

# **“This Can't Be Happening to Me”: What to Do When You Are Threatened with Discipline**

Lee Norris, Barbara Petersen, Bernhard Rohrbacher  
APC Labor Relations Team  
Contact for Questions: [brohrbacher@apc1002.org](mailto:brohrbacher@apc1002.org)

Last Modified April 29, 2013

## **I. It Happens More Often Than You May Think**

“Of 69,000 disciplinary actions [in the U.S. Postal Service in 1987] (representing 9 percent of all employees), close to 60 percent of the disciplinary actions resulted in letters of warning, 30 percent were suspensions, and 10 percent resulted in discharge.” Robert D. Mc.Crie, *Security Operations Management*, p.197 (2d ed. 2007).

## **II. Six Words of Advice: “Shut Up, Shut Up, Shut Up”**

### **A. Your Right to Union Representation Under *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975)**

In *Weingarten*, the United States Supreme Court held that the National Labor Relations Act “creates a statutory right in an employee to *refuse to submit* without union representation to an interview which he reasonably fears may result in his discipline.” 420 U.S. at p.256 (italics supplied). The Supreme Court limited this right as follows:

1. “[T]he right arises only in situations where the employee *requests* representation.” *Id.* at 257 (italics supplied).
  - a. The employer does not have to *offer* representation.
  - b. The employee can *waive* his or her right to representation. (“[T]he employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.” *Ibid.*)
2. “[T]he employee's right to request representation as a condition of participation in an interview is limited to situations where the employee *reasonably believes* the investigation will result in disciplinary action.” *Ibid.* (italics supplied). “We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of . . .”
  - a. “instructions or . . .”
  - b. “training or . . .”
  - c. “needed corrections of work techniques.” *Id.* at 257-58 (citation omitted).

## **B. Exercise Scenarios**

### **1. Zipper-Lips Sandy**

Sandy’s supervisor has repeatedly—and falsely—accused her of pilfering tea bags from the communal kitchen. Today, he wants to have “a little chat” with her in his office. She suspects it will be the same old song. She goes to his office and sits down without even saying “hello.” Sure enough, the first words out of his mouth are: “You wouldn’t per chance know what happened to our new box of ACME tea bags, would you?” And so it continues. Sandy leaves her supervisor’s office fifteen minutes later without having uttered a single word, let alone answered any of his questions.

Can Sandy be disciplined for refusing to answer her supervisor’s questions?

### **2. Blabber-Mouth Billie**

Billie has had to leave work early every day this week to pick up her daughter from school—she is a single mom and she cannot pay for somebody else to do it, as she can barely make ends meet with her meager CSU salary as it is. Afraid that her male supervisor would not understand, she did not ask him for permission. Today, he wants to have “a little chat” with her in his office. She suspects it will be about her unauthorized absences. She goes to his office and sits down after exchanging the usual pleasantries. Sure enough, the first words out of his mouth are: “You didn’t per chance leave work early yesterday?” Billie immediately requests union representation. Her supervisor assures her: “We can work this out amicably between ourselves without any outsiders.” Relieved, Billie tells him why she has had to leave work early every day this week. A week later, her supervisor suspends her without pay.

Can Billie beat the rap because she was denied union representation?

### **3. Scaredy-Cat Scotty**

Scotty is afraid of everything and everyone. For a while now, his supervisor has asked him how many students he services every week. In fact, Scotty knows that he services more students than any of his colleagues, and he can prove it. Nevertheless, he is afraid that any answer might lead to discipline. Therefore, he always answers: “I refuse to answer this question unless my union representative is present.” The supervisor hates Scotty’s union representative and tells Scotty that she cannot be present during these chats.

Can Scotty be disciplined for refusing to answer his supervisor’s questions?

