petitioner written notice that he was terminated from his position as medical consultant, effective 5 p.m., July 11, 1972. The notice specified three causes for the dismissal: (1) Intemperance, (2) inexcusable absence without leave, and (3) other failure of good behavior during duty hours which caused discredit to the Department. fn. 4 It further described petitioner's alleged acts and omissions which formed the basis of these charges, and notified him that to secure a hearing in the matter, he would be required to file a written answer with the Board within 20 days, and that in the event of his failure to do so, the punitive action [15 Cal.3d 198] would be final. On July 12, 1972, petitioner filed an answer, and on September 15, 1972, a hearing was held before an authorized representative of the Board.

At the hearing, the Department introduced the testimony of Philip L. Philippe, Gerald R. Green and Bernard V. Moore, three successive district administrators of the Department's Sacramento office to which petitioner had been assigned. Their testimony was corroborated in part by written documents from the Department files, and disclosed the following facts: Philippe met with petitioner on November 17, 1970, to discuss the latter's unexcused absences, apparent drinking on the job and failure to comply with Department work hour requirements. This meeting was held at the insistence of several staff members who had complained to Philippe about petitioner's conduct. The doctor was admonished to comply with pertinent Department rules and regulations.

Nevertheless, despite further warnings given petitioner and efforts made to accommodate

him by extending his lunch break from the usual 45 minutes to one hour, he persisted in his unexplained absences and failure to observe work hours and as a result on February 28, 1972, received a letter of reprimand and a one-day suspension.

This punitive action had little effect on petitioner who continued to take excessive lunch periods. On March 3, 1972, Gerald Green, then district administrator, and Doris Soderberg, regional administrator, met with petitioner and discussed his refusal to obey work rules, but apparently to no avail. He took lengthy lunch breaks on March 13, 14, 15 and 16. Green again met with petitioner on March 16 in an effort to resolve the problem. When asked why he had taken 35 extra minutes for lunch that day, petitioner claimed to be sick. Green responded that on the day in question he had observed the doctor drinking and talking at a restaurant and bar. Green then suggested that petitioner, for his own convenience, change from full-time to part-time status at an adjusted compensation. Petitioner declined to do so and Green admonished him that further violations of work rules would result in disciplinary action and even dismissal.

In the early afternoon of June 26, Bernard Moore, who succeeded Green as district administrator, attempted but without success to see petitioner in the latter's office. Moore found him at a local bar laughing and talking, with a drink in front of him, his hair somewhat disheveled, and his arm around a companion. Petitioner later left the bar but did not [15 Cal.3d 199] return to his office that day. Nor did he notify Moore of his proposed absence as required by Department rules. Subsequently petitioner attempted to have Moore record his absence as "sick leave."

In his defense, petitioner testified that he had in fact been sick on the afternoon of June 26, and that after an unsuccessful attempt to telephone his wife, he had informed a co-worker that he was going home. fn. 5 He then went to a local bar and, after requesting a friend to call his wife, remained at the bar until she picked him up. Petitioner's version of the events was corroborated by his wife, a cocktail waitress, and the friend who had placed the call. Petitioner admitted, however, that despite his illness, he had had two martinis at lunch.

Petitioner further testified that his longer lunch periods involved no more than 5 to 15 extra minutes. In justification of this, he stated that he had more than made up for the time missed by skipping his morning and afternoon coffee breaks, by working more than his allotted time over holidays and by occasionally taking work home with him. He denied having a drinking problem and stated that his alcoholic intake during working hours was limited to an occasional drink or two at lunch.

Three co-workers, including Dr. F. Audley Hale, the senior medical consultant and petitioner's immediate supervisor for 13 months, confirmed petitioner's testimony that he rarely took coffee breaks. They described him as efficient, productive and extremely helpful and cooperative, and stated that his work had never appeared to be affected by alcoholic consumption. Dr. Hale rated petitioner's work as good to superior fn. 6 and assessed him as "our right hand man as far as information concerning ear, nose and throat problems not only for the District Office but for the Region as well." He stated that the Department definitely needed someone with the doctor's skills.

The Department introduced no evidence to show, and indeed did not claim, that the quality or quantity of petitioner's work was in any way inadequate; his failure to comply with the prescribed time schedule did not impede the effective performance of his own duties or those of his fellow workers. Although petitioner was handicapped by relatively serious sight and speech impediments, the Department did not rely upon these physical deficiencies as grounds for dismissal; nor did it appear that these difficulties affected his work performance. [15 Cal.3d 200]

On September 19, 1972, the hearing officer submitted to the Board a proposed decision recommending that the punitive action against petitioner be sustained without modification. He made findings of fact in substance as follows: (1) That on February 28, 1972, petitioner suffered a one-day suspension for a four-hour unexcused absence on January 10, 1972, for excessive lunch periods on January 11 and 19, 1972, and for a lengthy afternoon break spent at a bar on February 25, 1972; (2) that despite efforts to accommodate petitioner by extending his lunch break to one hour, he continued to exceed the prescribed period by five to ten minutes for the four days following his suspension and again on March 13, 14 and 15, 1972; (3) that on March 16, 1972, petitioner took 1 hour and 35 minutes for lunch and claimed that this was due to illness when in fact he had been drinking; (4) that on the afternoon of June 26, 1972, the district administrator found petitioner at a bar during work hours, with his hair disheveled, his arm around another patron and a drink in front of him; and (5) that the petitioner's unexcused absence on June 26, 1972, was not due to illness.

The hearing officer found that these facts constituted grounds for punitive action under section 19572, subdivision (j) (inexcusable absence without leave). In considering whether dismissal was the appropriate discipline, the officer noted that "[a]ppellant is 64 years old, has had a long and honorable medical career and is now handicapped by serious sight and speech difficulties. Also, the Senior Medical Consultant has no complaints about appellant's work." On the other hand, he pointed out that the Department's problems with petitioner dated back to 1970, that he had been warned, formally as well as informally, that compliance with Department rules was required, and that he had nevertheless persisted in his pattern of misconduct. On this basis, the hearing officer concluded that there was no reason to anticipate improvement if petitioner were restored to his position and recommended that the Department's punitive action be affirmed. The Board approved and adopted the hearing officer's proposed decision in its entirety and denied a petition for rehearing. fn. 7 These proceedings followed.

Petitioner urges both procedural and substantive grounds for annulling the Board's decision. As to the procedural ground, he contends that the provisions of the State Civil Service Act (Act) governing the taking of punitive action against permanent civil service employees, without [15 Cal.3d 201] requiring a prior hearing, violate due process of law as guaranteed by both the United States Constitution and the California Constitution. As to the substantive grounds, he attacks the Board's decision on two bases. First, he argues that the Board's findings are not supported by substantial evidence; second, he asserts that the Board abused its discretion in approving petitioner's dismissal which, he claims, is unduly harsh and disproportionate to his allegedly wrongful conduct.

I

Turning first to petitioner's claims of denial of due process, we initially describe the pertinent statutory disciplinary procedure here under attack.

The California system of civil service employment has its roots in the state Constitution. Article XXIV, section 1, subdivision (b), describes the overriding goal of this program of state employment: "In the civil service permanent appointment and promotion shall be made under a general system based on merit ...." fn. 8 (Italics added.) (See also Assem. Interim Com. Rep., Civil Service and State Personnel (1957-1959) Civil Service and Personnel Management, 1 Appendix to Assem. J. (1959 Reg. Sess.) p. 21.) The use of merit as the guiding principle in the appointment and promotion of civil service employees serves a two-fold purpose. It at once "'abolish[es] the so-called spoils system, and [at the same time] ... increase[s] the efficiency of the service by assuring the employees of continuance in office regardless of what party may then be in power. Efficiency is secured by the knowledge on the part of the employee that promotion to higher positions when vacancies occur will be the reward of faithful and honest service' [citation] ...." (Steen v. Board of Civil Service Commrs. (1945) 26 Cal.2d 716, 722 [160 P.2d 816].) The State Personnel Board is the administrative body charged with the enforcement of the Civil Service Act, including the review of punitive action taken against employees. fn. 9 [15 Cal.3d 202]

To help insure that the goals of civil service are not thwarted by those in power, the statutory provisions implementing the constitutional mandate of article XXIV, section 1, invest employees with substantive and procedural protections against punitive actions by their superiors. fn. 10 Under section 19500, "[t]he tenure of every permanent employee holding a position is during good behavior. Any such employee may be ... permanently separated [from the state civil service] through resignation or removal for cause ... or terminated for medical reasons ...." (Italics added.) The "causes" which may justify such removal, or a less severe form of punitive action, fn. 11 are statutorily defined. (§ 19572.)

The procedure by which a permanent employee may be dismissed or otherwise disciplined is described in sections 19574 through 19588. Under section 19574, fn. 12 the "appointing power" fn. 13 or its authorized representative may effectively take punitive action against an employee by simply notifying him of the action taken. fn. 14 (California Sch. Employees Assn. v. Personnel Commission (1970) 3 Cal.3d 139, 144, fn. 2 [89 Cal.Rptr. 620, 474 P.2d 436]; Personnel Transactions Man., March 1972.) [15 Cal.3d 203] No particular form of notice is required. (29 Ops.Cal.Atty.Gen. 115, 120 (1957); Personnel Transactions Man., March 1972.) However, within 15 days after the effective date of the action, the appointing power must serve upon the employee and file with the Board a written notice specifying: (1) the nature of the punishment, (2) its effective date, (3) the causes therefor, (4) the employee's acts or omissions upon which the charges are based, and (5) the employee's right to appeal. (§ 19574.) fn. 15

Except in cases involving minor disciplinary matters, fn. 16 the employee has a right to an evidentiary hearing to challenge the action taken against him. fn. 17 To obtain such a hearing, the employee must file with the Board a written answer to the notice of punitive action within 20 days after service thereof. fn. 18 The answer is deemed to constitute a denial of all allegations contained in the notice which are not expressly admitted as well as a request for a hearing or investigation. (§ 19575; see fn. 18, ante.) Failure to file an answer within the specified time period results in the punitive action becoming final. (§ 19575.) [15 Cal.3d 204]

In cases where the affected employee files an answer within the prescribed period, the Board, or its authorized representative, must hold a hearing within a reasonable time. (§ 19578, see fn. 17, ante.) As a general rule, the case is referred to the Board's hearing officer who conducts a hearing fn. 19 and prepares a proposed decision which may be adopted, modified or rejected by the Board. (§ 19582.) The Board must render its decision within a reasonable time after the hearing. (§ 19583.) fn. 20 If the Board determines that the cause or causes for which the employee was disciplined were insufficient or not sustained by the employee's acts or omissions, or that the employee was justified in engaging in the conduct which formed the basis of the charges against him, it may modify or revoke the punitive action and order the employee reinstated to his position as of the effective date of the action or some later specified date. (§ 19583; see fn. 20, ante.) The employee is entitled to the payment of salary for any period of time during which the punitive action was improperly in effect. (§ 19584.) fn. 21

In the case of an adverse decision by the Board, the employee may petition that body for a rehearing. (§ 19586.) fn. 22 As an alternative or in addition to the rehearing procedure, the employee may seek review of [15 Cal.3d 205] the Board's action by means of a petition for writ of administrative mandamus filed in the superior court. (§ 19588; Boren v. State Personnel Board (1951) 37 Cal.2d 634, 637 [234 P.2d 981].) fn. 23

As previously indicated, petitioner asserts that this statutory procedure for taking punitive action against a permanent civil service employee violates due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15 of the California Constitution. His contention is that these provisions authorize a deprivation of property without a prior hearing or, for that matter, without any of the prior procedural safeguards required by due process before a person may be subjected to such a taking at the hands of the state. As it is clear that California's statutory scheme does provide for an evidentiary hearing after the discipline is imposed (§§ 19578, 19580, 19581), we view the petitioner's constitutional attack as directed against that section which permits the punitive action to take effect without according the employee any prior procedural rights. (§ 19574; see fn. 12, ante.)

