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CALPELRA 2022

"Pre-Disciplinary Process: Basics for Skelly in the DEI Era"

Session: November 17, 2022

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Alison Berry Wilkinson, Berry Wilkinson Law Group

Handouts

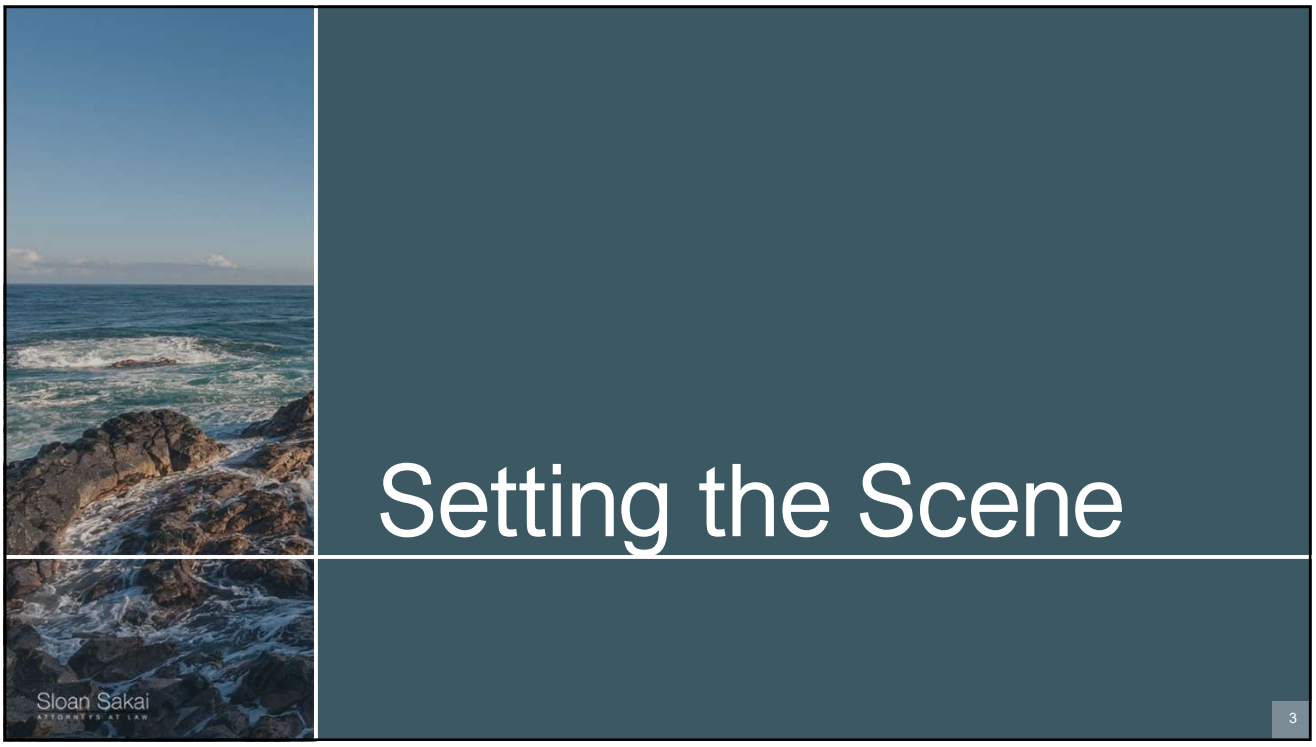
- PowerPoint Presentation
- Scenario
- Skelly Notice


This Comprehensive and Entertaining Skelly Session Belongs on Your Playlist
Sloan Sakai
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presented at
CALPELRA
moving forward, together
By
Jeff Sloan, Sloan Sakai Yeung & Wong LLP
Dania Torres Wong, Sloan Sakai Yeung & Wong LLP
Alison Berry Wilkinson, Berry Wilkinson Law Group
November 17, 2022
10:45 a.m. to 11:45 a.m.