Answers: 1. Yes, because she did not request representation; 2. No, because she waived representation; 3. Yes, because he did not reasonably believe in discipline

### **III. “Corrective Action” a/k/a “Oral Warnings and Written Reprimands”**

#### **A. Reprimands Generally Can Only Be Appealed to the President But Cannot Be Appealed to the State Personnel Board or Grieved to an Arbitrator**

- 12.1 “The University may administer corrective action . . . to an employee.
- a. Corrective action includes oral warnings and written reprimands. . . .”
- 12.2 “An employee may receive from an appropriate administrator an oral warning and/or written reprimand. Such a warning or reprimand shall be confidential and given within a reasonable time of event(s) giving rise to the warning or reprimand. As used in this Agreement, the term "reprimand" shall refer to any written communication from an appropriate administrator to an employee that criticizes or otherwise comments negatively upon the personal/professional conduct and/or job performance of the employee if that written communication is placed in the official personnel file, but does not include performance evaluations of notices of performance expectations or rules and regulations.”
- 12.3 “An employee shall be provided with a copy of a written reprimand at least five (5) days prior to the possible placement of such a reprimand in the employee's personnel file.”
- 12.4 “An employee may request a conference with the administrator who issued the reprimand to discuss the reprimand. Such a request shall not be unreasonably denied. The employee may be represented at such a conference by another employee or an APC representative. An employee may appeal the decision to place a written reprimand in his/her personnel file to the President within five (5) days after the conference held pursuant to this provision. The President may hold a meeting with the employee and his/her representative, if any. Within ten (10) days of receipt of the appeal, the President shall provide a written response to the employee.”
- 12.7 “Reprimands shall not be subject to Article 10, Grievance Procedure, except for alleged violations of the procedures described in this Article.”
- 12.18 “The University may administer corrective actions for violation of campus and/or systemwide policies. Such corrective action shall not be subject to Article 10, Grievance Procedure, except as provided in provisions 12.19 and 12.20 of this Article.”
- 12.19 “If an employee subsequently is disciplined and the notice of disciplinary action includes reference to corrective action for violation of a campus and/or systemwide policy, the employee may elect to either:

- A. appeal the disciplinary action to the State Personnel Board pursuant to Education Code Sections 89538 and 89539, or
- B. appeal the disciplinary action directly to the Grievance Procedure (Article 10) beginning at Level II.”

**B. You Have the Right to Attach a Rebuttal to Any Reprimand**

- 12.6 “The employee shall have the right to attach a rebuttal to a written reprimand and/or request correction of the record pursuant to Article 11, Personnel File.”

**C. Reprimands Generally Will be Removed from the Personnel File After Three Years Upon the Employee’s Request**

- 11.13 “Upon the employee's request, a reprimand in the personnel file shall be permanently removed three (3) years from its effective date. If a notice of disciplinary action has been served on the employee and such a reprimand is related to the disciplinary action, this provision shall not be implemented.”

**IV. Disciplinary Action a/k/a “Dismissal, Demotion, or Suspension Without Pay”**

**A. Public Employees Have the Right to a *Skelly* Hearing Before They Are Dismissed, Demoted, or Suspended Without Pay**

**1. CBA**

- 12.1 “The University may administer . . . disciplinary action to an employee. . . .
  - a. Disciplinary action shall be limited to dismissal, demotion, or suspension without pay.”

- 12.13 “Any notice of disciplinary action shall be issued by the President and served in person or by certified mail at the employee's last known address. . . .”

- 12.15 “The employee shall be provided a notice of the disciplinary action proposed to be taken; a copy of the charges and materials upon which the disciplinary action is based, and notice of the right to respond, either orally or in writing.”

**2. *Skelly v. State Personnel Board* 15 Cal.3d 194 (1975)**

“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.” 15 Cal.3d at 206.

“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 . . . 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 . . .”

- A. “notice of the proposed action, . . .”
- B. “the reasons therefor, . . .
- C. “a copy of the charges and materials upon which the action is based,”
- D. “and the right to respond, either orally or in writing, to the authority initially imposing discipline.” *Id.* at 215.

### **3. CSU’s “Instructions to Skelly Review Officers” (2007)**

“Non-Faculty Unit employees have five days to respond by either requesting a meeting, or submitting a written response[,] [a]s established by administrative practice within the CSU.” *Instructions*, p.4.

“[T]he Review Officer should submit the report to the President or his/her designee within a reasonable time after the meeting, receipt of a written response from the employee or completion of the Review Officer’s review.” *Id.* at p.7.

### **B. Public Employees Have the Right to a Hearing Before the State Personnel Board After They Have Been Dismissed, Demoted, or Suspended w/o Pay; CSU Employees Generally Cannot Grieve Discipline to an Arbitrator**

#### **1. Education Code**

##### **a. Section 89538(a)**

“Notice of dismissal, demotion, or suspension for cause of an employee shall be in writing, signed by the chancellor or his or her designee and be served on the employee. The notice shall set forth a statement of causes, the events or transactions upon which the causes are based, the nature of the penalty and the effective date, and a statement of the employee’s right to answer within 30 days and request a hearing before the State Personnel Board.”

