SKELLY TRAINING PRESENTATION

County of Los Angeles
Department of Public Works

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Conducted By:

Jeffrey M. Hausman, Esq.

Law Offices of Hausman & Sosa, LLP
18757 Burbank Blvd., Suite 305
Tarzana, CA 91356-6329

Tel: (818) 654-9000
Fax: (818) 654-9050

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SKELLY BACKGROUND

What is Skelly?

A Skelly meeting is a pre-disciplinary procedural due process meeting which is required by state and federal law when a <u>permanent</u> classified employee is disciplined or discharged. Civil Service Rule 18.02 provides for an opportunity for the employee to be heard before a discharge or reduction is put into effect.

It is generally accepted that a Skelly meeting is required when there is any suspension of more than five (5) days or loss of significant money. Thus, a letter of reprimand or a letter of warning would probably not require a Skelly meeting.

Although a five (5) day suspension (or less) may not require a Skelly meeting, we believe that all suspensions should be preceded by the Skelly process unless to do so would cause great inconvenience or otherwise be problematic for the Department.

The term Skelly comes from the name of a California Supreme Court decision, *Skelly v State Personnel Board* (1975) 15 Cal. 3d 194.

Why Skelly?

Because public employees have certain constitutional rights to their employment (this is grounded on the departure from the "spoils" system in the nineteenth century). Furthermore, California's constitution provides that state employment is governed by a "merit" system. To ensure that the goals of a merit system are achieved, Courts have held that procedural due process attaches to any action which would terminate or otherwise financially harm a public employee. Essentially, any action by the employer that is deemed to be a substantial "taking" requires the Skelly process. Some cases have even held that before an employee is placed on any involuntary leave of absence, the employee has a right to a due process meeting, i.e. what we refer to as a Skelly meeting. The Courts have used the phrase that public employees have a "property interest" in their continued employment.

From a practical side, it is also an opportunity for the Department to correct any errors in its judgment. For example, at a Skelly, information may be produced which either exonerates the employee or mitigates the conduct which could effect the imposition of discipline or even the type of discipline.

When is a Skelly required?

Although a permanent employee has a property interest, due process does not require a *Skelly* type notice and hearing in short-term suspensions of less than 5 days. *Civil Service Assn. v. San Francisco* (1978) 22 C.3d 552. Courts have said that although the risk of error in disciplining a public employee may be just as great in a short suspension as in a discharge, the consequences are not, and the interim loss to the employee should not be deemed a substantial loss in the absence of special circumstances. Hence, the employee's interest in continued employment, viewed in the context of a short suspension and the public employer's competing interest in prompt action for the maintenance of discipline, does not demand an accommodation of the nature required in *Skelly*.

Employee rights at the Skelly

There is no need for a full evidentiary hearing; however, the employee must be afforded (1) notice of the proposed action; (2) reasons for the proposed action; (3) a copy of the charges and materials on which the action is based; and (4) the right to respond orally or in writing.

It should be remembered that in cases of a suspension of more than five (5) days, a discharge or a reduction, an employee does have a right to a post termination or post disciplinary hearing before the Civil Service Commission (see CSC Rule 4.01) with a host of rights including the right to subpoena witnesses, cross examine witnesses, and the Department has the burden of proving the charges to the satisfaction of the Civil Service Commission. The Department, at a Civil Service Hearing must not only prove that the charges are true, but also that the level of discipline is appropriate.

We point out the foregoing to further explain that the Skelly meeting is not meant to fulfill all of the requirements of a post disciplinary hearing. Again, we stress that the Skelly meeting has limited purpose and it is not to fully “try” the matter.

What materials should be provided at or before the Skelly meeting?

Essentially almost everything should be provided before or at the Skelly meeting. Unless something is privileged (personal or personnel records of others, medical records, etc.) the better course of action is to provide all materials. If a portion of the discipline is based on privileged information, then that information can be provided in a redacted format. With that said, even if some tangential material is not produced, case law has held that this will not invalidate the process. In *Gilbert v City of Sunnyvale* (2005) 130 Cal. App. 4th 1264, the Court held that the employee does not have be provided with everything that is referenced in an investigation report; however, our advice is to provide all that you can. The fact that something that is not significant has been omitted does not invalidate the Skelly process.

Since this is an issue that is regularly raised in Civil Service Hearings, especially by the experienced advocates and union representatives, we have included portions of two briefs filed by our office in separate civil service hearings where, each Hearing Officer agreed with our position that the Department provided documents sufficient to satisfy the requirements of Skelly and due process.

What exactly should happen at a Skelly meeting?

You will find that union attorneys will press for more procedural rights at the Skelly meetings. As set forth above the four (4) basic rights are (1) notice of the proposed action; (2) reasons for the proposed action; (3) a copy of the charges and materials on which the action is based; and (4) the right to respond orally or in writing. The California Supreme Court and the United States Supreme Court have repeatedly recognized that due process in this context is a flexible concept. (See e.g. Civil Service Assn. v. City and County of San Francisco (1978) 22 Cal.3d 552, 561; Gilbert v. Homar (1997) 520 U.S. 924, 930. It is by now well established that "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Cafeteria & Restaurant Workers v. McElroy, (1961) 367 U.S. 886, 895. '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' Morrissey v. Brewer(1972), 408 U.S. 471, 481. Courts have recognized, on many occasions, that where a Department must act quickly, or where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies the requirements of the Due Process Clause. See, e.g., United States v. James Daniel Good Real Property, (1993) 510 U.S. 43. In Gilbert v. Homar, 520 U.S. at p. 930, the Supreme Court decided that the due process clause did not entitle a state university employee to notice and hearing prior to his suspension without pay based on his arrest on drug-related charges.

Who should be the Skelly Officer?

Cases have referred to a proper Skelly Officer as one who is has sufficient authority to make a recommendation to the appointing power and also should be far enough removed to be a reasonably impartial and non-involved reviewer. In some Departments, the Skelly Officer and decision maker become one and the same. In addition, in the recent case of *Flippin v. Los Angeles City Bd of Commissioners* (2007) 148 Cal. App 4th 272, it was held that a person who initiates the discipline could also serve as the Skelly Officer.

Our recommendation, however, is that the Skelly Officer not be the person who was involved with the investigation nor with the initiation of the discipline. However, as noted, this is not mandated by law.

The Department does not have to agree with the input from a Skelly Officer, but when this does occur, the Department should have a very good reason or reasons to disagree.

Recommended Guidelines for Skelly:

1. Make sure that there is written notification to both the employee and their representative about the date, time, and location for the Skelly meeting.

2. Make sure that there is written confirmation from the employee or their representative about attending the Skelly meeting.

