CAN THEY JUST FIRE ME?

The *Skelly* Decision and California Public Employees

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Center for Labor Research
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Institute of Industrial Relations
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PREFACE

In a major decision issued on September 16, 1975, the California Supreme Court extended the due process protections of both the United States and California Constitutions to permanent employees of the California Civil Service System. Additional cases have since extended such rights to almost all California public employees threatened by serious disciplinary action. These rights are popularly known as *Skelly* rights, after the title of the original court decision. (See *John F. Skelly v. State Personnel Board, et al.* 15 C.3d 194; 124 Cal. Rptr. 14, 539 P.2d 774.) The reasons for this decision, the specific guarantees it offers public workers and the means by which union representatives can most effectively implement it in the workplace are the subjects to be covered by this pamphlet.

INTRODUCTION

Who Was Skelly?

In 1965, Dr. John F. Skelly was hired by the State of California's Department of Health Care Services as a medical consultatnt. Prior to that he had operated a private practice for 28 years. In addition, he taught for thirteen of those years at the University of California Medical School. According to the Department, a drinking problem caused Skelly to develop a poor attendance record. In 1970 the Department began a series of verbal and written warnings regarding this problem. Skelly denied having a problem with alcohol, and he continued his practice of taking longer lunch breaks than strictly allowed by departmental regulations. In early 1972, Skelly received a one-day suspension and a letter of reprimand. Further warnings had no effect on Skelly's hours of work, and the Department fired him in July.

In defense at his subsequent hearing, Skelly presented testimony by co-workers, including his immediate supervisor, that he had made up for any of his absences by eliminating coffee breaks, by working holidays and occasionally taking work home with him. His co-workers "described him as efficient, productive and extremely helpful and cooperative, and stated that his work had never appeared to be affected by alcoholic consumption. [His immediate supervisor] rated [Skelly's] work as good

to superior....The Department introduced no evidence to show, and indeed did not claim, that the quantity or quality of [Skelly's] work was in any way inadequate; his failure to comply with the prescribed time schedule did not impede his effective performance of his own duties or those of his fellow workers." (*Skelly*, 15 C.3d 194, 199). The dismissal was, however, upheld by a hearing officer of the State Personnel Board on September 19, 1972.

Skelly, represented by attorneys for the California State Employees' Association, went to Superior Court in Sacramento to compel the Personnel Board to set aside the dismissal. The trial court denied the request and the appellate court backed them up. Skelly then appealed to the State Supreme Court arguing that the dismissal: 1) violated the due process protections of the United States and California Constitutions; 2) was based on findings not supported by the available evidence; and 3) was "unduly harsh" (*Skelly*, 15 Cal.3d 194, 201). The Court agreed with the first and third arguments made by Skelly: he had been denied due process and the punishment by dismissal was "excessive." The Court reversed the Superior Court decision and ordered them to conduct "further proceedings in conformity with [their] opinion." Dr. Skelly was unable to return to his old job due to a subsequent medical disability, but he did receive a major back pay award.

I. WHAT IS DUE PROCESS?

Reinstatement of discharged workers is quite common. Arbitrators often agree with a union that dismissal, considered "capital punishment" in the workplace, is too harsh. They then reinstate employees with back pay or with only a suspension. But in its *Skelly* decision the Supreme Court broke new ground for all California public employees when they found that Skelly's firing violated his constitutional rights. Skelly contended that it was not enough to provide him a hearing on his grievance **after** his discharge, but that the **Due Process** clauses of the 5th and 14th Amendments to the U.S. Constiution and Article I, Sections 7 and 15 of the California Constitution, required that he be given a chance to respond to the proposed discipline and to the charges of misconduct upon which the discipline was based **before** his dismissal. The Court agreed unanimously.

Though considered a "landmark" decision, the Court's reasoning in *Skelly* stemmed logically from existing constitutional and legal safeguards. The Fifth Amendment (which applies to the Federal Government) provides, in part, that "No person shall be deprived of life, liberty, or property, without due process of law; ...." The Fourteenth Amendment extends this prohibition to the States: "...nor shall any State deprive any person of life, liberty or property, without due process of law; ...." Nearly identical protections are found in Article I, Sections 7 and 15 of the California Constitution.