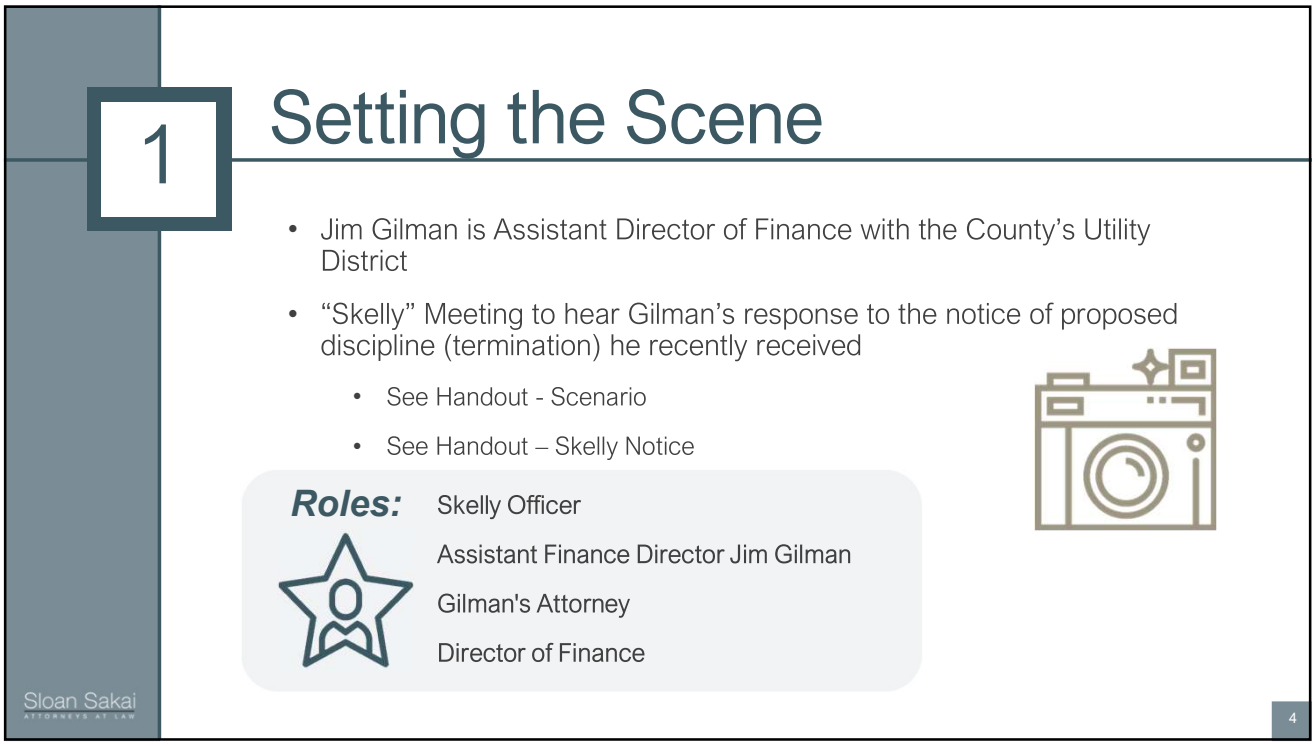
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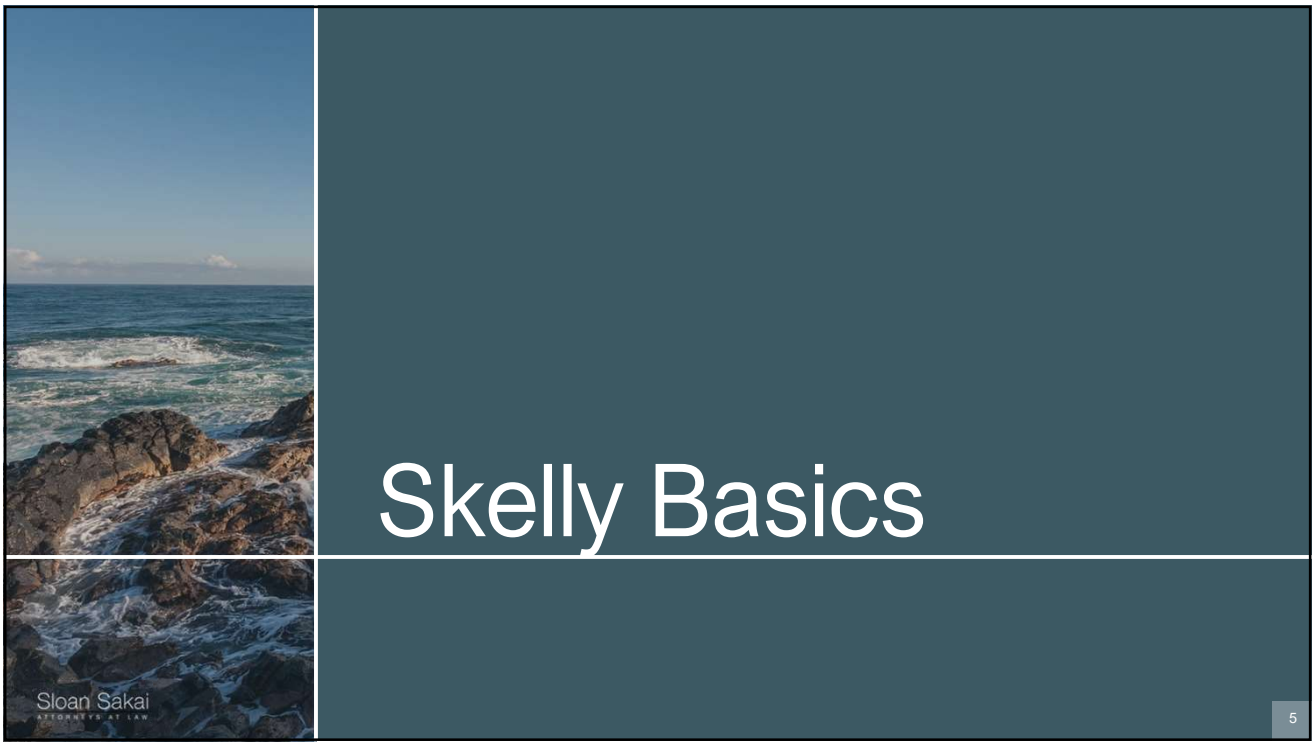
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Setting the Scene
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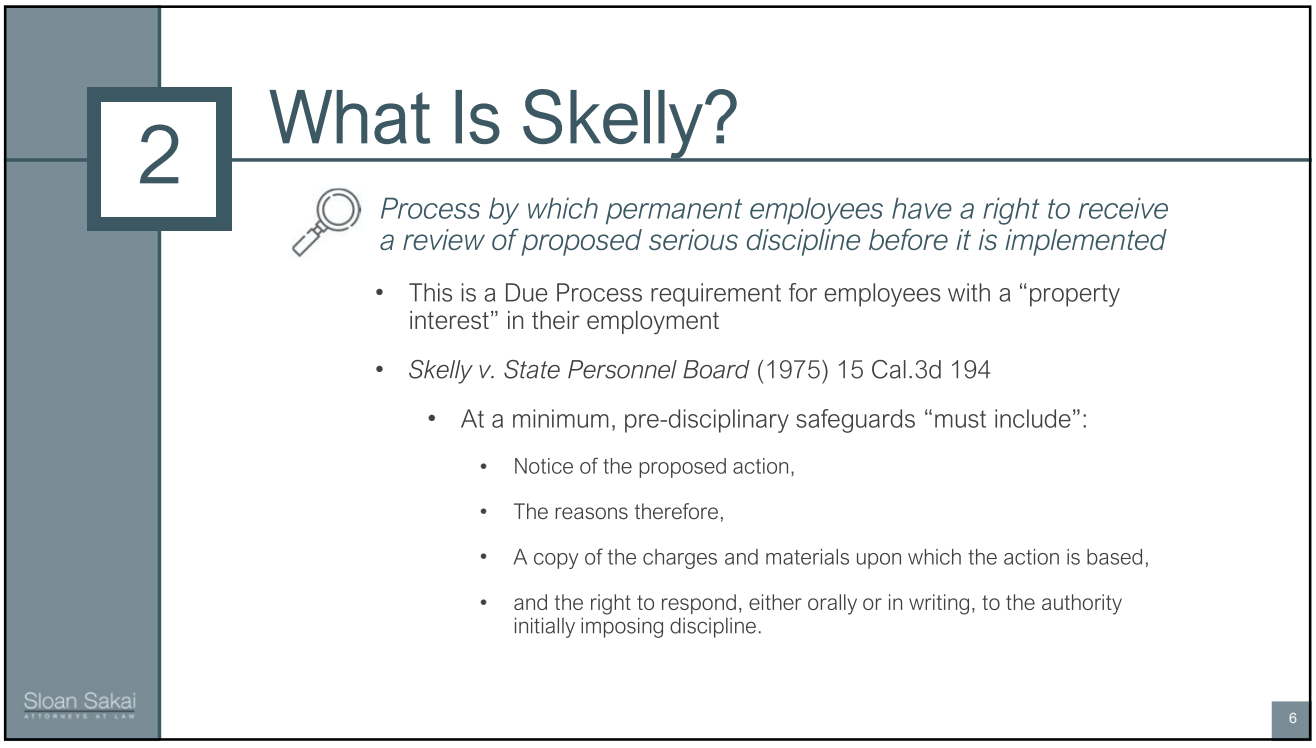
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Setting the Scene
• Jim Gilman is Assistant Director of Finance with the County's Utility District
• "Skelly" Meeting to hear Gilman's response to the notice of proposed discipline (termination) he recently received
• See Handout - Scenario
• See Handout – Skelly Notice
Roles:
Skelly Officer
Assistant Finance Director Jim Gilman
Gilman's Attorney
Director of Finance
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Skelly Basics
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What Is Skelly?
Process by which permanent employees have a right to receive a review of proposed serious discipline before it is implemented
This is a Due Process requirement for employees with a "property interest" in their employment
Skelly v. State Personnel Board (1975) 15 Cal.3d 194
At a minimum, pre-disciplinary safeguards "must include":
Notice of the proposed action,
The reasons therefore,
A copy of the charges and materials upon which the action is based,
and the right to respond, either orally or in writing, to the authority initially imposing discipline.
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What Is Skelly?