Our analysis of petitioner's contention proceeds in the light of a recent decision of the United States Supreme Court dealing with a substantially identical issue. In Arnett v. Kennedy (1974) 416 U.S. 134 [40 L.Ed.2d 15, 94 S.Ct. 1633], the high court was faced with a due process challenge to the provisions of the federal civil service act, entitled the Lloyd-LaFollette Act, regulating the disciplining of nonprobationary government employees. (5 U.S.C. § 7501.) Under that statutory scheme, a nonprobationary employee may be "removed or suspended without pay only for such cause as will promote the efficiency of the service." (5 U.S.C. § 7501 (a).) The same statute granting this substantive right to continued employment absent cause sets forth the procedural rights of an employee prior to discharge or suspension. [15 Cal.3d 206]

Pursuant to this statute and the regulations promulgated under it, the employee is entitled to 30 days advance written notice of the proposed action, including a detailed statement of the reasons therefor, the right to examine all materials relied upon to support the charges, the opportunity to respond either orally or in writing or both (with affidavits) before a representative of the employing agency with authority to make or recommend a final decision, and written notice of the agency's decision on or before the effective date of the action. (5 U.S.C. § 7501 (b); 5 C.F.R. § 752.202 (a), (b), (f).) The employee is not entitled to an evidentiary trial-type hearing until the appeal stage of the proceedings. (5 C.F.R. §§ 752.202 (b), 752.203, 771.205, 771.208, 771.210-771.212, 772.305 (c).) The timing of this hearing -- after, rather than before the removal decision becomes effective -- constituted the basis for the employee's due process attack upon the disciplinary procedure.

In a six to three decision, the court found the above procedure to be constitutional. However, the court's full decision is embodied in five opinions which reveal varying points of view among the different justices. As we proceed to consider petitioner's contention, we will attempt to identify the general principles which emerge from these opinions as well as

from the other recent decisions of the court in the area of procedural due process and which are determinative of the matter before us.

[1] We begin our analysis in the instant case by observing that the California statutory scheme regulating civil service employment confers upon an individual who achieves the status of "permanent employee" a property interest in the continuation of his employment which is protected by due process. In Board of Regents v. Roth (1972) 408 U.S. 564 [33 L.Ed.2d 548, 92 S.Ct. 2701], the United States Supreme Court "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. [Fn. omitted.]" (Id., at pp. 571-572 [33 L.Ed.2d at p. 557].) Rather, "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests -- property interests -- may take many forms." (Id., at p. 576 [33 L.Ed.2d at p. 560].)

Expanding upon its explanation, the Roth court noted: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement [15 Cal.3d 207] 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.

"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." (Id., at p. 577 [33 L.Ed.2d at p. 561].)

[2] Thus, when a person has a legally enforceable right to receive a government benefit provided certain facts exist, this right constitutes a property interest protected by due process. (Goldberg v. Kelly (1970) 397 U.S. 254, 261-262 [25 L.Ed.2d 287, 295-296, 90 S.Ct. 1011]; see Geneva Towers Tenants Org. v. Federated Mortgage Inv. (9th Cir. 1974) 504 F.2d 483, 495-496 (Hufstedler, J. dissenting).) Applying these principles, the high court has held that a teacher establishing "the existence of rules and understandings, promulgated and fostered by state officials, that ... justify his legitimate claim of entitlement to continued employment absent 'sufficient cause,'" has a property interest in such continued employment within the purview of the due process clause. (Perry v. Sindermann (1972) 408 U.S. 593, 602-603 [33 L.Ed.2d 570, 580, 92 S.Ct. 2694]; see also Board of Regents v. Roth, supra, 408 U.S. at pp. 576-578 [33 L.Ed.2d at pp. 560-562].) And, in Arnett v. Kennedy, supra, 416 U.S. 134, six members of the court, relying upon the principles set forth in Roth, concluded that due process protected the statutory right of a nonprobationary federal civil service employee to continue in his position absent cause justifying his dismissal. (Id., at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell); id., at p. 185 [40 L.Ed.2d at p. 51] (concurring and dissenting opn., Justice White); id., at p. 203 [40 L.Ed.2d at p. 61] (dissenting opn., Justice Douglas); id., at p. 211 [40 L.Ed.2d at p. 66] (dissenting opn., Justice Marshall).)

The California Act endows state employees who attain permanent status with a substantially identical property interest. Such employees may not be dismissed or subjected to other disciplinary measures unless facts exist constituting "cause" for such discipline as defined in sections 19572 and 19573. In the absence of sufficient cause, the permanent employee has a statutory right to continued employment free of these [15 Cal.3d 208] punitive measures. (§ 19500.) This statutory right constitutes "a legitimate claim of entitlement" to a government benefit within the meaning of Roth. Therefore, the state must comply with procedural due process requirements before it may deprive its permanent employee of this property interest by punitive action.

We therefore proceed to determine whether California's statutes governing such punitive action provide the minimum procedural safeguards mandated by the state and federal Constitutions. In the course of our inquiry, we will discuss recent developments in the area of procedural due process which outline a modified approach for dealing with such questions.

Until last year, the line of United States Supreme Court discussions beginning with Sniadach v. Family Finance Corp. (1969) 395 U.S. 337 [23 L.Ed.2d 349, 89 S.Ct. 1820], and continuing with Fuentes v. Shevin (1972) 407 U.S. 67 [32 L.Ed.2d 556, 92 S.Ct. 1983], and the line of California decisions following Sniadach and Fuentes adhered to a rather rigid and

mechanical interpretation of the due process clause. Under these decisions, every significant deprivation -- permanent or merely temporary -- of an interest which qualified as "property" was required under the mandate of due process to be preceded by notice and a hearing absent "extraordinary" or "truly unusual" circumstances. (Fuentes v. Shevin, supra, 407 U.S. 67, 82-88, 90-91 [32 L.Ed.2d 556, 570-573, 574-576]; Bell v. Burson (1971) 402 U.S. 535, 542 [29 L.Ed.2d 90, 96, 91 S.Ct. 1586]; Boddie v. Connecticut (1971) 401 U.S. 371, 378-379 [28 L.Ed.2d 113, 119-120, 91 S.Ct. 780]; Adams v. Department of Motor Vehicles (1974) 11 Cal.3d 146, 155 [113 Cal.Rptr. 145, 520 P.2d 961]; Brooks v. Small Claims Court (1973) 8 Cal.3d 661, 667-668 [105 Cal.Rptr. 785, 504 P.2d 1249]; Randone v. Appellate Department (1971) 5 Cal.3d 536, 547 [96 Cal.Rptr. 709, 488 P.2d 13]; Blair v. Pitchess (1971) 5 Cal.3d 258, 277 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206]; McCallop v. Carberry (1970) 1 Cal.3d 903, 907 [83 Cal.Rptr. 666, 464 P.2d 122].) These authorities uniformly held that such hearing must meet certain minimum procedural requirements including the right to appear personally before an impartial official, to confront and cross-examine adverse witnesses, to present favorable evidence and to be represented by counsel. (Brooks v. Small Claims Court, supra, 8 Cal.3d at pp. 667-668; Rios v. Cozens (1972) 7 Cal.3d 792, 798-799 [103 Cal.Rptr. 299, 499 P.2d 979], vacated sub nom. Dept. Motor Vehicles of California v. Rios (1973) 410 U.S. 425 [35 L.Ed.2d 398, 93 S.Ct. 1019], new dec. Rios v. Cozens (1973) 9 Cal.3d 454 [107 Cal.Rptr. 784, 509 P.2d 696]; see also Goldberg v. Kelly (1970) 397 U.S. 254, 267-271 [25 L.Ed.2d 287, 298-301, 90 S.Ct. 1011].) [15 Cal.3d 209]

However, as we noted a short time ago in Beaudreau v. Superior Court (1975) 14 Cal.3d 448 [121 Cal.Rptr. 585, 535 P.2d 713], more recent decisions of the high court have regarded the above due process requirements as being somewhat less inflexible and as not necessitating an evidentiary trial-type hearing at the preliminary stage in every situation involving a taking of property. Although it would appear that a majority of the members of the high court adhere to the principle that some form of notice and hearing must precede a final deprivation of property (North Georgia Finishing, Inc. v. Di-Chem, Inc. (1975) 419 U.S. 601, 606, [42 L.Ed.2d 751, 757, 95 S.Ct. 719]; Goss v. Lopez (1975) 419 U.S. 565, 579 [42 L.Ed.2d 725, 737-738, 95 S.Ct. 729]; Mitchell v. W. T. Grant Co. (1974) 416 U.S. 600, 611-612 [40 L.Ed.2d 406, 415-416, 94 S.Ct. 1895]; Arnett v. Kennedy, supra, 416 U.S. 134, 164 [40 L.Ed.2d 15, 39] (concurring opn., Justice Powell), p. 178 [40 L.Ed.2d pp. 46-47] (concurring and dissenting opn., Justice White), p. 212 [40 L.Ed.2d pp. 66-67] (dissenting opn., Justice Marshall)), nevertheless the court has made clear that "the timing and content of the notice and the nature of the hearing will depend on an appropriate accommodation of the competing interests involved." (Goss v. Lopez, supra, 419 U.S. 565, 579 [42 L.Ed.2d 725, 737], italics added; see also Mitchell v. W. T. Grant Co., supra, 416 U.S. at pp. 607-610 [40 L.Ed.2d at pp. 413-415]; Arnett v. Kennedy, supra, 416 U.S. at pp. 167-171 [40 L.Ed.2d at pp. 40-43] (concurring opn., Justice Powell), p. 188 [40 L.Ed.2d pp. 52-53] (concurring and dissenting opn., Justice White).) In balancing such "competing interests involved" so as to determine whether a particular procedure permitting a taking of property without a prior hearing satisfies due process, the high court has taken into account a number of factors. Of significance among them are the following: whether predeprivation safeguards minimize the risk of error in the initial taking decision, whether the surrounding circumstances necessitate quick action, whether the postdeprivation hearing is sufficiently prompt, whether the interim loss incurred by the person affected is substantial, and whether such person will be entitled to adequate compensation in the event the deprivation of his property interest proves to have been wrongful. (Mitchell v. W. T. Grant Co., supra, 416 U.S. at pp. 607-610 [40 L.Ed.2d at pp. 413-415]; Arnett v. Kennedy, supra, 416 U.S. at pp. 167-171 [40 L.Ed.2d at pp. 40-43] (concurring opn., Justice Powell), pp. 188-193 [40 L.Ed.2d pp. 52-56] (concurring and dissenting opn., Justice White); see Beaudreau v. Superior Court, supra, 14 Cal.3d 448, 463-464.)