In 1972, the U.S. Supreme Court ruled that certain public employees have a property interest in their job. Because the Constitution forbids the government from taking property from individuals "without due process of law," the government, as an employer, is prohibited from taking away this "property" without due process. In its decision, *Board of Regents v. Roth*, (408 U.S. 564 [1972]) the Court explained its definition of a job as personal property:

> To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> (*Skelly*, 15 C.3d 194, 206-7)

The California Court found that such property rights, and therefore due process protections, existed for permanent state civil service employees. As the Court explained in its *Skelly* decision:

> The California [Civil Service] Act endows state employees who attain permanent status with a substantially identical property interest. Such employees may not be dismissed or subjected to other disciplinary measures unless facts exist constituting "cause" for such discipline....In the absence of sufficient cause, the permanent employee has a statutory right to continued employement free of these punitive measures....This statutory right constitutes "a legitimate claim of entitlement" to a government benefit within the meaning of *Roth*. Therefore, the state must comply with procedural due process requirements before it may deprive its permanent employee of this property interest by punitive action.
>
> (*Skelly*, 15 C.3d 194, 207-8)

The Court then outlined the "procedural due process" to which it felt such employees are entitled. Again, they relied on a U.S. Supreme Court case: the 1974 decision *Arnett v. Kennedy* (416 U.S. 134 [1974]). This case examined the constitutionality of a law which regulated federal government employees. Under the Lloyd-LaFollette Act, "the employee is entitled to 30 days advance written notice of the proposed action, including a detailed statement of the reasons therefor, the right to examine all materials relied upon to support the charges, the opportunity to respond either orally or in writing or both (with affidavits) before a representative of the employing agency with authority to make or recommend a final decision, and written notice of the agency's decision on or before

the effective date of action....The employee is not entitled to an evidentiary trial-type hearing until the appeal stage of the proceedings." (*Skelly*, 15 C.3d 194, 206).

The U.S. Supreme Court in its *Arnett* decision was divided when it came to the precise nature of due process requirements. Three dissenting justices, for example, argued that a dismissal had such a serious impact on an employee that he/she "was entitled to a full evidentiary hearing prior to discharge, at which he could appear before an independent, unbiased decisionmaker and confront and cross-examine witnesses." (*Skelly*, 15 C.3d 194, 214). If the majority of the Court had agreed with this reasoning, all federal employees would be able to have an arbitration or civil service hearing **before** they could be fired. The remaining six justices, however, did not agree. Instead, basic safeguards of the Lloyd-LaFollette Act were upheld as adequate protection prior to job loss. Only after dismissal would the dismissed worker be entitled to a full hearing. But this gave the California Court enough support for its conclusion that the California Civil Service procedures were inadequate:

> Applying the general principles we are able to distill from these various opinions, we are convinced that the provisions of the California Act concerning the taking of punitive action against a permanent civil service employee do not fulfill constitutional demands. It is clear that due process does not require the state to provide the employee with a full trial-

> type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective.
>
> (*Skelly*, 15 C.3d 194, 215)

The Court then outlined what these rights must consist of:

> As a minimum, these preremoval safeguards must include **notice of the proposed action**, the **reasons therefor**, a **copy of the charges and materials** upon which the action is based, and the **right to respond**, either orally on in writing, to the authority initially imposing discipline.
>
> (*Skelly*, 15 C.3d 194, 215; emphasis added)

The Court gave no detailed guide to the implementation of these safeguards. This was left open for employees, their unions and public employers to hassle out in the workplace and at the bargaining table.

II. HOW DOES THE *SKELLY* DOCTRINE ACTUALLY FUNCTION

In a valuable article in the journal *California Public Employee Relations,* No. 45 (June 1980), pp. 19-35, labor attorney Richard J. Silber has concisely summarized the safeguards *Skelly* provides. In introducing his summary he notes that "the crux of these constitutional safeguards against arbitrary action by the employer is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" He then reviews each of the steps the public employer must take:

1) **'Notice of the proposed action.'** – If an employee did not have an opportunity to respond in a real and meaningful manner to the discipline actually imposed, procedural due process would not be satisfied. Consequently, notice must be given of the type of discipline proposed. In this regard, it is probable that a disciplinary demotion and a suspension from employment would be considered mutually exclusive punitive actions, each of which would require specific notice before either form of discipline could be validly imposed.

2) **'Reasons for the proposed discipline.'** – An employee would not have a meaningful opportunity to respond to a proposed disciplinary action if the employer, either when discipline is imposed or at the

post-disciplinary evidentiary hearing, alleges a violation of employer policies or rules that differ from that specified in the notice of intended action. In such an instance, procedural due process would not be satisfied.