3. If the employee or their representative makes a reasonable request for rescheduling of the Skelly meeting, it is prudent to grant a postponement. However, attempts to pose a lengthy delay on the occurrence of a Skelly meeting should be opposed.

4. Documentation of the process and communications concerning the rescheduling of the meeting should be meticulously maintained.

5. Prepare for the Skelly meeting, including reviewing all documents provided by the Department concerning the potential discipline.

6. All documents reviewed by the Skelly Officer should be identical to those made available to the Department's decision maker *and* the employee. An index of the materials should be created.

7. Allocate a specified period of time for the duration of the Skelly meeting. The length of time should be dependant on the nature of the case, type of discipline, and the complexity of the allegations and issues.

8. Listen carefully to the presentation by the employee and their representative.

9. Ask the employee and their representative questions which may clarify the response to the allegations or which is necessary to clearly communicate the employee's position.

10. Determine if there is categorical denial of the allegations or some admission that all or some of the allegations are true.

11. If the employee admits that some or all of the allegations of misconduct are true, try to determine if there is a genuine recognition of wrongdoing and acceptance of responsibility. Attempt to determine whether the employee is generally remorseful or sorry for the misbehavior or whether they are simply attempting to offer excuses or rationalizations for the misconduct.

12. Ensure that the Skelly Officer has access to any information regarding the employee's length of service, performance history and any previous discipline history.

13. Respond to any reasonable questions from the employee or their representative. However, do not permit the employee or their representative to interrogate the Skelly Officer and do not permit them to use the Skelly meeting as a mechanism to obtain information to which they are not entitled.

14. Reject any unusual or improper requests such as requests to tape record the Skelly meeting, call witnesses, or any attempt to insist on evidentiary type procedures. These have no place in a Skelly meeting.

15. Agree to accept all documents and written responses offered by the employee or their representative. Undertake to review such writings before a determination about the recommendation to be given to the Department.

16. At the conclusion of the Skelly meeting, advise the employee and their representative that the matter, their response, and any written submissions will be carefully considered.

17. Advise the employee and their representative that the recommendation will be given orally to the Department. If they request or try to insist on a written recommendation, you should simply decline to agree to this and indicate that the practice is to provide an oral recommendation.

18. Allow at least one day to pass before providing an oral recommendation to the Department.

19. Provide the oral recommendation directly to the Department's decision maker.

20. Notes can be made in the course of the Skelly meeting. However, there is no obligation to keep the notes after the conclusion of the Skelly process and the recommendation has been provided the Department.

Specific Skelly Issues:

Examples of actions not requiring a Skelly meeting?

Letter of reprimand, letter of warning, counseling letter, short suspensions of five (5) days or less (however, we recommend that a Skelly be afforded in all suspension cases), transfers (unless punitive). Please note, that the employee still has grievance rights.

How should/may a Skelly meeting be scheduled?

The Department should set a date, consistent with its own guidelines, but certainly giving the employee at least five (5) days notice. A policy should be made that Skelly meetings should only be postponed on a single occasion absent very good cause.

When should/may a Skelly meeting be re-scheduled or an extension granted?

A good policy would be to allow one rescheduling, after that, only postponements for very good cause (e.g. serious illness). In addition, the Department can always allow a Skelly response in writing.

Who may/must act as the Skelly Officer?

A Skelly Officer is one who is has sufficient authority to make a recommendation to the appointing power and also should be far enough removed to be a reasonably impartial and non-involved reviewer. Depending on the circumstances, a higher level manager in the employee's chain of command could be the Skelly Officer.

Who is *required* to attend the Skelly meeting?

The employee and his representative may attend, there is no requirement on the employee side, but on the Department's side, it must be a Skelly Officer as defined above. Although I have not seen it occur, a Skelly could take place without the employee present and instead through the employee's authorized representative.

Who is allowed to speak on the employee's behalf at the Skelly meeting?

The employee or his union or legal counsel can speak on behalf of the employee. The employee could bring a friend or relative to speak on his behalf if he or she does not have counsel or a union representative. However, the Department can reasonably limit who can speak to ensure that the meeting is courteous and is held with proper decorum.

Limitations/restrictions?

Reasonable time limitations can be imposed, as well as keeping the meeting free from improper language. Shouting or cursing should be forbidden. I do not recommend tape recording the meeting, and under no circumstances should the employee be allowed to tape record the meeting as this leads to the possibility of tampering with the tape and taking words out of context. Remember this is not an evidentiary hearing.

What should be the response if an employee asks to record the meeting?

Unless the Department wants the meeting recorded, see above.

How should *new* information submitted by the employee at the Skelly meeting be processed/handled?

If the new information is going to be investigated, then another Skelly meeting should be held to provide additional information; however this may not always be the case, depending upon what information is provided. As noted, this is a flexible process and there is no hard and fast rules. Generally, a good guideline is to consider what would be fair.

What is the role of the Skelly Officer during the Skelly meeting?

The role of the Skelly Officer is to listen and ask questions if necessary. The Skelly Officer is not to answer questions unless the he or she thinks it would be helpful to fulfilling his or her role. The Skelly Officer needs to control the proceedings and most importantly be fair and have the appearance of fairness – which many times are two different concepts.

What actions (if any) should/may the Skelly Officer take during the meeting?

Listen, and generally DO NOT make any promises or decisions at the Skelly meeting. There may be an exception, for example, if the employee shows that they were not at work when the conduct being punished occurred, the Skelly Officer might say that he or she will check the time records or check with the supervisor on this issue.

What information should/may the Skelly Officer provide to the employee during the meeting?

Explain the nature of the Skelly meeting and then ask the employee if there is anything they want to say in response to the letter of intent or the materials in support of the letter of intent.

What is the role of the Human Resources Division/Performance Management staff during the Skelly meeting?

To provide technical guidance to the Skelly Officer. However, in many cases, Human Resources staff may actually function in the role of Skelly Officer when Human Resources was not involved with the institution of the discipline (for example, excessive absences).

What actions (if any) should/may staff take during the meeting?

Provide technical assistance. Staff may also take notes, but bear in mind that notes might be subpoenaed some day, and thus care should be taken in this regard. If notes are taken, it is suggested that after the Skelly the notes be finalized and the original notes destroyed as a matter of practice.

What information should/may staff provide to the employee during the meeting?

If the employee requests some policy statement or other document related to the discipline that has not been provided, it should be provided. The nature of the meeting should be explained, however, staff is not there to be interrogated.

Who is the decision-maker in a disciplinary action? Can it be the Skelly Officer?

It can be and in some Departments it is. I prefer the Skelly Officer to be someone other than the final decision maker; however, as noted above that is not required by case law.