These principles have been applied by the high court to measure the constitutional validity of state statutes granting creditors certain prejudgment summary remedies. In Mitchell v. W. T. Grant Co., supra, 416 U.S. [15 Cal.3d 210] 600, the court upheld against due process attack a Louisiana statute authorizing a state trial judge to order sequestration of a debtor's personal property upon the creditor's ex parte application, noting that both the creditor and the debtor had interests in the particular property seized, fn. 24 that the creditor's interest might be seriously jeopardized by preseizure notice and hearing, fn. 25 and that adequate alternative procedural safeguards, including an immediate postdeprivation hearing, were accorded the debtor. fn. 26 On the other hand, the high court struck down a Georgia statute permitting garnishment of a debtor's property pending litigation on the alleged debt "without notice or opportunity for an early hearing and without participation by a judicial officer." (North Georgia Finishing, Inc. v. Di-Chem, Inc., supra, 419 U.S. 601, 606 [42

L.Ed.2d 751, 757].) In reaching its decision, the court emphasized that "[t[he Georgia garnishment statute has none of the saving characteristics of the Louisiana statute." (Id., at p. 607 [42 L.Ed.2d at p. 757].)

This modified position of the United States Supreme Court regarding such due process questions has also extended to the form of the hearing required. In Goss v. Lopez, supra, 419 U.S. 565, the court held that Ohio public school students had a property as well as a liberty interest in their education and that they were therefore entitled to notice and hearing before they could be suspended or expelled from school. (Id., at pp. 574-581 [42 L.Ed.2d at pp. 734-739].) However, where the suspension was short, the court concluded that the required "hearing" need be only an informal discussion between student and disciplinarian, at which the student should be informed of his alleged misconduct and permitted to explain his version of the events. (Id., at pp. 581-582 [42 L.Ed.2d at p. 738-739].) Such a procedure, the court reasoned, "will provide a meaningful hedge against erroneous action." (Id., at p. 583 [42 L.Ed.2d at p. 740].) On the other hand, the court carefully pointed out the limitations on its holding: "We stop short of construing the Due Process [15 Cal.3d 211] Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." (Id., at p. 583 [42 L.Ed.2d at p. 740].)

Our present task of determining the requirements of due process under the particular circumstances of the case at bench is made easier by the Supreme Court's decision in Arnett v. Kennedy, supra, 416 U.S. 134, upholding against constitutional attack the statutory procedure for the disciplining of nonprobationary federal civil service employees. Initially, we note that the rationale adopted by the plurality opinion of Justice Rehnquist, joined by the Chief Justice and Justice Stewart, would obviate the need for any balancing of competing interests. This rationale would apparently permit a state to narrowly circumscribe the procedures for depriving an individual of a statutorily created property right by simply establishing in the statute a procedural mechanism for its enforcement. (Id., at pp. 153-155 [40 L.Ed.2d at pp. 32-34].) In such instances, it is reasoned, the individual "must take the bitter with the sweet," that is, the substantive benefit of the statute together with the procedural mechanism it prescribes to safeguard that benefit. (Id., at pp. 153-154 [40 L.Ed.2d at pp. 32-33].) Under this rationale, it is arguable that California's procedure for disciplining civil service employees would withstand petitioner's due process attack, since the substantive right of a permanent state worker to continued employment absent cause (§ 19500) may be "inextricably intertwined [in the same set of statutes] with the limitations on the procedures which are to be employed in determining that right ...." (Id., at pp. 153-154 [40 L.Ed.2d at p. 33].)

However, this theory was unequivocally rejected by the remaining six justices and indeed described by the dissenters as "a return, albeit in somewhat different verbal garb, to the thoroughly discredited distinction between rights and privileges which once seemed to govern the applicability of procedural due process. [Fn. omitted.]" (See Justice Marshall's dissenting opn. at p. 211 [40 L.Ed.2d at p. 66]; see also Justice [15 Cal.3d 212] Powell's concurring opn. at pp. 165-167 [40 L.Ed.2d at pp. 39-41], and Justice White's concurring and dissenting opn. at pp. 177-178, 185 [40 L.Ed.2d at pp. 46-47, 51].)

Where state procedures governing the taking of a property interest are at issue, all six justices were of the view that the existence of the interest is to be determined in the first place under applicable state law, but that the adequacy of the procedures is to be measured in the final analysis by applicable constitutional requirements of due process. (Id., at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell), p. 185 [40 L.Ed.2d p. 51] (concurring and dissenting opn., Justice White), p. 211 [40 L.Ed.2d p. 66] (dissenting opn., Justice Marshall).) "While the legislature may elect not to confer a property interest in ... [civil service] employment [fn. omitted], it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." (Id., at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at p. 185 [40 L.Ed.2d at p. 51], and Justice Marshall's dissenting opn. at p. 211 [40 L.Ed.2d at p. 66].)

In Arnett, the remaining six justices were of the opinion that a full evidentiary "hearing must be held at some time before a competitive civil service employee maybe finally terminated for misconduct." (Id., at p. 185 [40 L.Ed.2d at p. 51], italics added (concurring and dissenting opn., Justice White), see also, Justice Powell's concurring opn. at p. 167 [40 L.Ed.2d at pp. 40-41], and Justice Marshall's dissenting opn. at p. 212 [40 L.Ed.2d at pp. 66-67].) The question then narrowed to whether such a hearing had to be afforded prior to the time that the initial removal decision became effective. (Id., at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell), p. 186 [40 L.Ed.2d at pp. 51-52] (concurring and dissenting opn., Justice White), p. 217 [40 L.Ed.2d at pp. 69-70] (dissenting opn., Justice Marshall).)

In resolving this question, the above justices utilized a balancing test, weighing "the Government's interest in expeditious removal of an unsatisfactory employee ... against the interest of the affected employee in continued public employment." (Id., at pp. 167-168 [40 L.Ed.2d at p. 41] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at p. 188 [40 L.Ed.2d at pp. 52-53], and Justice Marshall's dissenting opn. at p. 212 [40 L.Ed.2d at pp. 66-67].) On one side was the government's interest in "the maintenance of employee efficiency and discipline. Such factors are essential if the Government is [15 Cal.3d 213] to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial. [Fn. omitted.]" (Id., at p. 168 [40 L.Ed.2d at p. 41] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at pp. 193-194 [40 L.Ed.2d at pp. 55-56] and Justice Marshall's dissenting opn. at pp. 223-225 [40 L.Ed.2d at pp. 73-74].)

Balanced against this interest of the government was the employee's countervailing interest in the continuation of his public employment pending an evidentiary hearing: "During the period of delay, the employee is off the Government payroll. His ability to secure other employment to tide himself over may be significantly hindered by the outstanding charges against him. [Fn. omitted.] Even aside from the stigma that attends a dismissal for cause, few employers will be willing to hire and train a new employee knowing that he will return to a former Government position as soon as an appeal is successful. [Fn. omitted.] And in many States, ... a worker discharged for cause is not even eligible for unemployment compensation. [Fn. omitted.]" fn. 27 (Id., at pp. 219-220 [40 L.Ed.2d at p. 71] (dissenting opn., Justice Marshall); see also, Justice White's concurring and dissenting opn. at pp. 194-195 [40 L.Ed.2d at pp. 56-57] and Justice Powell's concurring opn. at p. 169 [40 L.Ed.2d at p. 42].)

The justices reached varying conclusions in resolving this balancing process. Justice Powell, joined by Justice Blackmun, concluded that the federal discharge procedures comported with due process requirements. In reaching this result, however, he emphasized the numerous preremoval safeguards accorded the employee as well as the right to compensation [15 Cal.3d 214] guaranteed the latter if he prevailed at the subsequent evidentiary hearing: "The affected employee is provided with 30 days' advance written notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to his case. After removal, the employee receives a full evidentiary hearing, and is awarded backpay if reinstated. See 5 CFR §§ 771.208 and 772.305; 5 U.S.C. § 5596. These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful. [Fn. omitted.]." (Id., at p. 170 [40 L.Ed.2d at p. 42].)

Justice White, concurring in part and dissenting in part, agreed that due process mandated some sort of preliminary notice and hearing, and similarly "conclude[d] that the statute and regulations provisions to the extent they require 30 days' advance notice and a right to make a written presentation satisfy minimum constitutional requirements." (Id., at pp. 195-196 [40 L.Ed.2d at p. 57].) fn. 28

Justice Marshall, joined by Justices Douglas and Brennan, dissented, apparently adhering to the "former due process test" requiring an "unusually important governmental need to outweigh the right to a prior hearing." fn. 29 (Id., at p. 222 [40 L.Ed.2d at pp. 72-73], quoting from Fuentes v. Shevin, supra, 407 U.S. at p. 91, fn. 23 [32 L.Ed.2d at p. 576], see also Justice Marshall's dissenting opn. at pp. 217-218, 223 [40 L.Ed.2d at pp. 69-70, 73].) Finding that the government's interest in prompt removal of an unsatisfactory employee was not the sort of vital concern justifying resort to summary procedures, the dissenters concluded that a nonprobationary employee was entitled to a full evidentiary hearing prior to discharge, at which he could appear before an independent, unbiased decisionmaker and confront and cross-examine adverse witnesses. (Id., at pp. 214-216, 226-227 [40 L.Ed.2d at pp. 67-69, 74-75].) [15 Cal.3d 215]

Applying the general principles we are able to distill from these various opinions, we are convinced that the provisions of the California Act concerning the taking of punitive action against a permanent civil service employee do not fulfill minimum constitutional demands. [3] It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, 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.