3) **'A copy of the charges and the material upon which the action is based.'** – In specifying this safeguard, the state Supreme Court has made it clear that mere allegations of wrongful behavior would be insufficient in order for an employee to have an opportunity to be heard in a meaningful manner. Accordingly, the employee must receive copies of the charges, which should set forth all instances of alleged wrongful conduct or violations of employer policy, which must be accompanied by copies of the policies and rules allegedly violated, and which further should be supported by all other materials and documents which have served as the basis for the proposed disciplinary action. It is reasonable to assume that copies of statements furnished to the employer, which have served as the basis for the proposed disciplinary action, must also be included.

4) **'The right to respond, either orally or in writing, to the authority initially imposing the discipline.'** – In order to conform with this safeguard, it is probable that the employee should be afforded an opportunity to review the proposed disciplinary action and material with his or her representative or counsel, and be afforded sufficient time, including released

time, to review the materials relied on by the employer in order to prepare a response. The State Supreme Court specifically designated that the authority who initially imposed the discipline must hold the hearing, in order that the employee might have the opportunity to be heard in a meaningful manner, therefore, an attempt to utilize another official, who does not have the authority to amend, modify, or revoke the proposed discipline, would presumably deny the employee the procedural due process right to a meaningful preremoval hearing.

A number of decisions by government agencies, the courts and arbitrators since the initial 1975 *Skelly* decision have defined in greater detail the actual implementation of the *Skelly* doctrine. A short summary of each follows.

1) The *Skelly* doctrine applies to **all public employees** who can demonstrate a property interest in their job. The *Skelly* case itself dealt with a permanent employee of the California Civil Service. However, more recent court decisions have made it clear that the constitutional guarantees apply as well to University of California, California State College and county and local government employees. (*e.g.* for U.C., *Mendoza v. Regents of University of California* 78 Cal. App.3d 168, 144 Cal. Rptr. 117 [1978].)

2) In some instances, **non-permanent employees** have also been judged to have a property interest in their job. In these instances the due process outlined by *Skelly* also applies. In *Williams v. County of Los Angeles*, 22 Cal.3d 731, 150 Cal. Rptr. 475 (1978), a summer lifeguard was deemed to be protected by due process because he had a reasonable expectation of returning to his job the following season. A very recent California Appeals Court decision concluded that a probationary employee was entitled to due process rights under *Skelly*, because no employee of her department could be dismissed "except for cause." (*Beerbohm v. Sonoma Co. Library, et al.*, 1 Civ. 48227, Superior Ct. No. 95114, 1/4/83. Not certified for publication.)

3) Even where a **probationary employee** does not have a property interest in his/her job, that is they may be dismissed without cause, due process protections may still be obligatory. In *Lubey v. City and County of San Francisco* 98 Cal. App.3d 340; 159 Cal. Rptr. 440 (1979), a probationary employee was found to be entitled to due process because his "liberty" interest, another interest also protected by the 5th and 14th Amendments and by the state constitution, was at risk:

> The exception will be applied where the probationary employee's job termination, or dismissal, is based on charges of misconduct which "stigmatize" his reputation, or "seriously impair" his opportunity to earn a living, or which "might seriously damage his stand-

ing and associations in his community." Where there is such a deprival of a "liberty interest," the employee's "remedy mandated by the Due Process Clause of the Fourteenth Amendment is 'an opportunity to refute the charge' [and] 'to clear his name.'" "'He must be afforded notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective.'"

(*Silber*, CPER No. 45, p. 30)

Hence, any dismissal for, let's say, alleged theft, lying or other kinds of personal misconduct, which might inhibit the employee's future potential to earn a living would require due process procedures before termination.

4) Though Skelly himself was fired, other less serious disciplinary actions are covered by due process rights. Even a one day suspension could be considered a denial of property, but the courts have decided that only suspensions longer than ten days, demotions or dismissals are a serious enough loss of property to warrant spending the time and money necessary for a due process hearing prior to the imposition of discipline. (*Civil Service Association v. City and County of San Francisco* 22 Cal.3d 552; 150 Cal. Rptr. 129 [1978].) The *Skelly* rule, as subsequently applied, has required that a due process hearing be held soon after the imposition of the lesser discipline.