What weight should be given to admissions made by the employee during the Skelly meeting?

Any admissions should be noted in the final letter of discipline so that they will be admissible in the Civil Service hearing should there be one.

What level of detail should be used to reference the Skelly meeting in the imposition letter?

This depends on whether anything significant happened at the Skelly. If the employee sets forth excuses or reasons which proved to be wrong or show culpability or which show that even if true would not change the discipline, then this should be spelled out in detail. If nothing new is presented, then a simple notation that during the Skelly the employee failed to present any evidence or reason to change the discipline is sufficient language to be included in the imposition letter.

What issues (if any) can/should be settled/resolved at the Skelly meeting stage?

Anything having to do with the discipline is fair game. However, changing any Department policies or procedures should not be done at the Skelly level. A Skelly Officer should ensure that the Department is willing to settle for the terms before entering into such agreement.

Should these items be negotiated *during or after* the Skelly meeting?

The best course of action is to discuss settlement, then advise the employee that the Skelly Officer will seek guidance from the Department and Human Resources and enter into a settlement after the meeting. It is very important to have an agreement that discussion of settlement is privileged and may not be used should the case not settle and cannot used as evidence in any other personnel action and that such settlement does not establish a pattern or practice of the Department in this or any other case.

After the Skelly meeting has taken place, should a limit on the amount of time to negotiate settlement options be observed?

It is always good, in all instances, to place deadlines on settlements. Even Courts recognize that settlement offers ought to be limited in time.

How (if at all) should a Settlement Agreement be documented/referenced in the final imposition letter?

A Settlement Agreement should always, without any exceptions, be documented/referenced by a FORMAL Settlement Agreement. If the formal settlement agreement results in a penalty, the final letter should simply be worded as a letter of imposition and should not reference it as a settlement, otherwise, the Department will have problems using the imposition as part of progressive discipline in the future.

Should a Skelly Officer expect to be called as a witness in a Civil Service Commission hearing appealing a disciplinary action?

Skelly Officers can and have been called as witnesses. It is unusual, but it happens, especially if there is an allegation that the Skelly Officer was not qualified, did not listen, made statements that he or she did not agree with the discipline, etc.

What are common errors made by Departments during the Skelly process?

Not listening to what is being presented. Trying to be accommodating and in so doing, making statements that are misunderstood by the employee as taking the employee's side, making statements that the employee believes are promises. Showing any emotion (remember the Skelly Officer is like a judge and should remember that he or she should not be biased nor appear to be biased).

In what areas can trouble arise during the Skelly process?

I will talk about a few anecdotal instances, one or two involving DPW.

BRIEF RE: SKELLY REQUIREMENTS

This is a brief that deals with the issue of the Department's failure to provide the ORIGINAL time cards of the employee at the time of the Skelly meeting.

LAW OFFICES OF HAUSMAN & SOSA, LLP
Jeffrey M. Hausman, Esq., Bar No. 057251
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone: (818) 654-9000
Facsimile: (818) 654-9050

Attorneys for: COUNTY OF LOS ANGELES,
DEPARTMENT OF CHILDREN AND FAMILY SERVICES

CIVIL SERVICE COMMISSION

COUNTY OF LOS ANGELES

In the Matter of the Discharge of: XXXXX Plaintiff, v. COUNTY OF LOS ANGELES, DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Defendants.	**CASE NO. XX-XXX** **BRIEF OF RESPONDENT COUNTY OF LOS ANGELES, DEPARTMENT OF CHILDREN AND FAMILY SERVICES RELATING TO ITS COMPLIANCE WITH SKELLY REQUIREMENTS**

Respondent COUNTY OF LOS ANGELES, DEPARTMENT OF CHILDREN AND FAMILY SERVICES ("Respondent" and/or "the Department") hereby files and serves its Brief relating compliance with Skelly requirements.

Respectfully submitted,

LAW OFFICES OF HAUSMAN & SOSA, LLP

Date:

By:____________________________
JEFFREY M. HAUSMAN
Attorneys for: COUNTY OF LOS ANGELES, DEPARTMENT OF CHILDREN AND FAMILY SERVICES

Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

1 *I.*

2 *RESPONDENT HAS COMPLIED WITH THE SKELLY REQUIREMENTS*

3

4 **A. Introduction and Background Relating to the Third Issue Certified by the Commission**

5 Respondent County of Los Angeles Department of Children and Family Services
6 ("Department") submits that any claim by Appellant and her attorney that there was a violation of the
7 due process requirements established by the California Supreme Court in Skelly v. State Personnel
8 Board (1975) 15 Cal. 3d 194, 215 (hereinafter referred to as "Skelly") is completely without merit, both
9 legally and factually. As such, the Department submits that it is no more that an attempt to create an
10 "issue" where none exists and is otherwise a red herring in these proceedings.[1]

11 Factually, the Skelly claim relates to original time cards and an assertion that Skelly was
12 somehow violated because the original time cards were not made available for inspection by Appellant
13 or her attorney prior to Appellant's discharge. It is undisputed that copies of the time cards were
14 provided to Appellant as part of the Skelly process. It is also undisputed that, prior to the effective date
15 of the discharge, the original time cards were made available for inspection to Appellant and/or her
16 counsel.

17 Appellant and her attorney were repeatedly offered the opportunity to inspect the original time
18 cards. On December 4, 2002 the Department conducted a Skelly meeting at 425 Shatto Place, 4th Floor.
19 At that time Appellant's counsel requested that the original time cards be produced for inspection[2]. The
20 Department agreed to do so, and the very next day David Kim from the Department, called Appellant's
21 counsel, advised him that the original time cards were available to be inspected and to schedule a
22 meeting for the viewing of the original time cards. The original time cards were available for inspection
23 on December 5, 2002. Michael Davis, the Department's investigator, obtained the original time cards

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25 [1] The requirements of Skelly are embodied in Civil Service Rule 18.02 which provides in part: "Before such discharge or reduction shall become effective, the employee shall
26 receive a written notice from the appointing power of intent to invoke discharge or reduction, with specific grounds and particular facts therefor."

27 [2] Copies of all relevant time cards, along with a complete investigation report had
28 previously been provided to Appellant. There had been no prior request that the original time cards be produced.

Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

on that date. Appellant's counsel agreed to a meeting to be held on December 13, 2002. Appellant's counsel, thereafter, left a voice mail message with Mr. Kim to reschedule the meeting to December 18, 2002 at 1:00 p.m. Mr. Kim then confirmed that the request of Appellant's counsel to reschedule to the new time and date was agreeable to the Department. Mr. Kim confirmed the foregoing by letter, by e-mail and by fax. These three confirmations went out on December 5, 2002.