California statutes governing punitive action provide the permanent employee with none of these prior procedural rights. Under section 19574, the appointing power is authorized to take punitive action against a permanent civil service employee by simply notifying him thereof. The statute specifies no particular form of notice, nor does it require advance warning. Thus, oral notification at the time of the discipline is apparently sufficient. (See 29 Ops.Cal.Atty.Gen. 115, 120 (1957), and Personnel Transactions Man., March 1972.) The employee need not be informed of the reasons for the discipline or of his right to a hearing until 15 days after the effective date of the punitive action. (§ 19574.) It is true that the employee is entitled to a full evidentiary hearing within a reasonable time thereafter (§ 19578), and is compensated for lost wages if the Board determines that the punitive action was improper. (§ 19584.) However, these postremoval safeguards do nothing to protect the employee who is wrongfully disciplined against the temporary deprivation of property to which he is subjected pending a hearing. [4] Because of this failure to accord the employee any prior procedural protections to "minimize the risk of error in the initial removal decision" (Arnett v. Kennedy, supra, 416 U.S. at p. 170 [40 L.Ed.2d at p. 42] (concurring opn., Justice Powell)), we hold that the provisions of the State Civil Service Act, including in particular section 19574, governing the taking of punitive action against a permanent civil service employee violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and of article I, sections 7 and 15 of the California Constitution.

Defendants fail to persuade us to the contrary. Relying upon cases which antedate Arnett v. Kennedy, supra, 416 U.S. 134, defendants first contend that we must apply a different and less stringent standard of due [15 Cal.3d 216] process in judging the state's exercise of a "proprietary" as opposed to a "regulatory" function. Where the state is acting as an "employer," so the argument goes, the balancing process must be more heavily weighted in favor of insuring flexibility in its operation; therefore, due process is satisfied as long as a hearing is provided at some stage of the proceedings. The Supreme Court's decision in Arnett v. Kennedy, supra, 416 U.S. 134, adequately disposes of this argument. In view of our extensive analysis of this decision we need not say anything further except to observe that nowhere in that case does any member of the high court advocate the distinction advanced by defendants.

Defendants further contend that emergency circumstances may arise in which the immediate removal of an employee is essential to avert harm to the state or to the public. Adverting to section 19574.5, fn. 30 which permits the appointing power to order an employee on leave of absence for a limited period of time, defendants argue that situations not covered by this statute but necessitating similar prompt action may conceivably arise under section 19574 (see fn. 12, ante). In answering this argument, we need only point out that section 19574 is not limited to the extraordinary circumstances which defendants conjure up. (Sniadach v. Family Finance Corp., supra, 395 U.S. 337, 339 [23 L.Ed.2d 349, 352]; Randone v. Appellate Department, supra, 5 Cal.3d at pp. 541, 553; Blair v. Pitchess, supra, 5 Cal.3d at p. 279.) Indeed, the instant case presents an example of the statute's operation in a situation requiring no special protection of the state's interest in prompt

removal. (Sniadach, supra, 395 U.S. at p. 339 [23 L.Ed.2d at p. 352].) Thus, since the statute "does not narrowly draw into focus those 'extraordinary circumstances' in which [immediate action] may be actually required," we remain convinced that the California procedure governing punitive action fails to satisfy either federal or state due process standards (Randone v. Appellate Department, supra, 5 Cal.3d at p. 541, 15 Cal.3d 217)

II

[5] Having determined that the procedure used to dismiss petitioner denied him due process of law as guaranteed by both the United States Constitution and the California Constitution, we proceed to examine under the well established standards of review fn. 31 the Board's action taken against petitioner. Petitioner first contends that the Board's findings are not supported by substantial evidence. Specifically he disputes the Board's determination that his absences on March 16 and June 26, 1972, were due to his drinking rather than to illness.

[6] The findings challenged are based upon the testimony of two apparently credible witnesses, Gerald Green and Bernard Moore, who stated that they personally observed petitioner at a bar drinking on the dates in question. With respect to the June 26th incident, petitioner himself testified that he had consumed two martinis at lunch, despite his illness. Clearly this evidence is sufficient to support the Board's findings with respect to the cause of petitioner's absences on these two occasions.

III

Petitioner finally contends that the penalty of dismissal is clearly excessive and disproportionate to his alleged wrong. We agree.

Generally speaking, "[i]n a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion." (Magit v. Board of Medical Examiners (1961) 57 Cal.2d 74, 87 [17 Cal.Rptr. 488, 366 P.2d 816]; see also Nightingale v. State Personnel Board (1972) 7 Cal.3d 507, 514-516 [102 Cal.Rptr. 758, 498 P.2d 1006]; Harris v. Alcoholic Bev. etc. Appeals Bd. (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633, 400 P.2d 745]; Martin v. Alcoholic Bev. etc. Appeals Bd. (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513, 362 P.2d 337].) [7] Nevertheless, while the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, "it does not have absolute and unlimited power. It is bound to exercise legal [15 Cal.3d 218] discretion, which is, in the circumstances, judicial discretion." (Harris, supra, citing Martin, supra, and Bailey v. Taaffe (1866) 29 Cal. 422, 424.) In considering whether such abuse occurred in the context of public employee discipline, we note 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, "[h]arm to the public service." (Shepherd v. State Personnel Board, supra, 48 Cal.2d 41, 51; see also Blake v. State Personnel Board (1972) 25 Cal.App.3d 541, 550-551, 554 [102 Cal.Rptr. 50].) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Blake, supra, at p. 554.)

[8] Consideration of these principles in the instant case leads us to conclude that the discipline imposed was clearly excessive. The evidence adduced at the hearing and the hearing officer's findings, adopted by the Board, establish that the punitive dismissal was based upon the doctor's conduct in extending his lunch break beyond his allotted one hour on numerous occasions, generally by five to fifteen minutes, and in twice leaving the office for several hours without permission. It is true that these transgressions continued after repeated warnings and admonitions by administrative officials, who made reasonable efforts to accommodate petitioner's needs. It is also noteworthy that petitioner had previously suffered a one-day suspension for similar misconduct.

However, the record is devoid of evidence directly showing how petitioner's minor deviations from the prescribed time schedule adversely affected the public service. fn. 32 To the contrary, the undisputed evidence indicates that he more than made up for the excess lunch time by working through coffee breaks as well as on some evenings and holidays. With perhaps one or two isolated exceptions, fn. 33 it was not shown that his conduct in any way inconvenienced those with whom he worked or prevented him from effectively performing his duties.

Dr. Hale, senior medical consultant and petitioner's immediate supervisor for about 13 months, rated his work as good to superior, compared it favorably with that of other physicians in the office, and described him as efficient, productive, and the region's "right

hand man" on ear, nose and throat problems. Two other employees who worked with petitioner testified that he was informative, cooperative, helpful, [15 Cal.3d 219] extremely thorough and productive. No contrary evidence was presented by or on behalf of the Department of Health Care Services.

In his proposed decision adopted by the Board, the hearing officer stated: "Appellant is 64 years old, has had a long and honorable medical career and is now handicapped by serious sight and speech difficulties. Also, the Senior Medical Consultant has no complaints about appellant's work. [¶] Consideration of appellant's age, his physical problems, the lack of any apparent affect on his work and sympathy for the man and his family are all persuasive arguments in favor of finding that appellant be given just one more chance." In testifying, petitioner apologized for his conduct and promised to adhere strictly to the rules if given another opportunity to do so.

Our views on this issue should not be deemed, nor are they intended, to denigrate or belittle administrative interest in requiring strict compliance with work hour requirements. The fact that an employee puts in his 40 hours per week by rearranging his breaks to suit his personal convenience is not enough. An administrator may properly insist upon adherence to a prescribed time schedule, as this may well be essential to the maintenance of an efficient and productive office. Nor do we imply that an employee's failure to comply with the rules regulating office hours may not warrant punitive action, possibly in the form of dismissal, under the appropriate circumstances. Indeed, in the instant case, a less severe discipline is clearly justified; and we do not rule out the possibility of future dismissal if petitioner's transgressions persist.

However, considering all relevant factors in light of the overriding concern for averting harm to the public service, we are of the opinion that the Board clearly abused its discretion in subjecting petitioner to the most severe punitive action possible for his misconduct.

In sum, we conclude that the dismissal of petitioner was improper for two reasons: First, the procedure by which the discharge was effectuated denied him due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and article I, sections 7 and 15, of the California Constitution; second, the penalty of dismissal was clearly excessive and disproportionate to the misconduct on which it was based.

Therefore, upon remand the trial court should issue a peremptory writ of mandate directing the State Personnel Board to annul and set aside its [15 Cal.3d 220] decision sustaining without modification the punitive action of dismissal taken by the State Department of Health Care Services against petitioner John F. Skelly, M.D., and to reconsider petitioner's appeal in light of this opinion. fn. 34

The judgment is reversed and the cause is remanded to the trial court for further proceedings in conformity with this opinion.

Wright, C. J., McComb, J., Tobriner, J., Mosk, J., Clark, J., and Molinari, J., concurred.

FN 1. Petitioner also named as defendants the Department and its director.

FN 2. Petitioner graduated from George Washington University Medical School, Washington, D.C. in 1934. He was licensed to practice medicine in California the same year and, after a three-year residency, entered private practice in 1937, specializing in ear, nose and throat problems. During 13 of his 28 years in private practice, he taught at the University of California Medical Center. Cataract surgery and resulting nerve degeneration in his eyes forced petitioner to cease private practice in 1965. He commenced employment as a medical consultant with the State Welfare Department, which became part of the State Department of Health Care Services in 1969.

FN 3. Government Code section 18528 provides: "'Permanent employee' means an employee who has permanent status. 'Permanent status' means the status of an employee who is lawfully retained in his position after the completion of the probationary period provided in this part and by board rule." The "probationary period" is the initial period of employment and generally lasts for six months unless the Board establishes a longer period not exceeding one year. (Gov. Code, § 19170.)

Hereafter, unless otherwise indicated, all section references are to the Government Code.

FN 4. Each of these causes provides a basis for punitive action against a permanent civil service employee under section 19572, subdivisions (h), (j), and (t).

FN 5. Moore apparently was not available at that particular time.

FN 6. The reports prepared during petitioner's probationary period similarly rated his work.

FN 7. The foregoing administrative actions conformed with the procedure prescribed by sections 19574- 19588 for the dismissal of a permanent civil service employee.