This does not mean that an employer cannot hold due process hearings prior to the imposition of such less serious

actions. A union may be able to successfully argue that the value of providing such safeguards for all disciplinary actions involving some permanent loss (shorter suspensions, termination of training or apprenticeship, the denial of a promotion due to the presence of a warning letter in one's file) outweigh the loss of the employer's resources. Improved morale and more efficient management could be two such arguments. Essentially, these are extensions of the logic behind a strong grievance procedure: both parties are better off when disputes can be resolved as quickly as possible. (See - Demotions: *Ng v. California State Personnel Board* 68 Cal. App.3d 600; 137 Cal. Rptr. 387 [1977]. Suspension: *Civil Service Association v. City of San Francisco* 22 Cal.3d 552; 150 Cal. Rptr. 129 [1978].)

5) **Other points** to keep in mind regarding the current legal status of the *Skelly* rule include:

a) Due process rights are applicable to discipline given in response to alleged **criminal actions** "since," according to Silber in his article, "only the employee has the right to decide whether or not to respond to the proposed disciplinary action in view of the potential effects of the criminal proceedings." (See *Chang v. Palos Verdes*, 98 Cal. App.3d 557, 157 Cal. Rptr. 630 [1979].)

b) If an employee is disciplined without being afforded due process rights s/he is entitled to **full back pay** for the period of time from the implementation of the discipline until that point where a proper due process hearing has

been held. So, for example, if John Jones is told at 4:00 p.m. on Friday that he is fired as of 5:00 p.m. the same day, he has been disciplined without due process. If he files a grievance or court action and is reinstated by a judge or a hearing officer six months later, then he is also automatically entitled to that six months pay, because he did not receive a due process hearing until that point. (See *Barber v. State Personnel Board* 18 Cal.3d 395, 402; 134 Cal. Rptr. 206, 210 [1976]; *Mitchell v. State Personnel Board* 90 Cal. App.3d 808, 153 Cal. Rptr. 552 [1979].)

c) Because the *Skelly* pre-disciplinary hearing is not "a full trial-type evidentiary hearing" the parties are **not entitled to have the proceedings reviewed in court.** (*Taylor v. California State Personnel Board*, 101 Cal. App.3d 498; 167 Cal. Rptr. 677 [1980].) Both sides may present evidence in the form of documents, affidavits, or witnesses, but are not required to do so as in an arbitration or trial. Further, there is nothing in the *Skelly* doctrine which absolutely requires that an employer provide the time to review detailed evidence and listen to witnesses.

d) The *Skelly* decision decided only the issue of pre-disciplinary hearings. The language of the decision makes it clear that the Court feels that such a **post-disciplinary, full evidentiary hearing** would be manadated by the state and U.S. Constitutions.

III. THE *SKELLY* DOCTRINE AND NEGOTIATED AGREEMENTS BETWEEN THE EMPLOYER AND THE UNION

To provide the best protection for a union's members it is recommended that the union attempt to negotiate into its contract or memorandum of understanding the basic provisions of the *Skelly* rule. This will also provide a strong educational tool for the union. Too often court decisions in favor of workers, the few that exist, are written about only in obscure journals. If it's in the contract, then the union membership is in the best position to understand and exercise its legal rights. If the *Skelly* rights are in the contract then they will be subject to the grievance procedure. This means due process protections can be enforced with less time and expense than is involved by going to court.

The contract negotiations can be used to extend those rights which the courts have only begun to examine. A court's ruling, when in favor of employees, could be viewed by a union as a starting point—not a limitation on the exercise of one's constitutional rights, but a guide to the fullest practice of those rights. In the *Skelly* case the California Supreme Court made this clear when it said it was outlining "**minimum** preremoval safeguards" (emphasis added) for public employees. Only the actual parties to this process, the employer and the union, can determine whether additional protections are truly necessary. The

state's civil service rules, for example, provide only five days notice in advance of the imposition of discipline. Is this adequate? Can the background to a case that may have evolved over a period of years be understood properly in five days? Will "cool" heads prevail at a meeting only a few days after the notice of discipline? As we noted above, due process is accorded those with a property or liberty interest at stake. The precise definition of these terms will vary. It will always be of use to attempt to define those instances when such interests are denied, while not preventing the possibility of adding new definitions in the future.