##### **b. Section 89539**

“(a)(1) Any employee dismissed, suspended, or demoted for cause may request a hearing by the State Personnel Board by filing a request, in writing, with the board within 30 days of being served with the notice.

(2) The request may be on any one or more of the following grounds:

- (A) The required procedure was not followed.
- (B) There is no ground for dismissal, suspension, or demotion.
- (C) The penalty is excessive, unreasonable, or discriminatory.
- (D) The employee did not do the acts or omissions alleged as the events or transactions upon which the causes are based.
- (E) The acts or omissions alleged as the events or transactions upon which the causes are based were justified.

(b) The State Personnel Board shall hold a hearing, following the same procedure as in state civil service proceedings, and shall render a decision affirming, modifying, or revoking the action taken. In a hearing, the burden of proof shall be on the party taking the dismissal action. . . .”

## **2. CBA**

12.16 “Within thirty (30) days of receipt of a notice of disciplinary action, an employee may request a hearing before the State Personnel Board pursuant to Education Code Sections 89538 and 89539. Except as provided elsewhere in this Article, such a request is the sole and exclusive procedure that may be utilized by a member of this bargaining unit for appeal from a disciplinary action.”

12.20 “Corrective action, notice of performance expectations, notice of rules and regulations, and/or temporary suspension with pay for violation of campus and/or systemwide policies shall be subject to review in arbitration if such action is cited in a notice of disciplinary action and that subsequent disciplinary action is appealed to arbitration pursuant to provision 12.19 B.”

## **3. APC State Personnel Board Representation Policy**

“The Academic Professionals of California . . . will provide representation for a member before the California State Personnel Board for proceedings related to disciplinary actions included in the APC-CSU collective bargaining agreement. Such representation will be conducted by individuals and in a manner deemed appropriate by APC.”

“Alternatively, a member is eligible for, and may request, reimbursement for other (personally selected) representation in such cases. Such representation will be reimbursed to an hourly rate of \$50.00 and a cumulative maximum per case of \$1,000.00.”

## **C. You Can Be Disciplined for Work-Related *And* Non-Work-Related Conduct, But CSU Must Prove That It Had “Just Cause” to Discipline You**

### **1. Education Code Section 89535**

“Any permanent or probationary employee may be dismissed, demoted, or suspended for the following causes:

- (a) Immoral conduct.
- (b) Unprofessional conduct.
- (c) Dishonesty.
- (d) Incompetency.
- (e) Addiction to the use of controlled substances.
- (f) Failure or refusal to perform the normal and reasonable duties of the position.
- (g) Conviction of a felony or conviction of any misdemeanor involving moral turpitude.
- (h) Fraud in securing appointment.
- (i) Drunkenness on duty.”

## **2. The Seven Tests for “Just Cause” to Discipline**

The following seven tests were established in 1964 by Arbitrator Carroll Daugherty to determine whether the employer had “just cause” to impose a specific discipline, including whether the employer employed “progressive discipline.” The State Personnel Board recognizes both “just cause” and “progressive discipline” as relevant concepts.

