

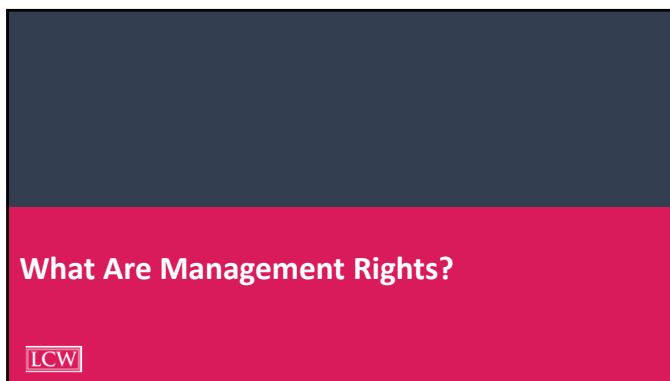
An Employment Relations Primer for Community College District Administrators and Supervisors

Bay Area CCD ERC | November 5, 2021

Presented by: *Melanie L. Chaney*







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“Management Rights” Definition

- Areas in the employer-employee relationship that are not the subject of negotiation

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Management Rights

- Set standards and level of service
- Determine means and methods of operations
- Hire, promote, transfer, assign, and retain employees
- Direct and manage the work of employees

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Management Rights

- Layoff for lack of work or funds
- Determine the size of the workforce
- Discipline employees
- Evaluate the performance of employees
- Determine the hours of operations
- Establish standards of productivity
- **BUT:** Negotiate the effects of the decision

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Management Rights are Subject to Challenge

- Employee groups may seek to gain as much advantage as possible at table
- Management rights and discretion should be well known
- Management rights should be regarded as more of a shield than a sword

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First Line Supervisor's Role

- Ensure implementation and protection of management rights
- Know contents of collective bargaining agreements
- Failure to exercise rights of management may establish a past practice

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Participatory Governance

- Interplay between organizational rights and participatory governance obligations
- Ed. Code §§ 70901 subd. (b)(1)(E) and 70902 subd. (b)(7): Faculty, staff, and students participate in CCD's governance
- Ed. Code § 70901.2 – classified employees to task forces, committees, and governance

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Participatory Governance (Cont.)

- Distinction between matters that are – and are not – mandatory subjects of bargaining under EERA
- Participatory governance should not intrude on collective bargaining relationships

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Case Study: Management Rights

The District has decided its campus police force is not providing the level of security and protection the District strives for on its campus. It wants to contract out these services to the Local City.

The District provides its classified Association notice of its intention to contract with the Local City for these services, and in that same notice, states that it will not negotiate its decision or the effects.

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Case Study: Management Rights

The District proceeds to enter into contract with the Local City but then receives an unfair practice charge from the Association, alleging violations of the Educational Employment Relations Act (EERA). The District responds that it was within its management rights to contract out. The management rights clause of the classified Collective Bargaining Agreement states, in pertinent part:

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Case Study: Management Rights

2.1 Powers and Authority

It is understood and agreed that the District retains all of its powers and authority to direct, manage and control to the full extent of the law. Included in but not limited to those duties and powers are the exclusive right to: determine its organization; direct the work of its employees; determine the times and hours of operation;

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Case Study: Management Rights

determine the kinds and levels of services to be provided, and the methods and means of providing them; establish its educational policies, goals and objectives; insure the rights and educational opportunities of students; determine staffing patterns; determine the number and kinds of personnel required; maintain the efficiency of District operations; determine the curriculum;

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Case Study: Management Rights

build, move or modify facilities; establish budget procedures and determine budgetary allocation; determine the methods of raising revenue; and contract out work. In addition, the District retains the right to hire, classify, assign, transfer, evaluate, promote, demote, terminate, and discipline employees, and all other rights and privileges not expressly waived by this Agreement or requirements of the law.

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2.2 Limitation by Agreement

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the District, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith,

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Case Study: Management Rights

shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms are in conformance with the law.

Question: Was the decision to contract out police services a matter within the scope of representation?

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Case Study: Management Rights

Was the District within its management right by entering into a contract with the Local City for police services?

Did the District violate the EERA by not negotiating with the Association the “effects” of the District’s decision to contract out police services?

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Case Study: Management Rights

What kind of notice should the District have provided the Association regarding its intent to contract out police services?