As a starting point, a union could place the four minimum requirements embodied in *Skelly* into the contract. Local 2428 of AFSCME did precisely that in its negotiations with the East Bay Regional Park District. Titled "Pre-disciplinary Notice and Meeting," these provisions are incorporated into AFSCME's grievance procedure. It is worded as follows:

> **Pre-disciplinary Notice and Meeting.** In the event the District intends to discharge an employee, to impose a suspension without pay, to demote an employee or to reduce an employee's pay; the District shall, if the employee has completed the original probationary period, utilize the following procedure:
>
> (1) The employee and the employee's steward shall be given notice in writing of the proposed disciplinary action not less than five (5) calendar days prior to

the effective date of the action. The notice shall set forth the reasons for the action and shall be accompanied by copies of written materials, if any, upon which the action is based.

(2) Prior to the effective date of the disciplinary action the employee may request and, if so, shall be granted an informal hearing to discuss the proposed disciplinary action. The informal hearing shall be conducted by the employee's Department Head and shall be attended by the next immediate supervisor of the employee who is not a member of the bargaining unit covered by this Agreement. The employee may be represented by one of the following: The Union President, Vice President, Secretary, Chief Steward or Steward. The purpose of this meeting is not to gather evidence for future meetings within the grievance procedure and, therefore, no record will be made. Failing reconciliation, the formal grievance procedure may be used.

Two clear advantages to this contract language should be remembered. First, the language goes beyond the specific minimum requirements of the *Skelly* decision by requiring that the Steward as well as the employee be given notice of the proposed disciplinary action. Although not required by the constitutional rights outlined in *Skelly*, such a provision is certainly within the spirit of the *Skelly* decision, whose intent is to provide a chance for the employee to be heard "at a meaningful time and in a meaningful manner." The

employee's representative is guaranteed a maximum amount of time to prepare for the informal hearing. Second, the language spells out who is to be present at the hearing. The Supreme Court decision requires that the authority who imposed the discipline, not necessarily the person who tells the employee of the pending action, must be present at the hearing. It is only in this way that the employee has a chance to confront his/her accuser.

IV HOW SHOULD THE *SKELLY* HEARING BE CONDUCTED?

The *Skelly* doctrine is fundamentally an extension of the grievance procedure itself. In actual practice the *Skelly* meeting will function in much the same way as an informal meeting held to resolve a typical grievance. The meeting can be any or all of the following:

- An opportunity to resolve the dispute through withdrawal or reduction of the proposed discipline;

- A chance to find out how much the other side, the employer, really knows and, sometimes more important, how far they are willing to push this particular action against the employee;

- The union, too, can demonstrate to the employer that it will strongly back up the employee.

The time available to a shop steward or union representative prior to the *Skelly* hearing will be short, usually five days, rather than the ten to thirty days common in the post-disciplinary period. Nonetheless, the same principles apply during this process. Here are some suggestions to keep in mind:

1) Investigate the situation thoroughly, as though the grievance is a potential arbitration case. Get all the facts: **Who** is involved? **What** did they say and do? **When** did it happen? **Where** did it happen?

2) These basic four W's are very important, but so are the less obvious three W's: **Why** did it happen—what is the underlying cause? **What** do you want from the employer in the way of a remedy? **Which** clauses or provisions of the contract will you rely on if you file a grievance?

3) Most grievances are easiest to settle at the initial stages of the procedure. This may be somewhat less true at the *Skelly* stage—management may view the *Skelly* meeting as simply an opportunity for the employee to say "I didn't do it." But a strong, well-reasoned and prepared defense of the employee could make a difference. As a minimum try to get management to start questioning its decision.

4) Pressure helps to settle grievances. This concept grows out of number three. Make it clear to management that the union, and individual employee's shop back-up the employee (if that is indeed the case). If publicity is a possibility, you may want to consider it a possible response to poor management actions. Public employers are particularly vulnerable to publicity.

5) Keep notes at the meeting—or, as soon as you leave, write down your recollection of the discussion. Though these notes have no legal standing, they can be useful in preparing the union's defense through future steps in the grievance procedure.

6) Bring the member along. Constitutional rights to due process would mean little if the employee him/herself were

excluded from the *Skelly* hearing. It usually makes sense to ask that the employee allow the steward or union representative to "do the talking," in order to avoid an emotional hassle with management. Such hassles can lead the employee to admitting facts, or non-facts, which are best left unmentioned. The presence of the employee through all steps of the procedure will increase the confidence of the member in his/her union representative and demonstrate to management the union's close relationship with its rank and file members.

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