On December 18, 2002 Appellant's counsel did not come to the pre-arranged meeting to view the time cards. The Department, including David Kim, Michael Davis and Bureau Chief of Information Services Leo Yu, was present at the date, time and location agreed to. The Department had the original time cards but, as indicated above, there was no showing on the part of Appellant nor her counsel. Further, there was no notice that Appellant nor her counsel would fail to keep the appointment.

The failure and refusal of Appellant's attorney to take advantage of this opportunity and other earlier opportunities can hardly be held against the Department. In fact, the Department submits that the opposite is true and raises serious questions about whether the Skelly violation allegation is even being raised in good faith by Appellant.

Furthermore, even without production of the original time cards, Appellant received more documentation and information about the reasons and basis for her discharge than is required by case law or Civil Service Rule.

For these reasons, and based on the evidence at the hearing, the Department submits that the allegations about an alleged Skelly violation are without substance.

B. Chronology of Relevant Events Relating to Appellant's Discharge and the Skelly Process

Appellant worked for the County of Los Angeles for approximately four and one half years. She commenced her employment on April 14, 1998 as an Intermediate Typist Clerk and has served in the capacity of Intermediate Supervising Typist Clerk since November 9, 2001. Appellant's responsibilities included that of Time Keeper in the Performance Management section of the Department.

After noting that Appellant's time sheets had been submitted in pencil and later the entries had been changed by erasure, the Internal Affairs section of the Department conducted an investigation concerning time keeping fraud by Appellant. Upon conclusion of the investigation on November 13,

Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

1 2002, it was determined that Appellant had made numerous alterations on her time card violating the
2 employment practices of the County and the Department. Appellant was aware of the investigation and
3 was interviewed during the investigation.

4 After the investigation was completed, the Department, on November 22, 2002, issued its Skelly
5 letter and notified Appellant of the Department's intent to discharge her. Further, the Department
6 provided Appellant with the facts upon which the proposed action was based and provided the
7 Appellant with a comprehensive package of materials upon which the discharge action was based
8 including but not limited to the Internal Affairs investigation.

9 A Skelly meeting was held on December 4, 2002. No justification or explanation was offered
10 which caused the Department to reconsider its decision to discharge and therefore, effective the close
11 of business, December 9, 2002, Appellant was discharged.

12 Prior to the Skelly meeting, Appellant was provided with one hundred nine pages of Skelly
13 materials, including copies of all time cards in issue. Clearly, as is evident from the Appellant's
14 Request for Hearing, there is no dispute that a Skelly meeting did take place after Appellant had in her
15 possession, copies of all of the materials on which the discipline was based.

16 Additionally, Appellant's attorney has been offered numerous and ongoing opportunities to
17 inspect the original time card and Appellant's attorney, apparently for tactical reasons, has steadfastly
18 refused to do so. Instead Appellant's attorney wants to manufacture an "issue." Nonetheless, the
19 Department continued to make the original time card available for inspection to Appellant's attorney.

20 Further, the evidence at the hearing will establish that David Kim, a Departmental Civil Service
21 Representative, who was present during the Skelly meeting communicated with Appellant's attorney
22 and offered Appellant the opportunity to view the original time card.

23 Consequently, there is no genuine issue relating to an alleged Skelly violation and there never
24 was any violation by the Department of the requirements, as set forth below, set forth in the Skelly
25 decision.

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Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

C. An Appellant's Right to Documents in a Discipline Case is Limited to Materials Upon Which the Action Is Based

The Department submits that Appellant's right to documents in a discipline case is limited to ". . . a copy of the charges and materials upon which the action is based" (Skelly v. State Personnel Board (1975) 15 Cal. 3d 194, 215).

In reaching its decision, the Court analyzed relevant precedent from United States Supreme Court and stated:

> " 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 [citations omitted], 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.' [citations omitted]. 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. [Citations Omitted]" Id. at 209. [Emphasis added] .

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Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

Moreover, in Clements v. Airport Authority of Washoe County (1995) 69 F.3d 321 the Court stated:

> It is well settled that "the root requirement of the Due Process Clause [is] that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 541, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985) (internal citations and quotations omitted). Although the pre-termination hearing need not be elaborate, "some kind of hearing" must be afforded the employee prior to termination. *Id.* The essential requirements of this pre-termination process are *notice* and *an opportunity to respond*.. [citations omitted]". Id. at 331-332. [Emphasis in Original]

In the instant matter these essential requirements were met because, as part of the pre-termination process, Appellant received *notice* and *an opportunity to respond* to the charges. Moreover, as stated above, Appellant was provided, as part of the Skelly process, with voluminous materials.

While Appellant's attorney may believe that elaborate hearings, the taking of testimony, conducting inspections and testing of documents would be a good idea, this is simply not required in the State of California. Instead, Appellant has this opportunity at the civil service hearing and attempts to turn the Skelly process into a substitute for or an addition to an administrative hearing have been rejected by our courts.

Accordingly, Appellant's legal argument is flawed and there is no "right" to an inspection of original documents as part of the Skelly process. Therefore, there can be no Skelly "violation" and any assertion by Appellant to the contrary is erroneous and without legal support.

D. Government Entities must Be Allowed to Respond Swiftly and Decisively to Violations of the Public Trust and Without Unduly Burdensome Procedures

Another reason why Appellant's argument about an alleged Skelly violation is without merit is because it is contrary to numerous Court decisions which have upheld the right of public employers to act expeditiously and in a non-cumbersome manner in discharging government employees who commit

Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

serious misconduct.

In fact, our Courts recognize the right, indeed the responsibility, of government entities to act when presented with serious misconduct, including dishonesty, by its employees. For example, in Pegues v. Civil Service Commission 67 Cal.App.4th 95, the Second District Court of Appeal reversed the decision of a trial court to grant a petition for writ of mandate brought by an eligibility worker with the County of Los Angeles, Department of Public Social Services. Id. at 99 and 109. The employee had been discharged after providing false information on her application for food stamps. The Los Angeles County Civil Service Commission sustained the Department's decision to discharge the employee. Id. at 98-99. The Court in Pegues stated:

> "As the County argues, because integrity and trustworthiness cannot be instilled in an employee, the Department must be allowed to respond swiftly and decisively to violations of the public trust in order to protect the public trust and preserve the Department's image in the community and among its own ranks. Case law recognizes that '[d]ishonesty is incompatible with the public trust' (citation omitted). Id. at 107. [Emphasis added]

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18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

Similarly, in Holmes v. Hallinan (1998) 68 Cal.App.4th 1523, the First District Court of Appeal reversed the decision of a trial court granting a petition for writ of mandate brought by a terminated district attorney's investigator. Id. at 1526 and 1536-1537. In discussing the employee's claims that he had been threatened with criminal prosecution, the Court stated:

> "[The employee's] threatened interest is no different than those of any other employee fired under a cloud of wrongdoing. Even though this interest is of great weight, 'so, too, is the government's interest in terminating law enforcement officers who are of questionable moral character, and in doing so in an expeditious, efficient, and financially unburdensome manner.' (citations omitted). Id. at 1532. [Emphasis added]

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The Department submits that these principles apply equally to Appellant, an Intermediate Supervising Typist Clerk, who was actually the timekeeper for the Section on Performance Management. Thus Appellant's misconduct related to violations of the very policy Appellant and her section were charged with enforcing.