- The process applies when the department issues a notice of proposed discipline and before it precedes implementation of discipline
- The focus is whether the proposed discipline should be sustained, modified, or rejected
- A relatively disinterested person – not ordinarily the person who proposed the discipline – serves as the Skelly officer

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What Is Skelly?



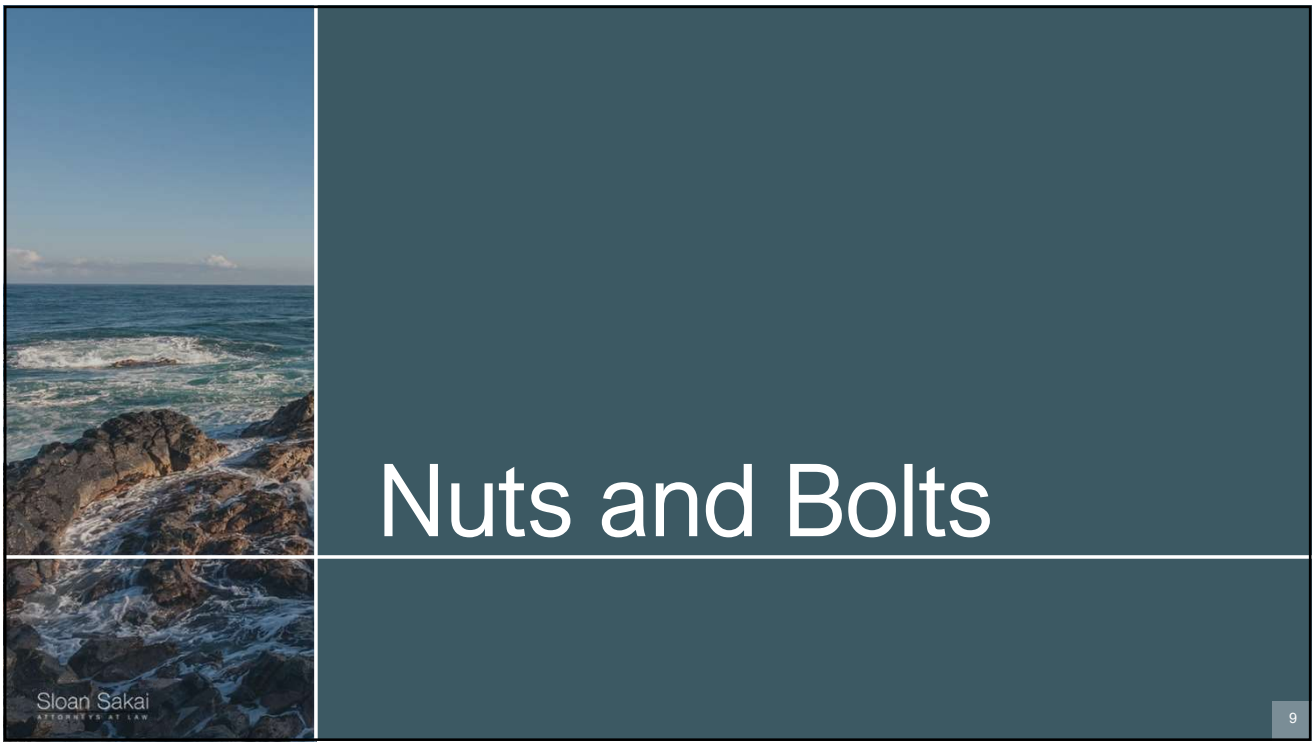
Union Viewpoint:

- Purpose/goals of the Skelly process
- Why the process is important from the union perspectives

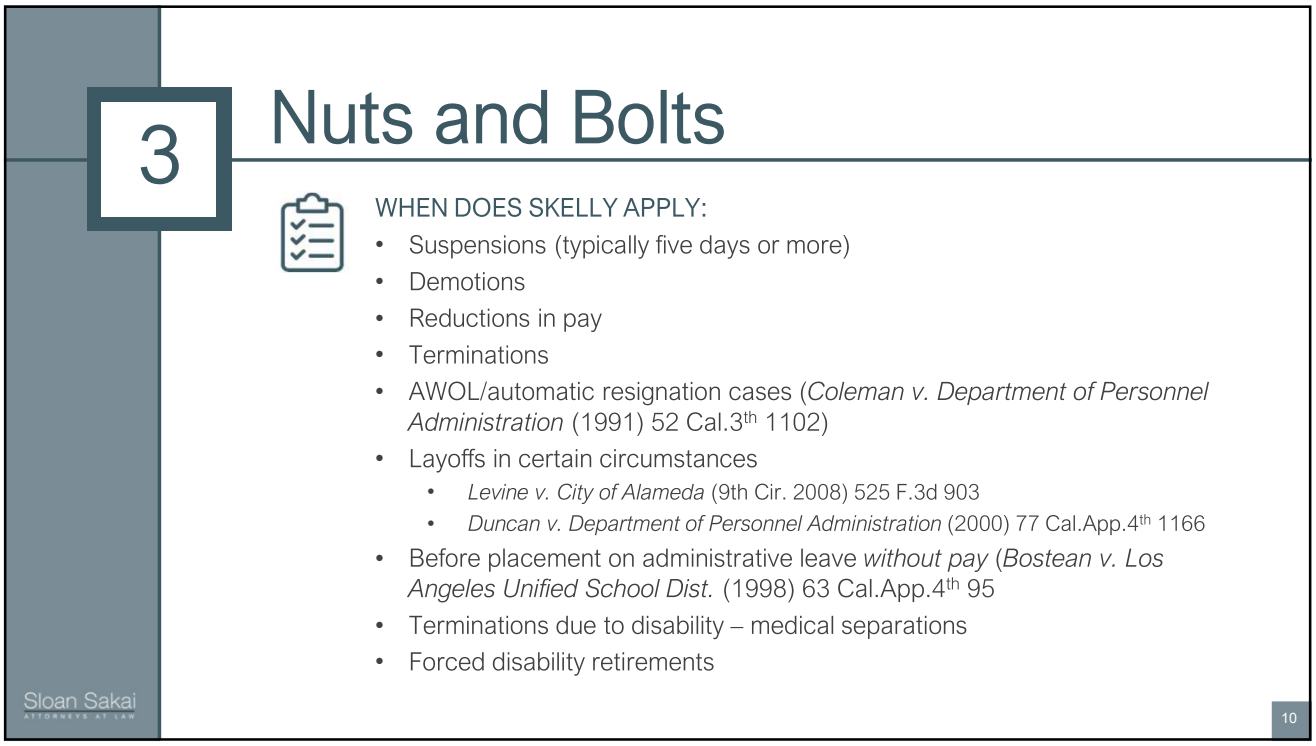
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Nuts and Bolts
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Nuts and Bolts
WHEN DOES SKELLY APPLY:
• Suspensions (typically five days or more)
• Demotions
• Reductions in pay
• Terminations
• AWOL/automatic resignation cases (Coleman v. Department of Personnel Administration (1991) 52 Cal.3th 1102)
• Layoffs in certain circumstances
• Levine v. City of Alameda (9th Cir. 2008) 525 F.3d 903
• Duncan v. Department of Personnel Administration (2000) 77 Cal.App.4th 1166
• Before placement on administrative leave without pay (Bostean v. Los Angeles Unified School Dist. (1998) 63 Cal.App.4th 95
• Terminations due to disability – medical separations
• Forced disability retirements
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Nuts and Bolts

WHEN DOES SKELLY NOT APPLY?