FN 8. Under the prescribed constitutional scheme "[t]he civil service includes every office and employee of the state except as otherwise provided in this Constitution." (Cal. Const. art. XXIV, § 1, subd. (a).) Article XXIV, section 4, lists those categories of officers and employees who are exempt from the civil service.

FN 9. The composition of the Board is described in article XXIV, section 2, subdivision (a), of the California Constitution as follows "There is a Personnel Board of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for 10-year terms and until their successors are appointed and qualified. Appointment to fill a vacancy is for the unexpired portion of the term. A member may be removed by concurrent resolution adopted by each house, two-thirds of the membership of each house concurring."

The Board's duties are set forth in article XXIV, section 3, subdivision (a), as follows: "The Board shall enforce the civil service statutes and, by majority vote of all of its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions."

FN 10. In the instant case, we are concerned only with provisions of the Act insofar as they govern the disciplining of permanent employees (see fn. 3, ante) and we limit our discussion accordingly.

FN 11. Section 19570 provides: "As used in this article, 'punitive action' means dismissal, demotion, suspension, or other disciplinary action." The Board has defined "other disciplinary action" to include, among other things, official reprimand and reduction in salary. (Personnel Transactions Man., March 1972.)

Section 19571 is the provision establishing general authority to take punitive action: "In conformity with this article and board rule, punitive action may be taken against any employee, or person whose name appears on any employment list for any cause for discipline specified in this article."

FN 12. Section 19574 provides as follows: "The appointing power, or any person authorized by him, may take punitive action against an employee for one or more of the causes for discipline specified in this article by notifying the employee of the action, pending the service upon him of a written notice. Punitive action is valid only if a written notice is served on the employee and filed with the board not later than 15 calendar days after the effective date of the punitive action. The notice shall be served upon the employee either personally or by mail and shall include: (a) a statement of the nature of the punitive action; (b) the effective date of the action; (c) a statement of the causes therefor; (d) a statement in ordinary and concise language of the acts or omissions upon which the causes are based; and (e) a statement advising the employee of his right to answer the notice and the time within which that must be done if the answer is to constitute an appeal."

FN 13. Under section 18524, "'[a]ppointing power' means a person or group having authority to make appointments to positions in the State civil service."

FN 14. For the procedure regulating discipline where charges against the employee are filed by a third party with the consent of the Board or the appointing power, see section 19583.5.

FN 15. See footnote 12, ante.

In an opinion issued on March 26, 1953, the Attorney General described the "statement of causes" as follows: "Such statement of causes is not merely a statement of the statutory grounds for punitive action set forth in section 19572 but is a factual statement of the grounds of discipline which, although not necessarily pleaded with all the niceties of a complaint in a civil action or of an information or indictment in a criminal action, should be detailed enough to permit the employee to identify the transaction, to understand the nature of the alleged offense and to obtain and produce the facts in opposition [citations]." (See 21 Ops.Cal.Atty.Gen. 132, 137 (1953).)

FN 16. Such minor disciplinary matters generally include those cases in which the discipline imposed is suspension without pay for 10 days or less. Section 19576 describes the procedural rights of an employee subjected to this form of discipline.

FN 17. Section 19578 provides that "[w]henever an answer is filed to a punitive action other than a suspension without pay for 10 days or less, the board or its authorized representative shall within a reasonable time hold a hearing. The board shall notify the parties of the time and place of the hearing. Such hearing shall be conducted in accordance with the provisions of Section 11513 of the Government Code, except that the employee and other persons may be examined as provided in Section 19580, and the parties may submit all proper and competent evidence against or in support of the causes."

FN 18. Section 19575 describes the procedure to be followed by an employee in answering a notice of punitive action: "No later than 20 calendar days after service of the notice of punitive action, the employee may file with the board a written answer to the notice, which answer shall be deemed to be a denial of all of the allegations of the notice of punitive action not expressly admitted and a request for hearing or investigation as provided in this article. With the consent of the board or its authorized representative an amended answer may subsequently be filed. If the employee fails to answer within the time specified or after answer withdraws his appeal the punitive action taken by the appointing power shall be final. A copy of the employee's answer and of any amended answer shall promptly be given by the board to the appointing power."

FN 19. At such hearing, the appointing power has the burden of proving by a preponderance of the evidence the acts or omissions of the employee upon which the charges are based and of establishing that these acts constitute cause for discipline under the relevant statutes. (§§ 19572, 19573.) The employee may try to avoid the consequences of his actions by showing that he was justified in engaging in the conduct upon which the charges are based. (See 21 Ops.Cal.Atty.Gen. 132, 139 (1953).)

FN 20. Under the terms of section 19583, "[t]he board shall render a decision within a reasonable time after the hearing or investigation. The punitive action taken by the appointing power shall stand unless modified or revoked by the board. If the board finds that the cause or causes for which the punitive action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the punitive action and it may order the employee returned to his position either as of the date of the punitive action or as of such later date as it may specify. The decision of the board shall be entered upon the minutes of the board and the official roster."

FN 21. Section 19584 provides: "Whenever the board revokes or modifies a punitive action and orders that the employee be returned to his position it shall direct the payment of salary to the employee for such period of time as the board finds the punitive action was improperly in effect.

"Salary shall not be authorized or paid for any portion of a period of punitive action that the employee was not ready, able, and willing to perform the duties of his position, whether such punitive action is valid or not or the causes on which it is based state facts sufficient to constitute cause for discipline.

"From any such salary due there shall be deducted compensation that the employee earned, or might reasonably have earned, during any period commencing more than six months after the initial date of the suspension."

FN 22. Section 19586 provides in pertinent part that "[w]ithin thirty days after receipt of a copy of the decision rendered by the board in a proceeding under this article, the employee or the appointing power may apply for a rehearing by filing with the board a written petition therefor. Within thirty days after such filing, the board shall cause notice thereof to be served upon the other parties to the proceedings by mailing to each a copy of the petition for rehearing, in the same manner as prescribed for notice of hearing.

"Within sixty days after service of notice of filing of a petition for rehearing, the board shall either grant or deny the petition in whole or in part. Failure to act upon a petition for rehearing within this sixty-day period is a denial of the petition."

FN 23. Section 19588 provides: "The right to petition a court for writ of mandate, or to bring or maintain any action or proceeding based on or related to any civil service law of this State or the administration thereof shall not be affected by the failure to apply for rehearing by filing written petition therefor with the board."

The judicial review proceedings are governed by Code of Civil Procedure section 1094.5. (Boren v. State Personnel Board, supra, at p. 637.)

FN 24. Under the terms of the statute, the trial judge could order sequestration only if the creditor proved by affidavit that he had a vendor's lien on the property and that the debtor had defaulted in making the required payments, thereby entitling the creditor to immediate possession. (Id., at pp. 605-606 [40 L.Ed.2d at pp. 412-413].)

FN 25. The court noted that the debtor might abscond with the property and that in any event the debtor's continued use thereof would decrease the property's value. (Id., at pp. 608-609 [40 L.Ed.2d at pp. 413-415].)

FN 26. The creditor was required to post a bond to cover the debtor's potential damages in the event of a wrongful taking. At the postdeprivation hearing which was immediately available to the debtor, the creditor had the burden of making a prima facie showing of entitlement to the property. If he failed to do so, the debtor was entitled to return of his property and to an award of any damages. (Id., at pp. 606-610 [40 L.Ed.2d at pp. 412-415].)

FN 27. Under California law, "[a]n individual is disqualified for unemployment compensation benefits if the director finds that ... he has been discharged for misconduct connected with his most recent work." (Unemp. Ins. Code, § 1256.) Thus, a state civil service employee who has been discharged for cause may be disqualified from receiving unemployment compensation in some circumstances.

FN 28. Justice White's dissent was based upon his view that the employee in Arnett had not been accorded an impartial hearing officer in the pretermination proceeding, which he found was required by both due process and the federal statutes. (Id., at p. 199 [40 L.Ed.2d at p. 59].)

FN 29. Justice Douglas also wrote a separate dissenting opinion in which he concluded that the employee in Arnett had been fired for exercising his right of free speech, and therefore that the discharge violated the First Amendment to the United States Constitution. (Id., at pp. 203-206 [40 L.Ed.2d at pp. 61-63].)

FN 30. Section 19574.5 provides: "Pending investigation by the appointing power of accusations against an employee involving misappropriation of public funds or property, drug addiction, mistreatment of persons in a state institution, immorality, or acts which would constitute a felony or a misdemeanor involving moral turpitude, the appointing power may order the employee on leave of absence for not to exceed 15 days. The leave may be terminated by the appointing power by giving 48 hours' notice in writing to the employee.

"If punitive action is not taken on or before the date such a leave is terminated, the leave shall be with pay.

"If punitive action is taken on or before the date such leave is terminated, the punitive action may be taken retroactive to any date on or after the date the employee went on leave. Notwithstanding the provisions of Section 19574, the punitive action, under such circumstances, shall be valid if written notice is served upon the employee and filed with the board not later than 15 calendar days after the employee is notified of the punitive action."

FN 31. The Board is "a statewide administrative agency which derives [its] adjudicating power from [article XXIV, section 3, of] the Constitution ... [; therefore, its factual determinations] are not subject to re-examination in a trial de novo but are to be upheld by a reviewing court if they are supported by substantial evidence. [Citations.]" (Shepherd v. State Personnel Board (1957) 48 Cal.2d 41, 46 [307 P.2d 4]; see also Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 35-36 [112 Cal.Rptr. 805, 520 P.2d 29].)

FN 32. Mr. Green testified on cross-examination that there was some latitude with respect to the hours kept by professional people in the office, as long as they worked 40 hours per week and received Green's approval.

FN 33. Apparently, petitioner's unexcused absence on the afternoon of June 26, 1972, inconvenienced Moore who wished to see him on a routine business matter.

FN 34. As petitioner has heretofore been accorded a full evidentiary hearing in this matter, it is unnecessary for the Board to order the Department to reinstitute new proceedings against him in order to impose an appropriate discipline in respect to the conduct involved herein.

What is a Skelly?

"Skelly" Rights

"Skelly" is an interesting word. It should NOT be confused with the dice game usually played in the streets by hustlers or sometimes kids. But, rather an integral part of labor relations representation and part of the formal discipline process. It has been around long enough in Employee-Employer labor relations jargon to become a regular word. Actually about 36 years, since the 1975 court decision of the same name.

In Skelly v. State Personnel Board (1975), the court ruled that the employee (Skelly) had a property interest in continued employment, and hence, could not be deprived of his job without the observance of due process. Although the LLNL/UC argued that this did not apply to their employees, a decision by the California State Court of Appeals, Mendoza v. Regents of University of California (1978), decided otherwise. The appellate court ruled that since Ms. Mendoza was not accorded due process prior to dismissal, she was entitled to back pay, etc.