Therefore, Appellant received all of her Skelly rights and, notwithstanding Appellant's attorney's rhetoric to the contrary, there never was any Skelly violation.

II.

CONCLUSION

Based on the foregoing, Respondent County of Los Angeles Department of Children and Family Services Appellant's claim of a Skelly violation is factually and legally without merit.

Respectfully submitted,

LAW OFFICES OF HAUSMAN & SOSA, LLP

Date:

By:____________________
JEFFREY M. HAUSMAN
Attorneys for: COUNTY OF LOS ANGELES, DEPARTMENT OF CHILDREN AND FAMILY SERVICES

Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

BRIEF RE: SKELLY LIMITATIONS

PORTION OF A BRIEF FILED REGARDING SKELLY LIMITATIONS

(1) **Skelly Only Requires Fair Notice and an Opportunity to Respond**

Appellant has argued that the Department violated the requirements established by the California Supreme Court in Skelly v. State Personnel Board (1975) 15 Cal. 3d 194 ("Skelly"). However, the Department submits that any such contention is completely without merit. Moreover, neither the facts nor the law support Appellant's claim that she was denied due process by the Department and Appellant has failed to sustain her burden of proof on this issue.

In Skelly, the Court summarized the "preremoval safeguards" as requiring "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." Id. at 215. In Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532 the United States Supreme Court explained the requirements as follows:

> "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. [Citations.] To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." Id at 545.

Further, in Clements v. Airport Authority of Washoe County (1995) 69 F.3d 321, the Ninth Circuit Court of Appeals stated that "[t]he essential requirements of this pre-termination process are *notice* and *an opportunity to respond.* [citations omitted]." Id. at 331-332. [Emphasis in Original]. In Titus v. Civil Service Commission (1982) 130 Cal.App.3d 357 the Court rejected claims of Skelly violations and emphasized that "Appellant was permitted to present his side of the controversy" and "[d]ue process requires nothing more." Id. at 363.

In the instant matter these essential requirements were met because, as part of the pre-termination process, Appellant received *notice* and *an opportunity to respond* to the charges. Moreover, Appellant was provided, as part of the Skelly process, with the comprehensive Report of the Audit and

Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

Compliance Division (Department's Exhibit "5") and the letter of intent to discharge (Department's Exhibit "3").

The Department submits that these documents contained detailed information, analysis and an explanation of the charges and the evidence. Therefore, any claim by Appellant that she was not on notice or that she was not advised of the charges or the reasons for the proposed disciplinary decision is simply untenable. In this regard, Skelly and its progeny are clearly concerned with fair notice and adequate due process and do not countenance wilful or feigned ignorance.

In Mohilef v. Janovici (1996) 51 Cal.App.4th 267, the Court of Appeal recognized that a governmental entity has wide latitude in creating procedures to afford due process. (Id. at 285-289.) The Court rejected any requirement for judicial evidentiary type hearings and emphasized that "'[i]n assessing what process is due . . . , substantial weight must be given to the good-faith judgments of the [agency] that [its] procedures . . . assure fair consideration of the . . . claims of individuals.' [citation omitted]." (Id. at 289 [emphasis in original]). Further, "due process is flexible and calls for such procedural protections as the particular situation demands." [Morrissey v. Brewer (1972) 408 U.S. 471, 481].

Additionally, the Department submits that this question should not be considered in a vacuum but in the context of Appellant' right to an evidentiary hearing before this Commission. In this regard, "[t]he minimal due process rights required by Skelly prior to discharge are merely anticipatory of the full rights which are accorded to the employee after discharge." [Kirkpatrick v. Civil Service Commission (1978) 77 Cal.App.3d 940, 945].

Therefore, when the Hearing Officer determines whether Appellant received sufficient due process in the circumstances of this particular case, the Department submits that it is not just Appellant's expectations or demands that should be considered.

Instead *all* of the surrounding circumstances should be carefully weighed and considered. This includes, but is not limited to, (1) other County employees' right to confidentiality and privacy, (2) Appellant's position as a Nurse Manager at the Medical Center, (3) the fact that Appellant was the direct supervisor of some of the Department's witnesses, (4) concerns about retaliation against Department's witnesses, and (5) the extent of disclosure of information in the ACD report and the letter

Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

of intent to discharge.

Additionally, "[i]t is well settled, however, that '[p]rocedural due process is a flexible concept whose contours are shaped by the nature of the individual's and the state interests in a particular deprivation.'" [Caine v. Hardy (5th Cir.1999 943 F.2d 1406, 1412 (en banc); Patel v. Midland Memorial Hospital (5th Cir. 2002) 298 F.3d 333, 339; and Gilbert v. Homar (1997) 520 U.S. 924, 929.

The United States Supreme Court has recognized that the government has an interest in the expeditious removal of unsatisfactory employees and that this governmental interest must be considered in determining what process is due. [Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532, 541, 543, 546]. Further, in Holmes v. Hallinan (1998) 68 Cal.App.4th 1523, the Court explicitly recognized and validated "the government's interest in terminating law enforcement officers who are of questionable moral character, and in doing so in an expeditious, efficient, and financially unburdensome manner. (citations omitted)." Id. at 1532. The Department submits that the same analysis applies to Nurse Managers at a hospital such as Martin Luther King, Jr.-Harbor Hospital.

Therefore, in considering Appellant's claims about due process, the Department submits that the Hearing Officer should also weigh the Department's recognized interest in protecting its employees from retaliation, safeguarding the rights to confidentiality of other County employees, and in only providing the documents which its own executive, Ms. Epps, relied upon in reading the decision.

(2) The Existence and Subsequent Production of Additional Documents Does Not Constitute a Denial of Due Process

Appellant may argue that there is a Skelly violation because additional documents were produced at the civil service hearing and these were not provided as part of the Skelly process. However, any claim by Appellant that she was not on notice about why she was being discharged or that she lacked an ability to respond is provably false. Moreover, a recent appellate decision is directly on point and completely undermines and refutes any argument by Appellant that there was a Skelly violation in connection with the instant matter.