- At-will employment
- Probationary employment
- Written Reprimands
- Transfers and Reassignments
- Negative Evaluations
- Short suspensions (typically less than 5 days) or lesser forms of discipline (trigger often depends on local rule)
- Layoffs in certain circumstances per prior slide

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Nuts and Bolts

BEGINNING THE PROCESS

- Employer has investigated allegations of wrongdoing
- Employer has prepared a "Skelly" Notice containing:
  - ✓ Statement of facts constituting wrongdoing
  - ✓ Reference to rules the conduct violated
  - ✓ Reference to aggravating and mitigating factors
  - ✓ Reference to personnel file contents and/or disciplinary history
  - ✓ The proposed penalty
- Employer has compiled:
  - ✓ A copy of the materials upon which the action is based (*Skelly v. State Personnel Board* (1995) 15 Cal. 3d 194, 215
  - ✓ At a minimum, the employer must provide "materials amounting to the substance of the relevant supporting evidence" evaluated before proposing discipline (*Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264.
- Employer has selected a Skelly Officer

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Nuts and Bolts

Serve the Skelly Notice on the employee

- Notice of right to Skelly review should include a reasonable deadline for the employee to respond

Discussion of Dos and Don'ts:

- ✓ Methods of Service
- ✓ Timing of Service
- ✓ What is a reasonable deadline for the employee stated that they are exercising their right to respond?
- ✓ How long should the employee have to prepare for the meeting?
- ✓ Should the Notice include a date on which discipline will be imposed if no response by the employee is provided?
- ✓ Should the Notice advise the employee s/he has a right to a representative at the Skelly Meeting?
- ✓ Should all the materials be provided with the Notice or should the employee simply be notified he/she can request the materials?

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The Skelly Meeting

Who should be present?



Management

- Manager most knowledgeable?
- Investigator?
- Employer's legal counsel?
- Notetaker?
- Representative(s)?



Employee

- Representative(s)?
- Shop stewards?
- Witnesses?
- Support person? Spouse/partner?

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Representational Rights



- Employee has right to be represented by union representative or attorney
- Employer is not required to advise employee of right to representation unless required by MOU/CBA or local rule
- Representative must be available within a reasonable time
- Representative's role – Participative, but within limits
- Panelist viewpoints:
  - *Is the employee required to speak or answer questions?*
  - *Can the employer control the length, tone, content, or manner of the response provided?*

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The Gilman Skelly Meeting
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Best Practices
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5 Best Practices for Management

If the employee objects to tape-recording, consider whether to proceed without taping rather than cancelling the meeting
– don't cancel the meeting
– use a good note-taker and have a witness

Remember that communications between the management representative and the Skelly officer are not ordinarily privileged – be careful about "briefing" the Skelly officer

Remember that settlement discussions during a Skelly hearing are not necessarily privileged and can come back to management as an allegation of "constructive termination"

Be sensitive to Diversity, Equity and Inclusion issues (covered in the next section)

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Union Tactics

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Union Tactics



- Requests for continuance of the Skelly meeting
- Claims of Skelly officer bias or partiality
- Claims of inadequacy/incompleteness of the Skelly packet
- Demands for information
- Demanding that witnesses be allowed to testify
- Demanding cross-examination of management representatives
- Disrupting the meeting
- "The Rapoport Gambit"
- "Let's Make a Deal"
  - Holding discipline in abeyance
  - Seeking forfeiture of leave rather than unpaid suspension
  - Last Chance Agreements

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Diversity, Equity and Inclusion Considerations

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Diversity, Equity and Inclusion Considerations

Important DEI principles as they related to the Skelly/discipline process:

WHAT

- Recognize our unconscious biases (assumptions) that influence our perception of others and can lead to stereotyping and bad decisions
- Create a supportive climate that recognizes, accepts and thrives on real and/or perceived differences such as culture, gender identity, sexual orientation, language, ethnicity, race, age and able-bodiedness

HOW

- Promoting organizational inclusion and equitable treatment through:
  - Practicing DEI in hiring, promotional and retainment practices
  - Recognizing and accepting cultural differences
  - Positive communication and attention to tone, body language and context as well as content
- Adopting and refining best practices, including explicit understandings and rules that facilitate interactions (everyone needs to be heard and respected) and decision-making
- DEI supportive education and training (i.e., unconscious bias, cultural competency)

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Diversity, Equity and Inclusion Considerations

DEI in the Skelly Process



- Selection, orientation and training of Skelly officer consistent with DEI principles
- Written meeting guidelines distributed in advance that facilitate a comfortable, cooperative environment → *full communication*
- Advance disclosure regarding the process and expectations
- Provide ample time for document review in advance of the meeting
- Offer opportunity for reasonable accommodation

DEI in grooming new Skelly officers



- Practice diversity –culture, gender identity, sexual orientation, language, ethnicity, race, age and able-bodiedness
- Develop skill set for future use
- Management support, praise, recognition; employee accountability and appraisal
- Training
  - Unconscious bias
  - Meeting facilitation
  - Tone, body language, communication nuances
- Networking, exposure to best practices, SHRM

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Skelly Officer
Role, Mindsets And
Cautions
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Choosing a Skelly Officer -
Qualifications for Service
Relatively objective and unembroiled
Skelly does not per se prohibit individuals who were involved in the underlying investigation/decision from being Skelly officers, but we discourage this
Use of outside persons/consultants as Skelly officers is permitted
For small departments, it is often useful to bring in a Skelly officer from another department
Can/should final decision-maker also serve as Skelly officer?
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Role of Skelly Officer

Do:

- Review materials
- Listen to the presentation made by the employee and the employee's representative
- Take good notes or record the meeting
- Determine whether the employee has presented sufficient information to persuade that the recommended discipline is somehow wrong in the facts or penalty
- Endeavor to conduct an objective review – be open minded

Don't:

- Conduct a detailed or independent investigation
- Add new charges during the Skelly Process
- Try to settle

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Key Skelly Officer Cautions



- Remember:
  - Everything is discoverable (except attorney/client privileged matters)
  - The Skelly officer may be called as a witness in an ensuing appeal of disciplinary action
- Decision-making time frame