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Past Practice
“Action Speaks Louder Than Words”

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Past Practice: Definition

An ongoing reaction to recurring types of situations mutually accepted by both employee association and management

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Past Practice: Elements

- Conduct that is followed or allowed
- Clear and consistent
- Conduct has consistently occurred over a reasonable time
- Employees and supervisors have knowledge of the conduct

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Past Practice: Continued

Can a past practice be changed or reversed?

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Reversing a Past Practice

- Past practice within the scope of bargaining
 - Provide reasonable notice and an opportunity to negotiate
 - Watch for zipper clause
 - Publicize intent
 - Allow time to adjust
- Past practice not within the scope of bargaining
 - Provide reasonable notice and an opportunity to discuss
 - Publicize intent
 - Allow time to adjust
- If no bargaining group, just provide reasonable notice of the change

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Past Practice: Questions

- Am I consistently implementing and enforcing current rules and policies?
- Am I holding employees accountable for basic responsibilities?

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Past Practice: Questions

- Is there any disparity in the application of disciplinary practices or assignments?
- Are there any procedures which I need to curtail or eliminate before they become an undesirable binding past practice?

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Employee Grievances

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Employee Grievances

- Purpose: a formal process for resolving employee disputes/complaints/"gripes" **alleging that a district violated a CBA provision.**
- Often concern interpretation of the CBA

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Employee Grievances

Procedure

- A formal appeals system of several steps
- Starts with the first-line supervisor
- Progresses through higher levels of management
- Final Step: Governing Board or Neutral Third party decision making (arbitration)

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Employee Grievances

- Definition of grievance
 - Be sure the matter fits the definition
- Timeliness as a defense

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Employee Grievances

PRACTICAL ADVICE

- Prepare for meeting
- Listen carefully at the meeting
- Get the facts/investigate
- After meeting – issue response/answer
- Follow-up: has the problem been solved?

DO NOT SETTLE A GRIEVANCE WITHOUT FIRST NOTIFYING HR

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Case Study: Past Practice & Grievances

Sally Brown is an Administrative Assistant at the Hill-Crest Community College District, which is comprised of two campuses, the Hills and the Crest. The two campuses are 40 miles apart. Sally is also the job steward for the classified association at the District, as well as the chair of the bargaining team. Sally has been very active in the Union,

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Case Study: Past Practice & Grievances

participating in negotiations and meetings with District officials, representing unit members, investigating grievances and participating in arbitration hearings and PERB proceedings.

In 2020, President Smith began working at the Hills campus. On September 4, 2020, President Smith gave Sally a memo concerning her use of release time. The memo stated, in part:

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“In order to insure that we have a successful year, it is important that you understand the protocol for leaving our campus, and my expectations. This is important for you because I am aware that you hold a position with the local classified union chapter. Therefore, I am informing you of the following:

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Case Study: Past Practice & Grievances

- Union-related calls and business should be limited to before or after the instructional day, your breaks, and your lunch hour.
- Job steward responsibility shall be carried out consistent with Article 5.2.1 of the collective bargaining agreement; in short, prior notification and approval are required if you feel you need to

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Case Study: Past Practice & Grievances

- leave our campus during the workday to carry out your role as job steward.
- It is your responsibility to complete the necessary forms if you are fulfilling your role as job steward.”

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On January 29, 2021, Sally verbally requested release time. President Smith denied the request. The union did not complain.

On May 7, Sally was contacted at home by a bargaining unit member and asked to serve as a union representative at a disciplinary meeting the next morning. On May 8, Sally verbally notified President Smith that she needed to attend the

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Case Study: Past Practice & Grievances

disciplinary meeting. Smith denied the request for release time.

Val, the classified union labor relations representative, called Smith that same day regarding the denial of release time. President Smith stated that release time had been denied by the Vice Chancellor of Human Resources, Victor.

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Case Study: Past Practice & Grievances

Val pursued the matter and asked Victor in an e-mail message dated May 11, for further clarification regarding the denial of release time. Victor responded by e-mail on May 12, affirming that the District would follow the provisions of the parties' collective bargaining agreement.

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Article 5.2.1 of the collective bargaining agreement, regarding job steward release time, states, in part:

A job steward shall be granted a reasonable amount of time to participate in the investigation, preparation, writing, and presentation of grievances.