In Gilbert v. City of Sunnyvale (2005) 130 Cal.App.4th 1264, the Sixth District Court of Appeal rejected expansive interpretations of Skelly rights. In its analysis, the Court stated:

Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

1 "We reject appellant's contention that the word 'material' as used in
2 Skelly means each and every document identified in the Chief's Case
3 was required to be produced prior to his pretermination hearing in order
4 to satisfy due process. Even the regulation in Arnett [v. Kennedy, (1974)
5 416 U.S.134], upon which Skelly relied, allowed 'extracts' from witness
6 statements, documents and investigative reports. (citation omitted). The
7 Chief's Case contains verbatim extracts of his telephone conversations.
8 . . and excerpts from other relevant documents, including transcribed
9 interviews. The Chief's Case together with the materials made available
10 to appellant prior to his pretermination hearing adequately provided 'an
11 explanation of the employer's evidence' (citation omitted) and 'notice
12 of the substance of the relevant supporting evidence' (citation omitted)
13 sufficient to enable appellant to adequately respond at the pretermination
14 stage. Appellant has failed to show that respondents did not
15 substantially comply with the pretermination requirements of Skelly."
16 Id. at 1280.

17 In the instant hearing, Appellant has admitted that her representative was provided with the
18 Audit and Compliance Division Report. Appellant testified that she read the Intent to Discharge letter
19 but she *never* read the Report from the Audit and Compliance Division.

20 Appellant may argue that since her representative was provided with the Audit and Compliance
21 Division Report, it is *his* understanding of the Report which is important. However, the due process
22 afforded by Skelly is for the *employee* and our Courts do not recognize the employee's attorney or
23 representative as possessing any due process rights. Further, this must be considered in the context that
24 there is no right to counsel in civil cases. [Chevalier v. Dubin (1980) 104 Cal.App.3d 975, 978].
25 Appellant certainly had the right to have an attorney or representative during the Skelly process and in
26 these civil service proceedings, but this does *not* confer on Appellant any *additional* rights or indeed
27 confer any rights on Appellant's representative.
28 / / /

Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

Accordingly, as a purely factual matter, Appellant cannot prove that she did not receive notice of the charges or the essential documents upon which the disciplinary decision was based.

(3) **Appellant Received the Same Documents as the Department's Decision Maker and the Skelly Officer**

At this hearing Antoinette Epps testified that she was the decision maker and made the final decision to discharge Appellant from County service. Ms. Epps testified that this was based on the information presented in the investigation. Ms. Epps was provided with a Report from the Audit and Compliance Division, and based on this Report, she approved the discharge letter to be sent to Appellant. Moreover, "the law presumes good faith action by administrative decisionmakers (citation omitted)." [California Teachers Association vs. Butte Community College District Board of Trustees (1996) 48 Cal.App.4th 1293, 1308].

Ms. Epps testified that she did not review any other documents and was not provided with any attachments or addenda to the ACD Report. This is significant because Skelly provides that Appellant was only entitled to the documents upon which the disciplinary decision was based. Since Appellant was provided or had access to the same materials relied on by Ms. Epps, there cannot be a Skelly violation in these circumstances.

Additionally, Rocio Pacheco testified that she was the Department's Civil Service Representative and assigned to Performance Management Human Resources at MLK in November 2005 and thereafter.

Ms. Pacheco prepared the Skelly package and this consisted of correspondence surrounding the interim suspension, the intent to discharge, the Discipline Guidelines, and the Audit and Compliance Division Report (Appellant's Exhibit "D"). Ms. Pacheco testified that the *identical* set of documents was provided to the decision maker, Ms. Epps, the Skelly officer, Armando Lopez, and Appellant. Further, Ms. Pacheco testified that the intent to discharge letter was based on the Audit and Compliance Division Report and not on any other documents.

Ms. Pacheco testified that she was requested by Brenda Kikkawa to draft a letter in response to Fred Williams' letter of April 9, 2006 requesting additional information and documents. In the letter

Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

prepared by Ms. Pacheco (Appellant's Exhibit "A," attachment 7), Mr. Williams was advised that Performance Management did not have the documents and they were not used in support of the letter of intent. Ms. Pacheco verified that this letter was accurate because the documents and information that Mr. Williams was requesting, were not seen or considered in preparation of the intent to discharge letter. Ms. Pacheco testified that the only documents used were those sent to Appellant and that Performance Management only came into possession of additional documents after the intent letter was sent to Appellant.

Ms. Pacheco also testified that she did not know the name of the HALT person or the names of the individual nurses and other staff when she prepared the intent to discharge letter. Further, when Ms. Pacheco drafted the final discharge letter, it was based on the intent letter and the Skelly package.

Ms. Pacheco did not remember attending this particular Skelly meeting or the Skelly officer commenting on the merits of Appellant's request for additional information and documents. However, even if the Skelly officer made such a comment, the Department submits that this was only an opinion and has no impact on the question of whether or not there was compliance with Skelly. Further, there was no evidence that Mr. Lopez was advised that Appellant had the same documents as provided to Ms. Epps.

In all of the circumstances Appellant received the documents to which she was entitled and was not denied due process.

(4) Appellant Had No Right to Demand Additional Documents or to Conduct Discovery

Appellant's Skelly claim also appears to rest on the fact that additional documents were produced at this hearing after a request for additional documents was not granted. However, the Court in Gilbert, in rejecting a claim about alleged discovery rights, stated:

> "Constitutional principles of due process do not create general rights of discovery. (citations omitted). We disagree with appellant's suggestion that the mere fact the City provided him with additional materials following his pretermination hearing proves a Skelly violation. 'What

Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

> Skelly requires is unambiguous warning that matters have come to a head, coupled with an explicit notice to the employee that he or she now has the opportunity to engage the issue and present the reasons opposing such a disposition.' (citation omitted). Id. at 1280.

Accordingly, the fact that additional documents were used at the hearing does not prove a Skelly violation. Moreover, simply because Appellant's representative wanted and requested more documents does not mean that he was entitled to them or that not providing them constituted a violation of due process.

In Holmes v. Hallinan (1998) 68 Cal.App.4th 1523, the First District Court of Appeal rejected arguments that an employee was entitled to pre-termination discovery rights. Id. at 1531. In its analysis, the Court stated:

> "A tenured public employee is 'entitled to a very limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing.' (citation omitted). The [United States Supreme [C]ourt has never held that an employee, tenured or otherwise, must be given a full evidentiary hearing before or after being terminated. The court has observed that 'differences in the origin and function of administrative agencies' preclude wholesale transplantation of the rules of procedure, trial and review which have evolved in the history and experience of the courts.' [Citation] The judicial model of an evidentiary hearing is neither required, nor even the most effective, method of decision making in all circumstances.' (citation omitted) Id. at 1531.