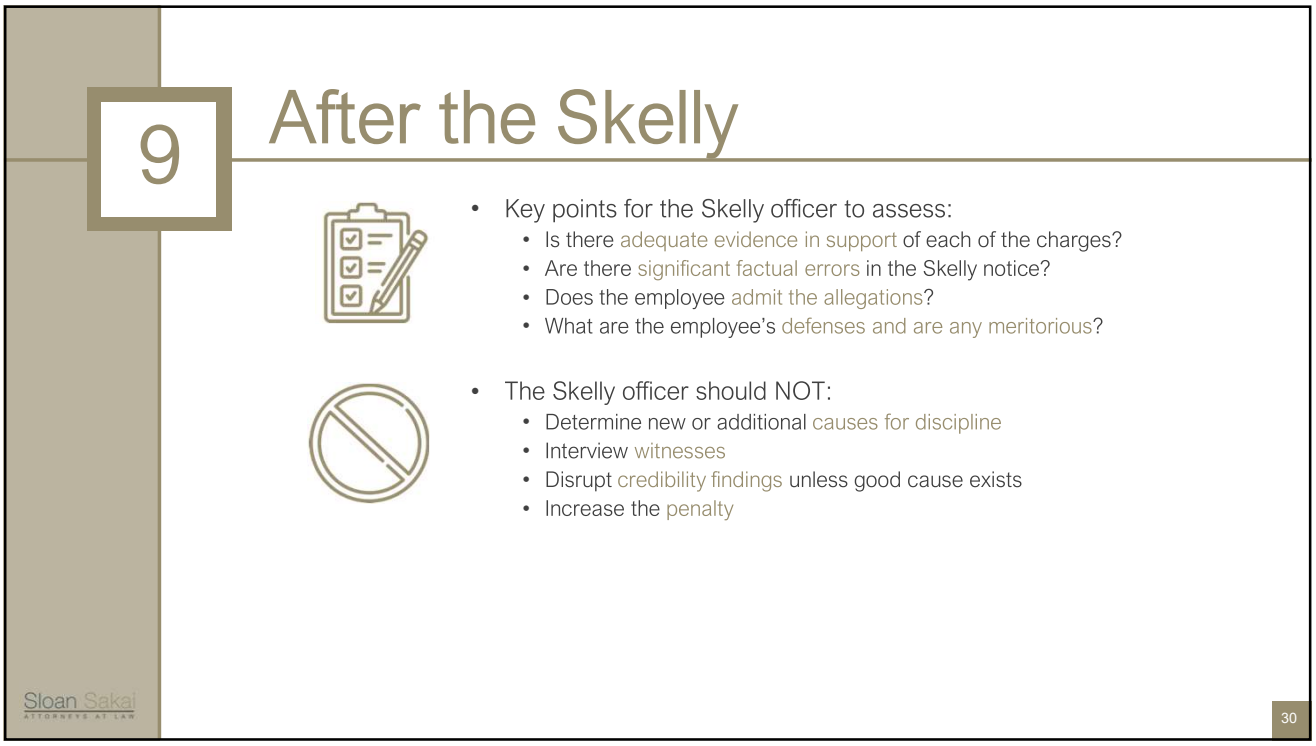
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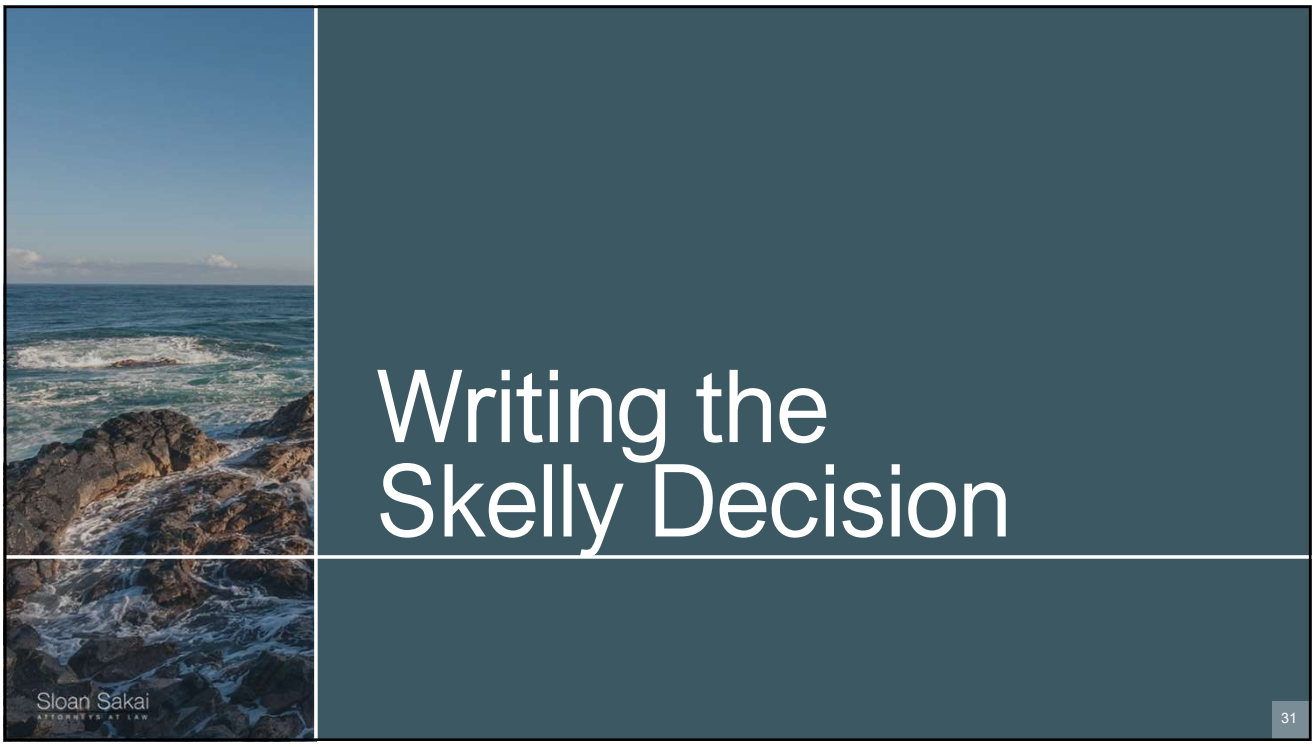
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After the Skelly Meeting
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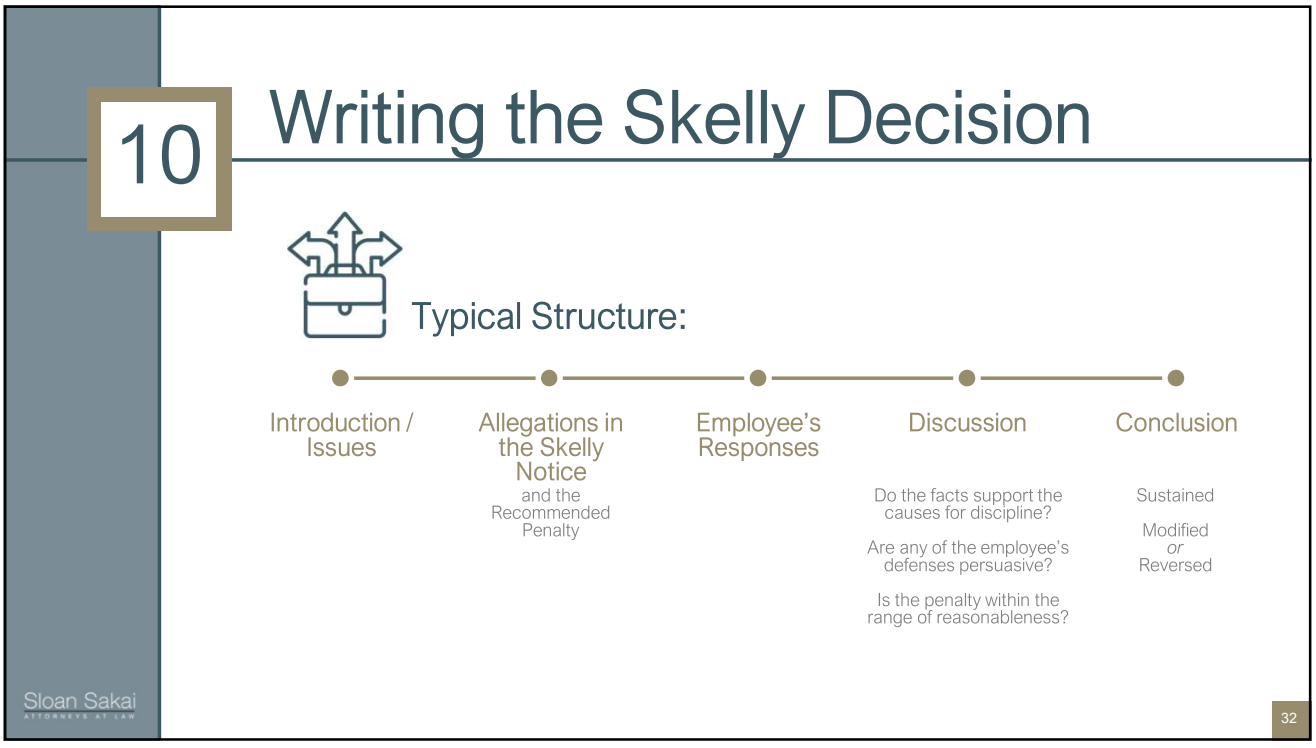
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After the Skelly
Key points for the Skelly officer to assess:
Is there adequate evidence in support of each of the charges?
Are there significant factual errors in the Skelly notice?
Does the employee admit the allegations?
What are the employee's defenses and are any meritorious?
The Skelly officer should NOT:
Determine new or additional causes for discipline
Interview witnesses
Disrupt credibility findings unless good cause exists
Increase the penalty
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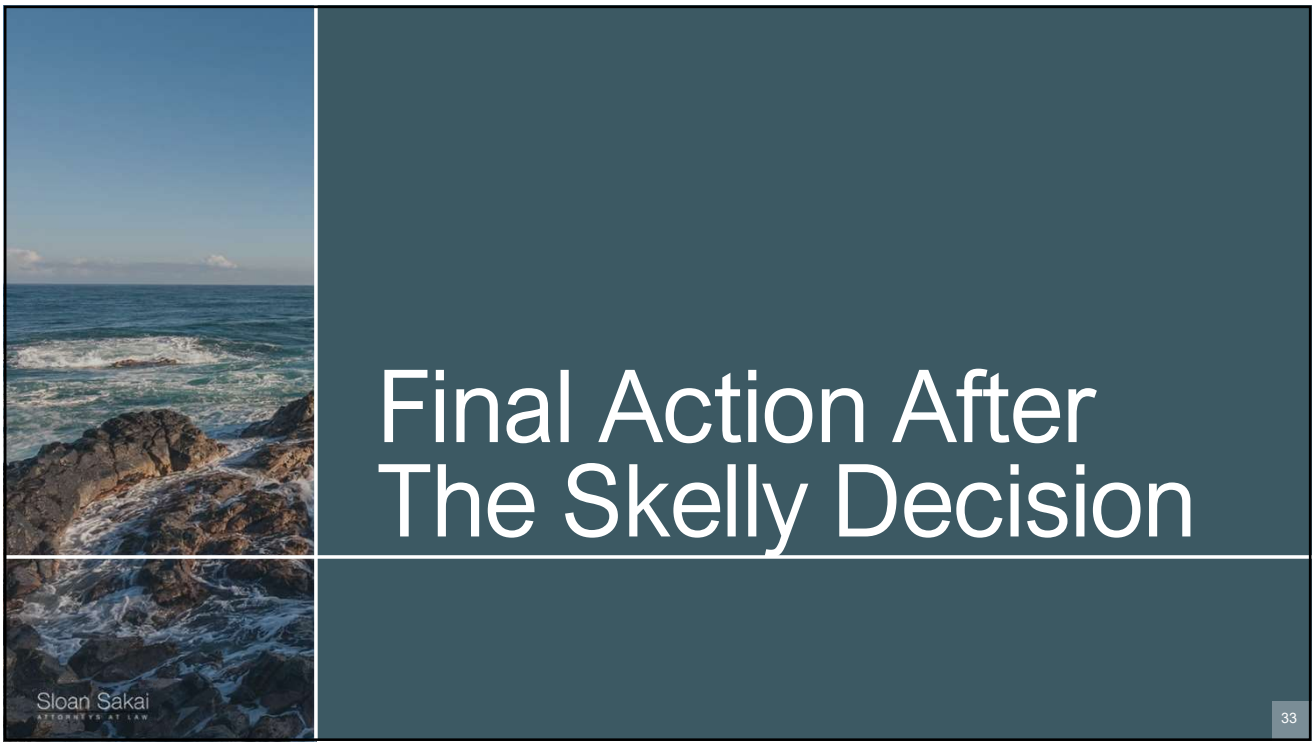
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Writing the
Skelly Decision
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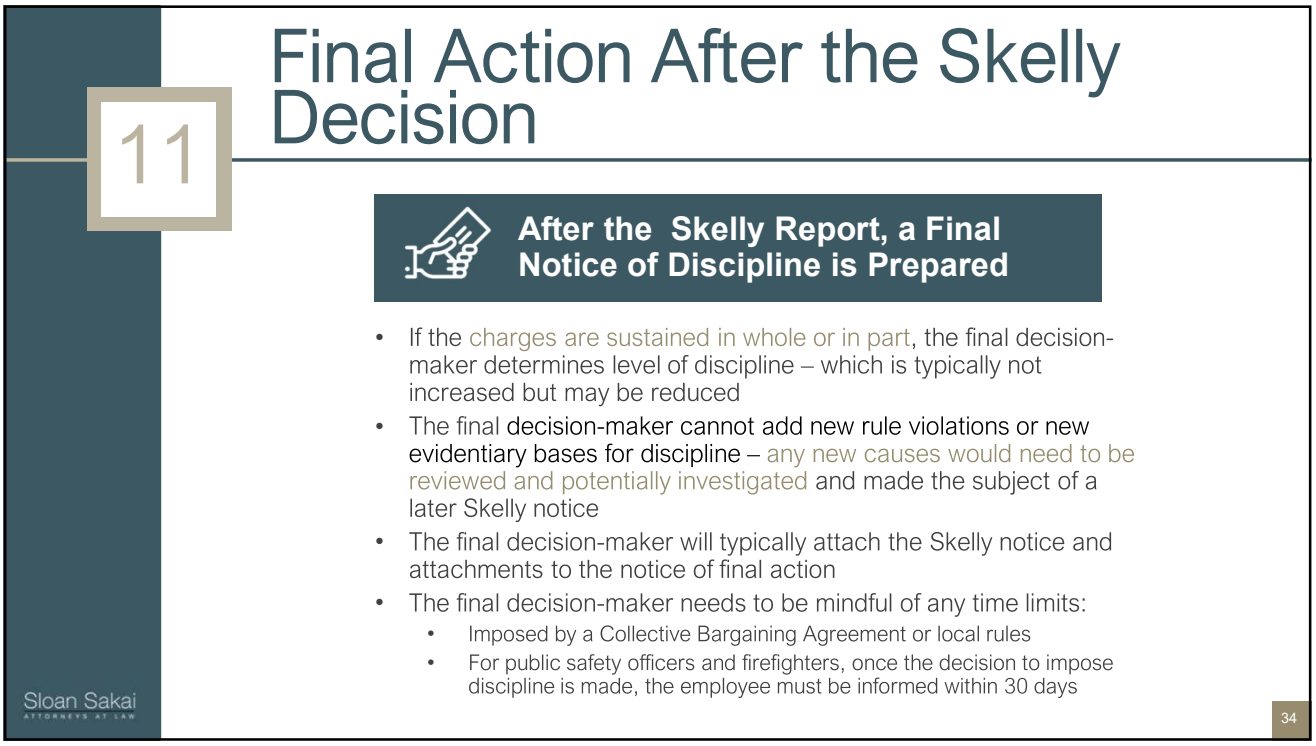
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Writing the Skelly Decision
Typical Structure:
Introduction / Issues
Allegations in the Skelly Notice
and the Recommended Penalty
Employee's Responses
Discussion
Do the facts support the causes for discipline?
Are any of the employee's defenses persuasive?
Is the penalty within the range of reasonableness?
Conclusion
Sustained
Modified
or
Reversed
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Final Action After
The Skelly Decision
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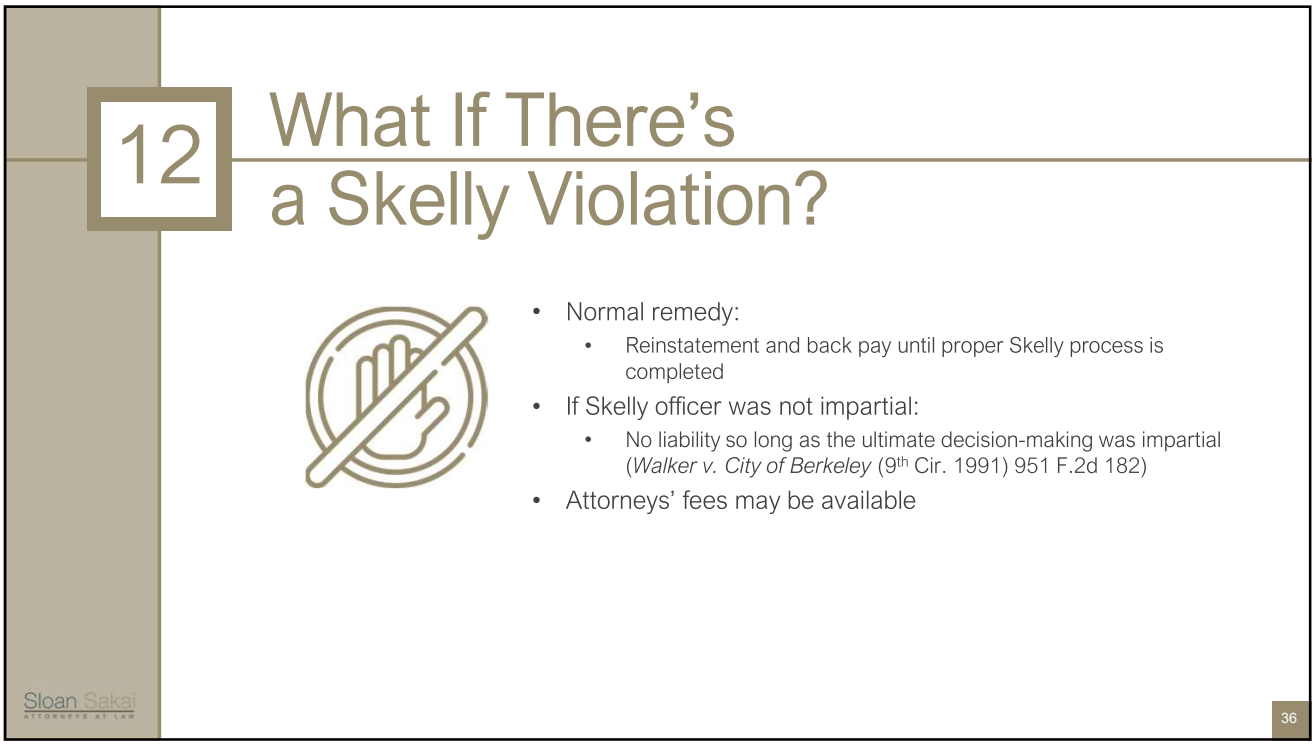
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Final Action After the Skelly Decision
After the Skelly Report, a Final Notice of Discipline is Prepared
If the charges are sustained in whole or in part, the final decision-maker determines level of discipline – which is typically not increased but may be reduced
The final decision-maker cannot add new rule violations or new evidentiary bases for discipline – any new causes would need to be reviewed and potentially investigated and made the subject of a later Skelly notice
The final decision-maker will typically attach the Skelly notice and attachments to the notice of final action
The final decision-maker needs to be mindful of any time limits:
Imposed by a Collective Bargaining Agreement or local rules
For public safety officers and firefighters, once the decision to impose discipline is made, the employee must be informed within 30 days
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What If There's a Skelly Violation?
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What If There's a Skelly Violation?
Normal remedy:
Reinstatement and back pay until proper Skelly process is completed
If Skelly officer was not impartial:
No liability so long as the ultimate decision-making was impartial (Walker v. City of Berkeley (9th Cir. 1991) 951 F.2d 182)
Attorneys' fees may be available
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Q's & A's
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NOTE TO PARTICIPANTS: this session includes a mock *Skelly* meeting. This memo provides relevant background.