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Case Study: Past Practice & Grievances

The job steward shall arrange with the grievant's supervisor for a mutually agreeable suitable time to conduct such business. The leave utilization form shall be submitted upon return to the worksite when verbal approval is granted. Prior notification to the immediate supervisor/manager/administrator shall be in writing.

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Case Study: Past Practice & Grievances – Question 1

The Association contends that the District violated the Educational Employment Relations Act (EERA) by unilaterally changing the release time policy for job stewards in May 2021, contending that the District's practice consisted of granting release time in response to verbal requests for release time. Did the District commit an unfair practice?

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Case Study: Past Practice & Grievances

The District determined the need to layoff the least senior administrative assistant. Although it would not be laying off Sally, it determined the need to transfer her because of a lack of funds or lack of work.

In an August 13 letter, the District formally notified Sally that she would be involuntarily transferred to Crest. Sally was instructed to report for the new academic year on August 25.

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Case Study: Past Practice & Grievances

The letter explained that the involuntary transfer resulted from the elimination of administrative assistant positions due to a lack of funds or lack of work for the upcoming academic year.

Sally did not want to work at Crest because the remaining bargaining team members worked at the Hills campus, and she would not then be able to meet with the rest of the bargaining team during breaks and lunch.

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Case Study: Past Practice & Grievances

Article 13.6 of the parties' CBA states:

13.6.1 An involuntary transfer may be initiated by the District and shall be based exclusively on the work-related needs of the District and will not be for disciplinary or capricious reasons. A bargaining unit member shall not have his/her assigned hours reduced, or shift changed, as result of the District-initiated transfer, but shall be constituted only by mutual agreement with the Association and concurrence of the bargaining unit member.

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Case Study: Past Practice & Grievances

13.6.2 In the event that circumstances require that a bargaining unit member be transferred on an involuntary basis, the bargaining unit member and the Association shall be informed of the reason(s) in writing prior to such action and shall be afforded an opportunity to meet with Human Resources regarding the proposed transfer.

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Case Study: Past Practice & Grievances – Question 2

The Association contends that the District's past practice limited "involuntary transfers" to situations where the District would transfer an employee in lieu of layoff or transfer the employee in lieu of discipline. Is the District's decision to transfer Sally for a third reason, because of a lack of funds/lack of work a violation of the EERA?

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Case Study: Past Practice & Grievances – Question 3

The Association contends that the District retaliated and discriminated against Sally for performing her duties as a job steward, arguing that the District's involuntary transfer of Sally to the Crest campus violated the EERA. Did the District retaliate or discriminate against Sally for her exercise of protected activity?

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Case Study: Past Practice & Grievances – Question 4

The Association filed a grievance alleging breach of the release time provision of the collective bargaining agreement. How would you address this grievance?

- Review the CBA!
- Timely?
- Give substantive response

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Employee Evaluations

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Employee Evaluations

One of the supervisor's most important tasks!

- First: Do them regularly!
- Second: Do them completely and with detail!
- Third: Do them honestly!

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Employee Evaluations

Why Important?

- Identify ongoing performance problems
- Address new problems as they arise
- Increase employee self-awareness
- Encourage improvement

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Evaluation of Classified Employees

- Requirements for classified employee evaluations
- Follow board policy and collective bargaining agreement

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How to Provide an Effective Evaluation

- Establish the criteria to be evaluated
- Gather and document your observations – “Supervisor’s file”
- Prepare the written evaluation
- The face-to-face meeting
- Discuss and set an action plan of goals and objectives
- Provide coaching and follow-up

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Employee Evaluations

A FEW KEY POINTS

- No surprises
- Document and communicate
- Apply proper criteria
- Cover the appropriate time frame
- What you write is what you will say

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Employee Evaluations

A FEW KEY POINTS

- Seek assistance from the Human Resources Department
- Be consistent between employees similarly situated
- Be timely
- Note accomplishments as well as negative performance

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Evaluation of Academic Employees

- Frequency (Education Code § 87663)
- Academic Employees
 - Probationary (contract)
 - At least once in each academic year
 - Permanent (regular)
 - At least once in three academic years
 - Temporary
 - Within first year of employment
 - Thereafter, at least once every six regular semesters or once every nine regular quarters

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Evaluation of Academic Employees

- Standards and Procedures (Education Code § 87663)
 - Classroom Observations
 - Student Evaluations
 - Peer Evaluations

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Implementing the Disciplinary Process

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Disciplinary Tools

- Verbal reprimand
- Written reprimand
- Suspension
- Demotion
- Termination

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What is "Cause"?