Further, in responding to the argument that he was improperly denied the right to conduct discovery, the Court responded:

> "[F]inally Holmes argues that he was denied 'discovery'. We have uncovered no authority for the proposition that Holmes was entitled to discovery before he was terminated. Holmes was given notice of the

Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

allegations against him and the evidence underlying the allegations. He was entitled to nothing more. [citation omitted]. The trial court erred in its determination that Holmes' due process rights were violated." Id. at 1534.

The decisions in Gilbert and Holmes are in accord with many other Federal and State cases. Thus, it has been consistently held that there is no constitutional right to pretrial discovery in administrative proceedings. [Silverman v. Commodity Futures Trading Commission (7th Cir. 1977) 549 F.2d 28, 33; Weinberg v. Commodity Futures Trading Commission (C.D. Cal. 1988) 699 F.Supp. 808, 813; Mohilef v. Janovici (1996) 51 Cal.App.4th 267, 302]. Therefore, even though Appellant requested additional documents from the Department, it is not a Skelly violation for the Department to decline to participate in or respond to attempts by Appellant to conduct pre-hearing "discovery."

Additionally, in Cimarusti v. Superior Court (2000) 79 Cal.App.4th 799, the Second District Court of Appeal expressly stated that "there is no due process right to prehearing discovery in administrative hearing cases" and that "[t]he scope of discovery in administrative hearings is governed by statute and the agency's discretion." Id at 807-809. The Court relied on the fact that at the hearing the employee could " call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any relevant matter even if not covered on direct examination, impeach witnesses, and rebut evidence." Id at 809. Therefore, the Court ruled that the hearing and related procedures were sufficient to satisfy the employee's due process rights. Id at 809.

Accordingly, in the instant matter, case precedent simply does not support Appellant's argument that she was wrongfully or unconstitutionally denied access to *essential* documents or information. Moreover, once Appellant was given "notice of the allegations against [her] and the evidence underlying the allegations," due process was satisfied and Appellant cannot expand her rights or invent new requirements for *this* case.

Therefore, all of Appellant's Skelly arguments about documents and notice are both factually and legally without merit.

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Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

(5) Appellant Received Sufficient Notice In Order to Respond to the Charges of Misconduct

At various times in these proceedings, Appellant and her representative have claimed that her due process rights were violated because there were allegedly insufficient facts and information provided in the documents sent to Appellant in connection with her discharge. The Department submits that this contention is completely without merit and that Appellant received more than adequate notice in order to apprise her of the nature of the charges and the grounds for the proposed decision. This, in turn, afforded Appellant sufficient opportunity in which to respond to the charges.

Moreover, the Department submits that the evidence adduced at this hearing directly related to the charges set forth in the discharge (Department's Exhibit "4") and the matters set forth in the comprehensive Report from the Audit and Compliance Division (Department's Exhibit "5") which was also provided to Appellant as part of the Skelly process. Accordingly, any contention by Appellant that she did not understand why the Department intended to discharge her is simply untenable. Similarly, any argument by Appellant that the evidence at this hearing materially differs from the basis for the discharge action is not sustainable.

Appellant has argued that the letters of intent and discharge (Department's Exhibits "3" and "4"), did not comply with Rule 18.02.A., which requires that the written notice include the "specific grounds and particular facts." However, the Department submits that a review of the intent letter establishes that it meets the requirements.

In fact, examination of the letter of intent to discharge (Department's Exhibit "3") reveals that Appellant was provided with ample notice about the nature of the charges and why the Department proposed to discharge Appellant. This includes, but is not limited to, the following:

- The specific sections of the Department's Guidelines for Discipline were identified (Department's Exhibit "3," first and second pages),
- Appellant was advised that she had sold and issued CPR cards to staff "without having staff follow protocol" (Department's Exhibit "3," second page),
- Appellant was advised the Nursing Education Center Instructor file did not contain a copy of Appellant's CPR Instructor card (Department's Exhibit "3," second page),

Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

- Appellant was advised about signing her name on the instructor's line for seven (7) CPR cards without providing the classroom training to the employees (Department's Exhibit "3," third page),
- Appellant was advised about providing CPR cards to employees without the employees completing the CPR training course (Department's Exhibit "3," third page)

Further, this information should not be viewed in isolation but also in the context of Appellant being provided with the Audit and Compliance Division Report (Department's Exhibit "5"). Further, Appellant admitted, at the hearing, that she knew that the HALT employee referred to Mr. Hancz. Additionally, Appellant had become qualified as a CPR Instructor in a two (2) day course conducted by the AHA and accordingly, must have known the "protocol" and the necessary components of "the CPR training course." If Appellant disputes this, it would constitute an admission of lack of knowledge of her own responsibilities, adding further support to the decision to discharge her.

Appellant also claimed that the hearing ventured into matters beyond the facts and reasons in the discharge letter. However, in Cook v. Civil Service Commission, (1960) 178 Cal.App.2d 118, the Court expressly rejected a similar type of argument. In its analysis, the Court stated:

> "Another claim of invalidity arises out of petitioner's contention that he was discharged for reasons other than those set forth in the statement of charges served upon him. The basis for his contention comes from the answers of the chief of police to questions put to him by petitioner's counsel during the civil service hearing. . . . It is not necessary to set forth all the reasons which might have justified his discharge. [citation omitted] The record does not disclose that the commission considered evidence of charges other than those set forth in the statement. His findings are limited to the issues raised by the statement. Its conclusions and recommendation expressly were based upon these findings." Id. at 133.

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18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

Additionally, an employee cannot complain of vagueness where misconduct is simply inconsistent with proper working behavior. [Carter v. United States (1968) 407 F2d 1238, 1246]. It is also established that the charges against Federal employees in a notice of dismissal need not meet the specificity of a criminal indictment. [Lowrey v. Richardson (1973) 390 F.Supp.356, 359]. Further, a citation of practicing without a valid license provided adequate notice and a finding of a violation of a regulation not specifically charged in the citation did not constitute a denial of due process. [Jaramillo v. State Board for Geologists and Geophysicists (2006) 136 Cal.App.4th 880, 896].