In Re: County Utility District
Proposed Termination of Jim Gilman

ACTORS

Skelly Officer: Dania Torres-Wong:
Skelly Officer Assistant Director of Finance: Steve Shaw

Union Attorney: Alison Berry
Wilkinson Labor Relations
Director: Jeff Sloan

THE PLOT

Jim Gilman is Assistant Director of Finance with the County's Utility District, a position he has held since 2001. He is a member of Union of District Professionals, which represents the district's professional and managerial employees.

Prior to November 2021, his evaluations were always stellar, and he had the confidence of his Director, the General Manager, and a majority of the governing board. Since November 2021, Gilman's performance declined, and he has displayed a negative, disgruntled attitude.

The performance and demeanor change followed a 30-day suspension that was imposed on November 30, 2021 disciplinary action that was imposed for having improperly received a car allowance. His Skelly notice (covered in our 2021 CalPELRA session) proposed that he be terminated, accused him of various other misdeeds – including retaliation against a co-worker. However, following the *Skelly* hearing, County HR Director Dania Torres-Wong recommended the discipline be reduced to a 30 calendar day suspension. The District accepted and implemented that recommendation in December 2021.

In January 2022, the District implemented a policy that required members of the Finance Department to return to the workplace three days per week. Gilman requested his social anxiety disorder be accommodated by allowing him to only work half-days in the office, as well as the ability to play the radio at his workstation because music soothed him. Both accommodations were granted.