- Without it, discipline will not be upheld!
- Did employee have advance warning that the conduct could lead to discipline?
- Where applicable, did the district apply progressive discipline?

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What is "Cause"? (cont.)

- Did the district conduct a fair, objective investigation?
- Would a reasonable person agree that this is a legitimate reason to take a job from someone, or to take a some lesser action (e.g. suspension, demotion)?

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What is "Cause"? (cont.)

- Is the discipline reasonable?
 - Does the punishment fit the "crime"?
 - Did you consider employee's past service?
 - Mitigating and aggravating circumstances
 - Is the penalty comparable with those imposed on other employees for same/similar conduct at the district?

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Discipline of Community College Employees

- Classified Employees
 - Non-Merit System
 - Merit System
- Academic Employees
 - Probationary
 - Tenured
 - Temporary

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Classified Employees: Non-Merit System Disciplinary Procedure

- Governing board prescribes written rules and regulations
 - Requirements:
 - Written notice of specific charges
 - Statement of employee's right to hearing on charges
 - Time period for requesting hearing (not less than 5 days after service of notice to employees)
 - Demand for hearing and denial of charges

Education Code § 88013 subd. (c)

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Classified Employees: Non-Merit System Disciplinary Procedure

- No disciplinary action for:
 - Cause occurring prior to employee becoming permanent
 - Cause arising more than 2 years preceding date of filing notice of cause
 - Exception: If cause concealed or not disclosed by employee

Education Code § 88013 subd. (d)

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Classified Employees: Merit System Disciplinary Procedure

- Personnel Commission
 - Set rules and causes for discipline
 - Caution: Bargaining unit members, scope of representation and negotiated agreement
 - Causes for suspension or dismissal in Personnel Commission Rules for non-bargaining unit employees

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Classified Employees: Merit System Disciplinary Procedure

- Types of discipline
- Written charges and service on employee
- Provision for mandatory leave where specified criminal charges pending

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Classified Employees: Merit System Disciplinary Procedure

- Appeal Rights
 - Who has the right to appeal?
 - 14 day rule
 - Personnel Commission's authority regarding reinstatement and compensation
 - Who conducts the hearing?

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Substitute and Temporary Employees: Disciplinary Procedures

- Substitute and Short-Term (Temporary) Employees
 - No statutory due process guarantees
 - BEWARE: 75% of school year

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Academic Employees: Disciplinary Procedures

- Probationary (Contract) Academic Employees
- Permanent (Regular) Academic Employees

Education Code, § 87732

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Probationary Academic Employees: Disciplinary Procedure

- Distinction between non-renewal of contract v. discipline
- If discipline, must use same procedure as for tenured faculty members

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Probationary Academic Employees

- Contract Employee Release
 - First Contract (Education Code 87608)
 - Second Contract (Education Code 87608.5)
 - Third Contract (Education Code 87609)
 - Beware of Tenure issues
 - Challenge to probationary release

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Tenured Academic Employees: Disciplinary Procedure

- The 90-day Notice
 - Unprofessional Conduct
 - Unsatisfactory Performance

Ed. Code, § 87734

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Academic Employees: Disciplinary Procedure

- Statement of charges served on employee
 - Four year statute of limitations
- 30 days to request hearing
- If hearing requested, agree on arbitrator or OAH assigns ALJ

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What Triggers “Skelly” Rights?