But what really is a Skelly and how does it actually impact the workplace?

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protects a public employee's right to both a property and liberty interest in employment. The California Constitution also provides a similar protection. The California Supreme Court has stated that "when a person has a legally enforceable right to receive a government benefit, provided certain facts exist, this right constitutes a property interest protected by due process." Hence, under the court's interpretation, the job is actually characterized as the employee's property. This was articulated in 1975 by the California Supreme Court in the now famous case called Skelly v. State Personnel Bd., 15 Cal. 3d 194.

The concept of due process should be defined at the outset. It generally means that, prior to any significant discipline; an employee must be afforded the charges against him/her and an opportunity to present his/her side of the issue in an informal setting.

The court decisions, including Skelly and later decided cases, have long established that public employees who may be terminated only for cause (i.e., not on probation and not specifically at-will) have a property interest in their continued employment. Therefore, a public employer must satisfy the procedural due process requirements before depriving a permanent employee of his/her property interest through disciplinary action. Usually, a public employer can satisfy these procedural requirements with a minimum of impact to the organization.

Skelly thus applies to discipline that constitutes a "taking" of property (the employee's job) and may include discipline that is short of termination if it is nevertheless "significant." Significant is one of those hard to define legal terms and the courts continue to struggle with it. With regards to short term suspensions of public employees, the Court has acknowledged that "suspension of a right or of a temporary right of employment may amount to a 'taking' for 'due process purposes." In relation to significant employee discipline, regardless of whether or not good cause is ultimately found to exist for the discipline, before an employee can be deprived of the property interest he/she has in a job, certain procedural safeguards must be provided.

Due process, however, does not require that the employee be given a full evidentiary hearing prior to imposition of discipline. It does require that the employee be accorded certain procedural safeguards before the discipline becomes effective. The term Skelly is thus considered synonymous with pre-discipline hearing procedures.

The basic Skelly decision held that, as a minimum, pre-removal safeguards must

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1. Notice of the proposed action,
2. The reasons for the action,
3. A copy of the charges and materials on which the action is based, and
4. The right to respond, either orally or in writing, to the employing agency imposing the discipline.

Note: Skelly rights are pre-disciplinary safeguards and are required even where the public employer, at a later time, provides a full evidentiary hearing after imposing the discipline. These safeguards are not overly burdensome and should be satisfied by an employer with a minimal effort.

The remedy for denial of due process by virtue of a Skelly violation is back pay for the period in which the discipline was improperly imposed. Thus, the back pay period commences on the date of actual discipline and ends on the date the employer reaches a decision on the discipline's validity.

In summation, the due process clause of the Fourteenth Amendment to the U.S. Constitution protects a public employee's right to a property interest in employment. Skelly v. State Personnel Bd. is the leading court case that has sought to define and clarify these due process interests. Most permanent (non- probationary) public sector employees in California have a legally enforceable property right to continued employment, subject to minimum due process protections.

Understanding this, an employer should be able to meet the requirements of the Skelly due process and protect an employee's interest, with a minimal impact to the organization.

If you have any other questions, or are facing a Skelly hearing, always consult your Labor Relations Representative.

AFL-CIO
California School Employees Association

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www.csea.com

Member of the AFL-CIO

The nation's largest independent classified employee association

AEU

December 10, 2014 Via Email: corrie.amador@sduhsd.net

Ms. Corrie Amador, Director of Personnel
San Dieguito Union High School District
710 Encinitas Blvd.
Encinitas, CA 92024-3357

Re: Discipline of [redacted]

Dear Ms. Amador

Let this serve to reiterate the CSEA position that was presented to you at the disciplinary matter you held in regard to [redacted]. On Wednesday December 4, 2014 you held a disciplinary meeting in regard to [redacted]. When I asked why you were handling the meeting and also why you were part of the district investigation into claims against [redacted] you stated that it was because "[redacted] was a probationary employee."

So the record is clear I objected again to your involvement in the investigation and also to you being the district representative notifying [redacted] that the SDUHSD had "determined to end your probationary period".

When I asked for a charge packet as is required under Personnel Commission Rule 13.2

13.2 Procedure for Disciplinary Action:

B. Hearing before the Superintendent. When a regular employee is to be suspended, demoted or dismissed, a written statement of charges shall be formulated by a member of the administration and submitted to the District Superintendent for presentation to the Board of Trustees.

Before the Superintendent makes a recommendation to the Board that an employee be dismissed, the employee shall be given written notice of this intention to recommend dismissal to the Board by a specific date. The written notice shall contain a statement of the proposed charges, the specific causes for the disciplinary action, and the acts or omissions which establish the causes for disciplinary action. The employee shall be afforded the opportunity, upon request, to examine and obtain copies of all pertinent written materials and to meet with the District Superintendent to fully present the employees views with respect to the proposed recommendation. The employee shall be given ten (10) working days from receipt of written to examine and copy the materials and to meet with the District Superintendent. The written notice shall be personally served on the employee and the employee is required to acknowledge receipt of the notice on a copy to be retained by the District, or the written notice shall be sent to the employee at the last known address by certified mail, return receipt requested.

When I asked if this rule was going to be complied with you stated that [redacted] was a probationary employee and that this provision did not apply to her.

When I pointed out to you the definition of Regular Employee under Chapter I Preliminary Statement and Definitions of the Personnel Commission.

"REGULAR EMPLOYEE - A person who has probationary or permanent status in the classified service".

You stated that you would check into the matter.

As of this notice there has been no clarification from you on this matter.

Let this also sever as CSEA request to put this matter on the November 16th Personnel Commission Agenda as an action item.

Your immediate attention to this matter is expected

Sincerely,
California School Employees Association

Scott W. Hendries/cj

Scott Hendries
Labor Relations Representative

C: Matthew Colwell, Chapter President
Alex Gurrero, Steward
Maritza Gonzales, Regional Representative
Jim King, Area K Director
Leticia Munguia, Field Director
File

Hendries, Scott

From: Amador, Corrie [corrie.amador@sduhsd.net]
Sent: Thursday, November 20, 2014 5:36 PM
To: Hendries, Scott
Cc: Matt Colwell; Alex.Guerrero@sduhsd.net
Subject: Re: Director of PC Conducting Investigatory Meeting

Mr. Hendries,

As you know, the probationary period is under the purview of the Personnel Commission. As this particular matter involves a probationary employee (not permanent in the district), it falls under the responsibility of the Director of Classified Personnel to assist and advise the hiring administrator as needed. This concludes with the responsibility of the Director to inform the employee in writing of any actions taken if applicable as per Education Code 45305 and Personnel Commission Rule 8.2 B.

At your request, I will include this as an agenda item for the December 16, 2014 meeting.

Sincerely,
Corrie Amador
Director of Classified Personnel

On Thu, Nov 20, 2014 at 6:48 AM, <SHENDRIES@csea.com> wrote:
Dear PC Director Amador

Last evening I spoke to both CSEA Grievance Chair Alex Guerreor and CSEA President Matt Colwell in regard to a investigatory meeting that you had just conducted where Mr. Guerrero was representing a CSEA probationary employee. Why I am writing to you is to express my belief and position that you as the Director of the Personnel Commission should not be conducting potential disciplinary investigations on behalf of the district.

To say it bluntly, I was shocked to hear that you were conducting an investigation into an alleged sexual harassment complaint. I was advised that you had a list of questions that you were asking and that you were taking notes on the response(s) provided. It is CSEA position that management of the district has and should conduct potential disciplinary investigations not the Director of the Personnel Commission. The CSEA is formally going on record objecting to your continued involvement in this and any other potential disciplinary investigation(s).

Additionally, the CSEA would like this matter placed on the Personnel Commissions December 16, 2014 agenda as a discussion topic.

Your immediate attention to this matter is expected and appreciated.

Scott Hendries
CSEA Labor Relations Representative

--
Corrie Amador
Director of Classified Personnel
San Dieguito Union High School District

CHAPTER 8

PROBATIONARY PERIOD

8.1 Duration of Probationary Period

6 Month Probationary Period

A. A new employee appointed from an eligibility list shall serve a probationary period in a class for six months or 130 days of paid service, whichever is longer, before attaining permanency in the classified service. An employee who has been promoted shall serve a probationary period of six months in the higher class before attaining permanency in that class. Credit toward completion of probation shall be granted only for service in regular positions in the class after appointment from the eligibility list.

One Year For Management

B. For those classes designated as management or administrative, the probationary period shall be one year. (**EC 45269, 45270, 45301**)

8.2 Rights of Probationary Employees

A. New employees who resign in good standing during their initial probationary period shall, upon request, have their names restored in proper rank to the eligibility list. Such action shall not extend the life of the eligibility list or the period of eligibility for the employees.

B. New employees who are suspended or dismissed during their initial probationary period shall be notified in writing of the actions taken and the reasons therefore. They shall not have the right of appeal. **(EC45305)**

Probationary Employees Cannot Appeal

C. Employees who have permanent status in the classified service, and who have been promoted to a higher class, may be demoted involuntarily during the probationary period to their former class. They shall be notified in writing of the actions taken and the reasons therefore, and shall not have the right of appeal.

(EC45305)

D. Permanent employees who are suspended, or dismissed, or demoted~~,~~ to other than their former class, during a probationary period retain full rights of appeal. **(EC45305)**

Layoff of Probationary Employees

E. Should the work for which probationary employees have been appointed prove temporary instead of permanent as certified, and should they be laid off without fault or delinquency on their part before their probationary period is completed, their names shall be restored in proper rank to the eligibility list and the time served shall be credited to them on their probationary period. Such action shall not extend the life of the eligibility list or the period of eligibility for the employees.

CHAPTER 13

DISCIPLINARY ACTION & APPEAL

13.1 Causes For Suspension, Demotion, Dismissal

A. Persons employed in the classified service may be suspended, demoted, or dismissed for any of the following causes provided that specific instances must be set forth as to any of the causes enumerated under this heading **(EC45302)**:

1. a. Incompetency, inefficiency, insubordination, inattention to or dereliction of duty;

   b. Persistent discourteous treatment of the public or of fellow employees;

   c. Any other failure of good conduct tending to injure the public service;

   d. Any persistent violation of the provisions of the Education Code or of policies, rules, regulations, or procedures adopted by the Board of Trustees or the Personnel Commission pursuant to it.

2. a. Dishonesty.

   b. Theft.

   c. Immoral conduct.

3. a. Use of, or being under the influence of, alcoholic beverages on District property.

   b. Use of, or possession of, illegal controlled substance.