This is similar to the way our courts treat claims by government employees that rules of governmental entities are too vague. Such claims have been consistently rejected by our Courts which view the application of the rule in light of the facts of the case at hand. [Cranston vs. City of Richmond (1985) 40 Cal.3d 755, 764, 769-772 and Arellanes vs. Civil Service Commission (1995) 41 Cal.App.4th 1208, 1217-1218]. This includes whether a "reasonable" employee should "normally" be able to determine what kind of behavior is prohibited. [Cranston at 770 and Arellanes at 1218].

In such circumstances Appellant received sufficient notice of the charges and Appellant cannot feign ignorance in order to support a claim of a denial of due process.

(6) Any Alleged Variance Between the Letter of Discharge and the Evidence Should Be Disregarded in Light of Appellant Being Afforded a Fair Hearing

Even assuming arguendo, that there is any variance between the evidence adduced at this hearing and the matters set forth in the letter of discharge, this is simply not a tenable basis for either challenging the discharge decision or arguing that there has been a denial of due process. In fact, this kind of argument has been *consistently* rejected by our courts.

For example, in Stearns v. Fair Employment Practice Commission (1971) 6 Cal.3d 205, the California Supreme Court emphasized that the employee must simply be informed of the "substance of the charge." Id. at 213. In Stearns, an apartment landlord claimed that there was a variance between an accusation of discrimination and the proof at hearing. Id. at 212. After defining "a variance as a failure of the proof to correspond to the pleadings" (Id. at 212), the Court proceeded to state:

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Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

"Even assuming that the accusation charged only a refusal to rent, and not discriminatory rental practices, we do not believe that any such variance between the accusation and proof justifies a reversal of the commission's order against Stearns. As applied to civil actions, Code of Civil Procedure section 469 provides that 'No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.' (Citations omitted)" Id. at 212-213.

The Court proceeded to state:

"Finally, this court should not impose a more rigid rule for a variance in an administrative proceeding than in a court action. If we have concluded that under the rules of pleading applicable to court proceedings no variance occurred here, and that even if a variance did take place, no prejudice flowed from it, certainly no more onerous rule should apply to this administrative proceeding. Since such proceedings are not bound by strict rules of pleading (citation omitted), courts, in reviewing such proceedings, are even less inclined to treat a variance as reversable error. (Citation omitted). **So long as the respondent is informed of the substance of the charge and afforded the basic, appropriate elements of procedural due process, he cannot complain of a variance between administrative pleadings and proof.** (Citations omitted)." [Id. at 213-214]. [Emphasis added]

The Court also noted that in providing an administrative remedy for housing discrimination, the Legislature undertook to make sure that individual actions "did not become burdened with procedural technicalities." Id. at 214. The Department submits that the same analysis should apply in civil service proceedings. This is especially the case since the Department did not charge Appellant with one (1) offense (dishonesty and lack of sound judgment) and come to hearing to try to prove something manifestly different (e.g. threats or sexual harassment). While Rule 18.02 limits the Department to the

Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

charges in the letter of discharge, this is not designed to preclude proof of all of the facts relevant to and underlining these charges.

Similarly, in Burako v. Munro (1959) 174 Cal.App.2d 688, the First District Court of Appeal, when dealing with the suspension of a liquor license by the Alcoholic Beverage Appeals Board, rejected the contention that the licensee was prejudiced by a claimed deficiency in the accusation. Id. at 691. The Court emphasized that the accusation was "sufficient to enable the licensee to prepare his defense" and in such licensing proceedings "the courts are more interested in fair notice to the accused than in adherence to technical rules of pleading." Id. at 691. The Court also noted that the licensees demonstrated "amply their readiness to meet the Department's evidence" and they were afforded sufficient time, after presentation of the Department's evidence, to secure any further refutation available to them." Id. at 691.

In Cooper v. Board of Medical Examiners (1975) 49 Cal.App.3d 931, the First District Court of Appeal upheld the revocation of a license of a psychologist for engaging in misbehavior with patients and illegally prescribing medications. Id. at 937 and 950. The psychologist contended that the "accusation was so vague as to give him inadequate notice of the charges against him, precluding him from preparing a defense." Id. at 941. In rejecting this argument, the Court stated the following:

> "This contention is unsound for two reasons. First, the liberal rules of administrative pleading require only that the respondent licensee be informed of the substance of the charge and afforded the basic, appropriate elements of procedural due process (citation omitted). . . A variance between the allegations of a pleading and the proof would not be deemed material unless it has actually misled the adverse party to its prejudice in maintaining his action or defense on the merits, and a variance may be disregarded when the action has been as fully and fairly tried on the merits as though the variance had not existed. (Citations omitted)." Id at 942.

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18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050

These decisions are in accord with how our courts have consistently considered this question. For example, a variance between a pleading relating to date of a particular transaction was held to be immaterial when the adverse party is not misled thereby. [State Medical Education Board v. Roberson (1970) 6 Cal.App.3d 493, 502]. Further, any variance is not a basis for reversal unless it prejudicially misleads a party and it must be disregarded if the issues on which the decision is based were fully and fairly tried. [Franz v. Board of Medical Quality Assurance (1982) 31 Cal.3d 124, 143-144].

In the instant case, a review of the letter of intent to discharge establishes that Appellant was clearly and unequivocally advised that she had committed misconduct in connection with the CPR re-certification process at the Medical Center (Department's Exhibit "3," page 2). Appellant was further advised that there were a number of irregularities and improprieties in connection with her behavior with respect to this CPR re-certification process (Department's Exhibit "3", pages 2 and 3).

Moreover, in the letter, Appellant was clearly apprised about the basis for the proposed discipline, the grounds for the Department's contentions, including individuals not undergoing complete CPR re-certification process, an uncertified person being permitted to act as an instructor in the CPR re-certification process and other documented problems concerning the records and files relating to the CPR re-certification process at the Hospital (Department's Exhibit "3", pages 2 and 3).

Additionally, the evidence at the hearing related to these very charges of misconduct against Appellant, and the Department submits that no variance exists. However, even *if* there was any variance, it is not material and caused absolutely no prejudice to the Appellant. In fact, Appellant has had ample opportunity to respond to, deny and attempt to rebut the Department's evidence. The question here is not whether or not the Department has proved the charges (and it submits it has), but rather whether Appellant received sufficient notice in order to respond to and deny the charges. The Department submits that this is clearly the case and that any claim by Appellant to the contrary is simply without merit.

In such circumstances, the Department submits that due process requirements have been adhered to in connection with the disciplinary process and that Appellant's claims of Skelly violations or denials of due process should be rejected as unproven or otherwise contrary to established legal principles in this State.

Law Offices of Hausman & Sosa, LLP
18757 Burbank Boulevard, Suite 305
Tarzana, California 91356-6329
Telephone (818) 654-9000
Facsimile (818) 654-9050