- Due process right
- Comes with permanence
 - Successfully passed a probationary period
- “For cause” rights
- “Property interest”

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The “Skelly Pre-Action Procedure”

REQUIREMENTS:

- Written notice of the proposed action
- The specific grounds
- The rules/policies violated, and
- Specific facts upon which the proposed action is based

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The “Skelly Pre-Action Procedure”

REQUIREMENTS:

- Along with this notice
- Any known written materials, reports, or documents upon which the action is based
- Employee may respond
 - Orally, writing, both

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"Skelly" Meeting

- Must be conducted by an appropriate level individual
- President or senior administrator
- Not a formal evidentiary hearing
 - Really not a hearing

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Final Notice of Discipline

- Final notice mirrors in the notice of intent to discipline.
- Reiterates the charges and facts
 - Unless revised based on *Skelly* conference
- Informs the employee of his or her appeal rights

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Issues at Post Disciplinary Hearing

- Has the District proven alleged conduct?
 - Preponderance of the evidence standard
- If so, was the level of discipline reasonable

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Remedies

- Reinstatement
- Back pay – mitigation
- Attorney’s fees

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**Case Study:
Implementing Discipline**

Carrie and Marcie work as administrative assistants in your office. You are the new Human Resources Director at the District. Marcie produces good quality reports and finishes complex assignments well before the assigned deadlines. You have been giving her additional assignments since she always completes them without working overtime. On occasion during the past five weeks, you have heard

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**Case Study:
Implementing Discipline**

Marcie yelling at Carrie. You did not do anything about this since Marcie is a good performer and you are new to the District.

Recently, Carrie came to you to complain about Marcie’s yelling, contending the yelling is inappropriate and demeaning.

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Case Study: Implementing Discipline

Carrie told you Marcie is yelling at her to pick up the pace and claiming that Carrie is always missing deadlines. You have been slowly learning this about Carrie as well. Carrie's missing deadlines is another reason you have been giving Marcie additional assignments; these assignments should have been assigned to Carrie to balance the workloads.

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Case Study: Implementing Discipline

You review both Marcie's and Carrie's personnel files. You find that the previous Human Resources Director had issued Marcie a reprimand for yelling at an applicant who asked questions Marcie told the applicant were stupid. There is no prior discipline in Carrie's file but there is a negative performance evaluation for Carrie's high level of absenteeism. Since you have been there, Carrie has had great attendance.

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Case Study: Implementing Discipline

1. Should you address Marcie's yelling?
2. Should you discipline Marcie for her yelling at Carrie? If so, what should be the level of discipline?
3. What, if any, issues do you need to address with Carrie?

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**Case Study:
Discipline Gone Wrong**

You have decided to discipline Tom with a 5 day suspension for sleeping on the job. Tracy witnessed Tom's misconduct. You did not interview Tom as part of an investigation. You recognize that the discipline will depend upon one witness' testimony against another, Tom. Tracy will be leaving in a couple weeks to move to New York.

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**Case Study:
Discipline Gone Wrong**

You conduct a *Skelly* meeting with Tom and the classified association representative. During the meeting, Tom does not speak but his representative denies that Tom was sleeping. You issue the final notice of discipline, and also charge Tom with dishonesty for his representative's denying Tom was sleeping. Tom files an appeal.

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**Case Study:
Discipline Gone Wrong**

The matter proceeds to a hearing before a neutral hearing officer. You are trying to get Tracy to return from New York but she cannot leave New York and her new job.

You testify based upon your conversations with Tracy to support the discipline.

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Case Study: Discipline Gone Wrong

For the first time, you also produce pictures of Tom asleep at work from Tracy's work cell phone that she had given you as part of the investigative interview. Tom testified that he was not sleeping but had closed his eyes for a brief moment while waiting for a phone call from his supervisor. Tom works the evening shift.

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Case Study: Discipline Gone Wrong

His supervisor testified that he did in fact call Tom and Tom answered and responded to the call immediately. Tom completed all his tasks that day. The hearing officer found no cause for discipline and finds in favor of Tom.

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Case Study: Discipline Gone Wrong

What went wrong in this scenario?

So many things...

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Personnel Files

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Personnel Files – In or Out?

- Medical or psychological reports
- Confirmation of counseling or oral reprimand
- Discipline documents before the discipline is final
- Drug test results
- Anonymous, unverified complaints
- Supervisor’s File

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Right to Inspect

- Employees have right to inspect own files at reasonable time and place
- Employees have right to copy file (at own expense)

Education Code § 87031

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Labor Code § 1198.5

No Right to Inspect

- Letters of Reference
- Ratings
- Reports
- Records Obtained Prior to Employment (background)
- Promotional Exam Information

Education Code § 87031

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Discussing Current or Former Employees

BE CAREFUL!

- Defamation Laws
- The Generic Reference
- Waivers

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Thank You!

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