4. Political activities engaged in by an employee during his/her assigned hours of employment.

5. a. Conviction of a serious crime by a court

of law; a record of one or more criminal convictions which indicates that the person is a poor employment risk; failure to disclose material facts regarding criminal records; and other false or misleading information on application forms or examination and employment records concerning material matters.

b. Conviction of a sex offense as defined in Education Code Section 44010. Conviction of such offense shall result in dismissal.

c. Conviction of a narcotics offense as defined in Education Code Section 44011. Conviction of such offense shall result in dismissal.

d. Conviction of a crime involving moral turpitude. A plea, verdict, or finding of guilt, or a conviction following a plea of *nolo contedere*, deemed to be a conviction.

6. Excessive absence or tardiness.

7. Continuing illness of a disabling nature, after the exhaustion of illness leave and leave of absence privileges, resulting in physical or mental inability to perform the tasks and/or functions of the employee's classification, with or without reasonable accommodation and after an interactive process with the employee to determine if a reasonable accommodation can be made, which would allow the employee to perform the essential functions of his/her usual and customary position or an alternate position.

8. Refusal to report for review of criminal records or for health examination after due notice.

9. Advocacy of overthrow of the Government of

the United States or the State of California by force, violence, or other unlawful means.

10. Membership in the Communist Party. **(EC45303)**

11. The discovery or development during an initial probationary period of any physical, emotional, and/or mental condition which would have precluded acceptance as a candidate for assignment.

Five Days Absence without notification

12. Abandonment of position, which is defined as absence for a period of more than five consecutive working days without notification.

13.2 Procedure for Disciplinary Action

Discrimination Prohibited

A. No employee in the classified service shall be suspended, demoted, dismissed, or in any way discriminated against because of political or religious acts or opinions or affiliations, or race, color, sex, national origin or ancestry, or marital status, subject to the provisions of Rule 13.1.A.4., 9., and/or 10., above. **(EC45293)**

B. Hearing before the Superintendent. When a regular employee is to be suspended, demoted or dismissed, a written statement of charges shall be formulated by a member of the administration and submitted to the District Superintendent for presentation to the Board of Trustees.

Written Notice Given to Employee

Before the Superintendent makes a recommendation to the Board that an employee be dismissed, the employee shall be given written notice of this intention to recommend dismissal to the Board by a specified date. The written notice shall contain a statement of the proposed charges, the specific causes for the disciplinary action, and the acts or omissions which establish the causes for disciplinary action. The employee shall be afforded the opportunity, upon request, to examine and obtain copies of all pertinent written materials and to meet with the District

10-Day Rule

Superintendent to fully present the employee's views with respect to the proposed recommendation. The employee shall be given ten (10) working days from receipt of written notice to examine and copy the materials and to meet with the District Superintendent. The written notice shall be personally served on the employee and the employee is required to acknowledge receipt of the notice on a copy to be retained by the District, or the written notice shall be sent to the employee at the last known address by certified mail, return receipt requested.

The foregoing procedure is applicable to demotions and to long-term suspensions of five (05) days or more.

After the pre-termination process has been completed, a copy of the written charges shall be presented to the Board of Trustees. The written statement of charges shall set forth the particular causes charged and shall specify the supporting facts so that the employee will be able to prepare a defense.

In exceptional circumstances (for example, to protect the safety of co-workers) an immediate suspension may be made without advance notice, subject to later ratification by the Board of Trustees and approval of charges which must be transmitted to the employee within 10 days after the date of suspension.

The Board of Trustees shall notify the Director Classified Personnel of its action. **(EC45304)**

10 Days for Commission to Be Notified of the Disciplinary Action

C. Within 10 working days of the suspension, demotion, or dismissal the Personnel Director shall file the written statement of charges with the Personnel Commission and give to the employee or deposit in the United States registered or certified mail with postage prepaid, addressed to the employee at his/her last known place of address, a copy of the charges. In the case of a permanent employee who is suspended, demoted or dismissed, the

copy of the written statement of charges shall be accompanied by a copy of Rules 13.3.A and 13.4.A, and Sections 45304, 45305, 45306, 45307, 45311 and 45312 of the Education Code. In the case of a permanent employee who has been demoted to the class from which promoted and has not served the full probationary period in the higher position, the copy of the written statement or charges shall be accompanied by a copy of Rules 13.3 A and B.

D. Dismissal shall cause removal of the employee's name from all employment lists.

E. Failure to appeal, as provided below, shall make the action of the Board of Trustees final and conclusive.

F. Suspension, without pay shall not exceed the time limitations outlined in the Education Code Section 45304 (30 days, except for sex and narcotics offenses).

13.3 Appeal

Permanent Employees May Appeal

A. A permanent employee who has been suspended, demoted, or dismissed may appeal to the Personnel Commission within 14 days after having been furnished with a copy of the written charges by filing a written answer to such charges and stating the grounds for appeal which may include but are not limited to:

1. That the procedures set forth in these Rules have not been followed.

2. That the action was taken because of political or religious opinions or affiliations, or race, color, national origin or ancestry, sex, or marital status.

3. That there has been abuse of discretion.

4. That the action taken was not in accord with the facts.

5. That the penalty invoked is excessive.

Permanent/ Probationary Employee May Request Investigation

B. A permanent employee who has not served the full probationary period for the class and who is demoted to the class from which promoted may request an investigation by the Commission 14 days after the receipt of the copy of written charges. The request for the investigation shall state the grounds for the appeal. The Commission shall conduct an investigation confined to the grounds set forth in the charges and in the request for the investigation but shall not be required to follow the procedures for appeals and hearings set forth in these Rules. The Commission shall notify the Superintendent and the employee in writing of its findings. If the Commission's investigation and findings, however, indicate any discriminatory action, the Commission may order a formal hearing. The decision of the Commission shall be binding on the Board of Trustees. (**EC 45305, 45306**)

13.4 Hearing Procedure

Hearing Officer May Be Employed

A. The Personnel Commission may conduct hearings of appeals or may appoint a hearing officer to conduct the hearing and report findings and recommendations to the Commission. (**EC45306, 45312**)

B. Hearings shall be conducted in the manner most conducive to determination of the truth, and neither the Commission nor its hearing officer shall be bound by technical rules of evidence. Decisions made by the Commission shall not be invalidated by any informality in the proceedings.

C. The Personnel Commission or its hearing officer shall determine the relevancy, weight, and credibility of testimony and evidence. It shall base its findings on the preponderance of evidence.

D. Each side will be permitted an opening statement (Board first) and closing arguments

(employee first). The Board shall first present its witnesses and evidence to sustain its charges and the employee will then present their witnesses and evidence in defense.

E. Each side will be allowed to examine and cross-examine witnesses.

F. Both the Board and the employee will be allowed to be represented by legal counsel or other designated representative.

G. The Commission may, and shall if requested by the Board or the employee, subpoena witnesses and/or require the production of records or other material evidence. (**EC45311**)

H. The Commission or hearing officer may, prior to or during a hearing, grant a continuance for any reason it believes to be important to its reaching a fair and proper decision.

I. When the hearing is held by the Commission, whether held in public or executive session, the Commission may deliberate its decision in executive session. No persons other than members of the Commission, its counsel, and its staff shall be permitted to participate in the deliberations. If the Director Classified Personnel or any staff is not serving exclusively for the Commission and/or was a witness in the proceedings, they shall also be barred from the Commission's final deliberations. If its counsel also served as counsel for the Board, they shall be barred from the Commission's final deliberations.

14 Days to Render a Decision

J. The Commission shall render its decision as soon after the conclusion of the hearing as possible and in no event later than 14 days after the conclusion of all proceedings by the Commission as authorized in the Education Code. Its decision shall set forth what charges, if any, are sustained and the reasons therefore. **(EC45312)**

K. The Commission may sustain or reject any or all

of the charges filed against the employee. It may sustain, reject, or modify the disciplinary action invoked against the employee. It may not provide for discipline more stringent than that invoked by the Board. (**EC45312**)

L. The Commission's decision will be filed with the Board of Trustees and with the charged employee and will set forth its findings and decision. If a disciplinary action is not sustained, its decision shall set forth the effective date of the action ordered by the Commission.

M. The employee or the employee's representative may obtain a copy of the transcript of the hearing upon written request and agreement to pay for necessary costs.

1.2 Definitions

Unless otherwise required by context and/or prevailing law, words used in these rules are understood to have the following meaning:

ACCELERATED HIRING RATE: An initial hiring rate at other than the beginning of the range for the class, which rate must be specifically authorized by the Personnel Commission for the particular class. Such rates are based on anticipated or actual recruitment difficulty.

ACT or THE ACT: The Act shall mean those sections of the Education Code of the State of California applying to the merit system for classified employees.

ADMINISTRATIVE CLASS: The class meeting the criteria outlined in the rule on overtime whose incumbents do not receive payment or compensating time off for overtime.

ALLOCATION: The official placing of a position in a given class and the assignment of the class title to the position.

ANNIVERSARY DATE: The date on which an employee is granted an earned salary increment. This is the first day of the pay period closer to the completion of the required period of service.

APPEAL: A protest by an employee regarding an administrative action actually or potentially detrimental to him.

APPLICANT: A person who has filed an application to take a merit system examination.

APPOINTING AURTHORITY or APPOINTING POWER FOR CLASSIFIED EMPLOYEES: The Board of Trustees, San Dieguito Union High School District.

APPOINTMENT: The official act of the appointing authority in approving the employment of a person.

BEREAVEMENT LEAVE: Paid leave of limited duration granted to an employee on the death of a relative as

defined.

BOARD: The Board of Trustees, San Dieguito Union High School District.

BUMPING RIGHT: The right of an employee, under certain conditions, to displace an employee with less seniority in a class.

CANDIDATE: A person who has competed in one or more portions of a merit system examination.

CERTIFICATED SERVICE: All employees required by law to possess credentials issued by the State Department of Education and the positions which are limited to those who possess such credentials.

CERTIFICATION: The submission by the Commission of the names of eligibles from an appropriate eligibility list of from some other source of eligibility to the appointing power or to the department which selects employees prior to approval of the appointing power.

CLASS: A category of positions with similar duties and responsibilities, to which the same title, salary, entrance qualifications, and tests of fitness apply.

CLASS SPECIFICATION (JOB DESCRIPTION): A formal statement, approved by the Commission, of the nature and level of duties and responsibilities of the positions in a class, and containing the qualification requirements of the positions in the class.

CLASSIFICATION: The art of placing a position in a class.

CLASSIFIED SERVICE: All positions and employees in the District's service to which the merit system provisions of the Education Code apply and which are not exempted by these provisions.