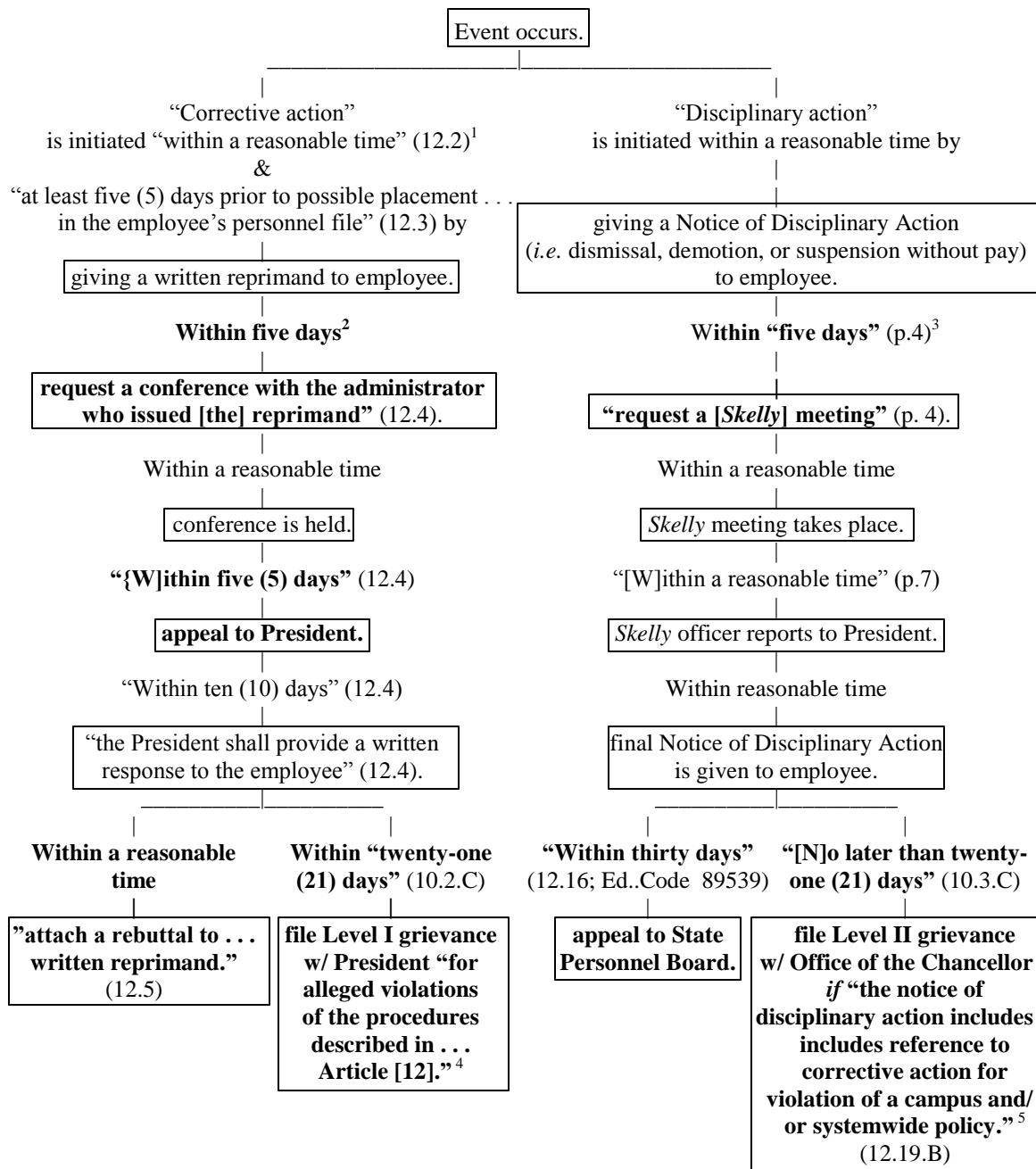
1. Did the employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?
2. Was the employer’s rule or managerial order reasonably related to the orderly, efficient, and safe operation of the company’s business?
3. Did the employer, before administering discipline to an employee, make an effort to discover whether the employee violated or disobeyed a rule or order of management?
4. Was the employer’s investigation conducted fairly and objectively?
5. At the investigation did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the employer reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee’s service [a/k/a “progressive discipline”]?

## **D. Dismissal, Demotion, or Suspension Without Pay Stay in Your Personnel File Forever!**





## IX. Corrective and Disciplinary Action Flowchart



<sup>1</sup> These numbers refer to articles in the APC-CSU Collective Bargaining Agreement.


<sup>2</sup> Boldface indicates that the employee must take action to preserve his or her rights.

<sup>3</sup> These numbers refer to the CSU "Instructions for *Skelly* Review Officers."

<sup>4</sup> Always file a rebuttal, even if you also file a Level I grievance.

<sup>5</sup> Either appeal to the State Personnel Board or file a Level II grievance if this condition is met.

**XI. A Handy-Dandy Weingarten Rights Wallet Card**

 <b>ACADEMIC PROFESSIONALS of CALIFORNIA</b>	<b>Weingarten Rights</b>
<p>You have the right to union representation at any meeting that could lead to discipline. This is known as "Weingarten Rights." Use the text on the back of this card to properly invoke your Weingarten Rights.</p>	<p>"If this discussion could in any way lead to my being disciplined or terminated, or affect my personal working condition, I respectfully request that my union steward, representative, or officer be present at the meeting. Without representation, I choose not to answer any questions."</p>
APC Steward's Name: _____	
APC Steward's Phone #: _____	