In June 2022, the District received a complaint that instead of playing soothing music at his workstation, Gilman was listening to a controversial political podcast, which he would turn up to a disturbing volume whenever Ms. Beecher came into the office.

That podcast contained incendiary commentary on immigration as well as commentary supporting Oath Keepers and using expletives to describe the President and leaders of the Democratic Party. Submitted with the complaint were two videos that supported the allegations.

Following an investigation, the District sustained the allegations, finding that Gilman breached his return to work agreement, engaged in unacceptable behavior towards co-workers, and issued a Notice of Proposed Discipline (Termination), alleging the penalty was warranted both based on progressive discipline as well as a Personnel Rule that states: "Suspension without pay shall not exceed thirty working days, nor shall any employee be penalized by suspension for more than thirty working days in any continuous twelve month period."

The District again retained County HR Director Dania Torres-Wong to preside over the *Skelly* hearing, which is scheduled for November 17, 2022 at the CalPELRA conference.

PUD

Energizing Life In Our Communities

CONFIDENTIAL MEMORANDUM

To: James Gilman, Assistant Finance Director

From: Marisa Perez, District General Manager County Public Utility District

Re: Notice of Intent to Discipline

Date: November 1, 2022

The purpose of this memorandum is to notify you of proposed disciplinary action stemming from Administrative Investigation No. 22-013

Nature of Action/Authority

The Director of Finance has recommended that you be dismissed from your employment as the Assistant Finance Director with the Utility District. This proposed discipline is due to your violation of the following policies and procedures:

District Personnel Policies and Procedures Section 5.10, Subsections:

a) Neglect of Duty
b) Discourteous treatment of the public or other employees
c) Violation of a department work rule
d) Dishonesty
e) Ethics: any failure to abide by the standards of ethical conduct
f) Other acts inimical to the public service

District Administrative Regulation 301: Safety and Workplace Violence

Threatening or intimidating behavior, threats, or acts of violence will not be tolerated and may be grounds for immediate termination of employment. Any individual who engages in threatening behavior or violent acts (or who makes comments about inflicting self-harm or harming others) while on Agency property will be removed from the premises and may not return until the incident is fully investigated.

PUD
Energizing Life In Our Communities

James Gilman
November 1, 2022

District Administrative Regulation 302: Discrimination/harassment/Retaliation

> Discrimination, Harassment, and Retaliation based on employees' protected status as defined below are strictly forbidden. Proven acts of any such conduct reflect serious misconduct and shall result in disciplinary action up to and including termination.

A complete version of Regulation 302, including definitions and investigative process, is attached hereto.

Description of Incidents Upon Which the Discipline Is Based

> In January 2022, the District implemented a policy that required members of the Finance Department to return to the workplace three days per week. Remote work was only permitted two days per week. Based on your documented social anxiety disorder, you requested and received two accommodations that permitted you to work a modified, shortened schedule on the three-days per week you were required to work in the office, and that allowed you to play soothing music on the radio at your workstation. A written accommodation agreement was signed by you on January 19, 2022.
>
> On March 1, 2022, the District received an anonymous complaint on its Ethics Hotline alleging that you were listening to a controversial political podcast at your workstation, and that you would turn the volume up to a disruptive level whenever your co-worker, Jayne Beecher, entered the office. Accompanying the complaint were two videos corroborating the allegations.

An investigation into these allegations revealed the following:

1. Instead of playing soothing music at your workstation, you regularly listened to a controversial political podcast.
2. The podcast contained incendiary comments targeting immigrants as a cause of crime, drug-dealing and increases in social services spending. The podcast also called the Oath Keepers "heros" and encouraged all good Americans to support them in order to "preserve our democracy" and "stop the steal," using expletives to describe President Biden, House Speaker Nancy Pelosi, and other leaders of the Democratic Party.
3. The podcast also claimed trans-gender persons were mentally ill, socially deviant, and sexually predatory.
4. On at least seven occasions, two of which were captured on video, you turned up the volume on the podcast to a disturbing and disruptive level

when your co-worker, Jayne Beecher, entered your work location.

5. Ms. Beecher is an immigrant from Guatemala who came to the United States to escape gang violence and extreme poverty.

6. Despite being asked on multiple occasions, you refused to change the radio from the controversial political podcast. This created a hostile, offensive, demeaning, and disruptive work environment.

7. Your conduct violated the return to work accommodation agreement that you signed on January 19, 2022.

8. You knew or should have known that the playing of a controversial podcast that espoused demeaning views of immigrants and trans-gender persons would violate District work rules.

9. During your investigative interview, you denied playing anything other than soothing radio programs. When confronted with the video recordings, you retracted that statement, but stated you only "occasionally" listened to political podcasts.

10. Also, during your investigative interview, you expressed the view that much of the American predicament is to blame on the many criminals and drug cartel members who enter the country illegally. You also said, however, that you get along with District employees of all races, genders and ethnicities.

11. During the interview, when confronted with a report from the Department of Justice, you ultimately admitted that you had been arrested for entering the United States Capitol on January 6, 2021, and that the charges are still pending.

Facts Considered in Determining the Level of Proposed Discipline

In determining the appropriate level of discipline, I considered the following factors:

Mitigating Factors: You are a long-term district employee.

Aggravating Factors:

- The conduct was intentional and willful.
- You had a primary role in the misconduct.
- The conduct is discriminatory in nature.
- The conduct brought disrepute upon the District.
- Your conduct relating to the January 6, 2021, riot is criminal in nature.
- More than one act of misconduct forms the basis for the disciplinary

action.

- Based on the length of your employment, you knew or should have known that your behavior violated District policies and work rules.
- The conduct was committed with malicious intent.
- The conduct was committed for personal gain.
- You have been disciplined previously for violating District work rules.

In determining the appropriate level of discipline, I also considered District Personnel Policies and Procedures section 11.05, which states:

> The District may suspend an employee from a position at any time. Suspension without pay shall not exceed thirty working days, nor shall any employee be penalized by suspension for more than thirty working days in any continuous twelve month period.

On December 15, 2021, you received a 30 calendar day suspension for accepting the $500 per month car allowance set out in the Memorandum of Understanding between the District and the Union of District Professionals while consistently driving a District vehicle, rather than your own vehicle, while conducting District business and your own personal affairs.

Conclusion

For the above reasons, I am terminating your employment.

Pertinent Documents

The documents on which this determination relies are itemized below and attached.

Right to Pre-Disciplinary Skelly Meeting

In accordance with the District's Personnel Policies and Procedures, you have the right to respond, either orally or in writing, to the District's General Manager within seven (7) calendar days. If your response has not been received within seven (7) calendar days, you will be deemed to have waived the right to respond unless an agreement to extend the time to respond has been reached.

Marisa Perez
District General Manager

James Gilman
November 1, 2022

ATTACHMENTS:

Investigative Report with Accompanying Exhibits (Administrative Investigation No. 22-013)
District Personnel Policies & Procedures, sections 5.10 and 11.05
District Administrative Regulations 301 and 302
March 1, 2022 Ethics Hotline Complaint
Performance Evaluations – 2001-2022
Final Notice of Discipline dated December 15, 2021
Notice of Intent to Discipline (Termination) dated February 20, 2020
Administrative Investigation No. 19-123