COMMISSION: The three-member Personnel Commission established pursuant to the merit system provisions of the Education Code for the San Dieguito Union High School District.

DAY: The period of time between any midnight and the

midnight following.

DEMOTION: A change in assignment of an employee from a position in one class to a position in another class that is allocated to a lower maximum salary rate.

DISCHARGE OR DISMISSAL: Separation from service for cause.

DISTRICT: The San Dieguito Union High School District.

DUAL CERTIFICATION: A procedure authorized by the Commission under specific conditions, which provides for simultaneous certification from an open eligibility list and a promotional eligibility list according to examination scores.

EARNED SALARY STATUS: For a permanent employee who has resigned, been laid off, or taken a voluntary demotion or reduction to limited-term status, the current flat rate of or the highest step achieved in a class in which the employee had permanency and a regular assignment at the time of termination or reduction.

ELIGIBILITY LIST: A rank order list of the names of persons who have qualified in a merit system examination for the selection of classified employees for a specific class. In the event of tie scores, more than one name may hold the same rank.

ELIGIBLE: *Noun:* a person whose name appears on the eligibility list. *Adjective:* legally qualified to be appointed.

EMERGENCY APPOINTMENT: An appointment for a period not to exceed 15 working days to prevent the stoppage of public business when persons on eligibility lists are not immediately available.

EMPLOYEE: A person who is legally an incumbent or a position or who is on authorized leave of absence.

EMPLOYMENT LIST: A list of names from which certification may be made. Includes eligibility lists, reemployment lists, and lists of persons who wish to transfer, change location, demote, be reinstated after resignation, or be restored after voluntary demotion or

reduction to limited-term or part-time status.

ENTRANCE QUALIFICATIONS: Mandatory and desirable experience and education qualifications prescribed for those who wish to compete in merit system examinations for a specific position or class.

EXAMINATION: The process of testing and evaluating the fitness and qualifications of applicants.

EXHAUSTED LIST: A list of eligibles from which it is impossible to fill a regular full-time or part-time vacancy. A list may be considered exhausted when only two eligibles remain. A list may be exhausted for part-time positions, yet remain in effect for full-time positions, or vice versa.

FIELD OF COMPETITION: Those categories of persons (either from within or outside the District) authorized by the Personnel Commission to participate in a merit system examination for a specific class.

FISCAL YEAR: From July 1 to June 30 inclusive.

FULL-TIME POSITION: A position for which the assigned time, when computed on an hourly, daily, weekly, or monthly basis, is equal to or greater than 87.5 percent of the normal assigned time of the majority of employees in the qualified service.

GRIEVANCE: An employee complaint concerning conditions of employment, not including appeals of disciplinary actions or requests for classification study or salary review.

HEARING: Formal review in the presence of the parties involved, of evidence in connection with an action affecting an employee, concerning which the employee has filed an appeal.

HEARING OFFICER: A qualified person employed by the Personnel Commission to hear and make recommendations on appeals from disciplinary action for nonmedical reasons.

ILLNESS: Any pronounced deviation for a normal, healthy state which makes it disadvantageous to the

limited period of six months or less.

MERGING: The art of combining two or more eligibility lists for the same class, established not more than one year apart, in order of the scores of eligibles. Each individual eligibility list within a merged list expires one year after its promulgation.

MERIT SYSTEM: A personnel system in which merit and fitness govern each individual's selection, progress, and retention in the service.

MILITARY LEAVE: Authorized absence to engage in ordered military duty.

MULTIPLE ASSIGNMENT: A limited-term classified assignment in addition to a regular classified assignment.

NOTICE OF UNSATISFACTORY SERVICE: A form used as a written reprimand. Such notice may be used to lay a foundation for taking disciplinary action.

OPEN EXAMINATION: An examination which is not restricted to persons who are current permanent employees of the District, i.e. may be taken by any person otherwise qualified.

OVERTIME: Authorized time worked by an employee in excess of eight hours a day and/or 40 hours a week, or in excess of five consecutive days in a workweek for employees who work an average of four hours or more per day. An employee who works an average of less than four hours a day is paid overtime or provided with compensating time off for authorized time worked on the seventh day of his workweek.

PART-TIME POSITION: A position for which the assigned time, when computed on an hourly, daily, weekly, or monthly basis, is less than 87.5 percent of the normally assigned time of the majority of employees in the classified service.

PERFORMANCE EVALUATION: An evaluation of the work and conduct of an employee; the form used for this purpose.

PERMANENT EMPLOYEE: In reference to District

employment status, an employee who had completed his/her initial probationary period in the classified service, In reference to employment status in a specific class, an employee who has competed a probationary period for that class.

PERMANENT POSITION: A position established for a continuing and indefinite or unlimited period of time or for a fixed period in excess of six months.

PERSONNEL COMMISSION: The three members appointed in accordance with Education Code provisions and responsible for maintenance of the merit system or classified employees.

POSITION: A group of duties and responsibilities assigned by competent authority requiring the full or part-time employment of one person.

PROBATIONARY PERIOD: The trial period of six months or 130 paid days of service immediately following an original or promotional appointment to a permanent position from an eligibility list.

PROMOTION: a change in the assignment of an employee from a position in one class to a position in another class with a higher maximum salary rate.

PROMOTIONAL LIST: An eligibility list resulting from a promotional examination limited to qualified employees of the District.

PROMOTIONAL PROBATION: The trial period of six months or 130 paid days of service immediately following a promotional appointment to a permanent position from an eligibility list.

PROVISIONAL APPOINTMENT: A temporary appointment to a permanent or limited-term position made in the absence of an appropriate eligibility list, not to exceed 90 working days except in specific circumstances.

PROVISIONAL EMPLOYEE: A person employed under a provisional appointment.

REALLOCATION: Movement of an entire class from one salary schedule, range, or hourly rate to another

salary schedule, range, or hourly rate on the basis of either internal or external alignment or a change in the salary-setting basis for the class.

RECLASSIFICATION: The removal of a position or positions from one class and placement into another, usually based on a change in duties, responsibilities, or class concept.

REEMPLOYMENT: Reassignment to duty of an employee who has been laid off or reassignment of a former employee~~:~~ to a lower class than that from which the employee had resigned; or to limited-term status.

REEMPLOYMENT LIST: A list of names of persons who have been laid off from permanent positions by reason of lack of work, lack of funds, abolishment or reclassification of position, exhaustion of illness or industrial accident leave, or other reason specified in these Rules and who are eligible for reemployment without examination in their former class, arranged in order of their right to reemployment.

REGULAR APPOINTMENT: An appointment to a position of more than six months' duration made from an eligibility list or from some other list of persons who are legally qualified, e.g., reemployment or reinstatement.

REGULAR EMPLOYEE: A person who has probationary or permanent status in the classified service.

REINSTATEMENT: A reappointment (discretionary with the Board of Trustees) after resignation within 39 months after the last day of paid service, without examination, to a position in one of the employee's former classes, or a related lower class, or after reduction to a limited-term status, to permanent status. Also refers to a return to work after appeal from disciplinary action when so ordered by the Personnel Commission.

RESIGNATION: A voluntary statement, preferably in writing, from an employee to be terminated from one or all assignments.

RULE OF THREE RANKS: The scope of choice available to an appointment power in making a selection from an

eligibility list; refers to selection from among those eligibles having any of the three highest scores who are ready and willing to be appointed to a specific position.

SALARY RANGE: A series of consecutive salary steps that comprise the rates of pay for a classification. ~~A~~ Current salary ranges consists of either four, five or six salary steps.

SALARY RATE: A specific amount of money paid for a specified period of service, e.g., dollars per hour or month.

SALARY SCHEDULE: A complete list of ranges, steps, and rates established for the Classified Service.

SALARY STEP: A specific rate in a salary range. One of the consecutive rates that comprise a monthly or hourly salary range.

SALARY SURVEY: The collection of current wage and salary data for the purpose of determining the prevailing wage for certain types of work in private industry and/or other public agencies. Also, the report of such data.

SENIORITY: Status secured by length of service counted in hours. Used for determining order of layoff as well as for certain informal purposes. May be used to calculate extra points for employees taking promotional examinations.

SEPARATION: Leaving a position; includes resignation, dismissal, layoff, retirement, etc.

SHIFT DIFFERENTIAL: Additional pay for night work.

STATUS: Tenure which is acquired in a classification by reason of examination, certification from eligibility lists, election or appointment by the appointing power, and the successful completion of the probationary period.

STEP ADVANCEMENT: Movement to a higher step of the salary range or schedule for a class as a result of having served the require number of days in paid

status.

SUBSTITUTE EMPLOYEE: An employee temporarily occupying a regular position during the absence of the incumbent.

SUSPENSION: An enforced absence of an employee without pay for disciplinary purposes or pending investigation of charges made against an employee.

TEMPORARY: Employment on a basis other than permanent or probationary; i.e., in a limited-term or provisional status

TRANSFER: A change in the assignment of an employee from a position in one class to a different position in the same class, or to a position in a similar or related class with the same maximum salary rate.

UNCLASSIFIED SERVICE: All positions and employees not in the classified or certificated service, i.e., those exempted by law. Includes part-time playground positions where an employee is not otherwise employed in a classified position, full-time day students employed part-time, apprentices, part-time students employed part time in any college workstudy program, and professional experts and community representatives employed in consulting or advisory capacities on a temporary basis for a specific project.

UNSATISFACTORY SERVICE: The performance of assigned duties in a manner which is detrimental to the good of the service or the failure to perform them, or the performance of actions while on duty which are detrimental to the good of the service.

VETERANS' CREDIT: Five additional points added to a passing score in entrance examinations, for military or related service rendered during a time of war or national emergency. An additional five points are added for disabled veterans.

VOLUNTARY DEMOTION: A change in assignment of an employee from a position in one class to a position in another class that is allocated to a lower maximum salary rate when the change is requested by the employee and approved by the District.

WAIVER: The voluntary relinquishment by an eligible of a right to be considered for a specific appointment from an employment list in one or more positions, locations, or for a specific or unlimited period of time.

WORKDAY: That part of a 24-hour period during which an employee is scheduled to work in accordance with the employee's specific assignment.

WORKING DAY: Any day for which an individual employee received compensation, regardless of the number of hours in a day for which the District's central office is open to the public for business purposes.

1. A work shift that begins in one calendar day and ends in the succeeding calendar day shall be considered one working day.

2. A calendar day for which only overtime compensation is received shall not be considered a working day.

WORKWEEK: Forty hours, usually served in five consecutive calendar days within a seven-day cycle, is the regular workweek for the majority of classified employees.

WORK YEAR: The portion of the year for which work is authorized.

THIS PAGE HAS NO RULES CONTENT.