

Introduction to Appeals,
Process, and Hearings



San Luis Obispo County Civil Service Commission

Steven L. Simas



- **Outside Counsel to Commission (May 2012)**
 - Advise Commission regarding hearing process
 - Represent Commission at hearings
- **Experience**
 - Simas & Associates, Ltd. –2002 to present
 - Deputy Attorney General, Office of the Attorney General
 - Legal Counsel, Public Employment Relations Board
 - Chief Consultant, California State Assembly, Committee on Labor and Employment

Purpose of the Program

- To familiarize attendees with the history, purpose, process, and procedures of the San Luis Obispo County Civil Service Commission (“Commission”).

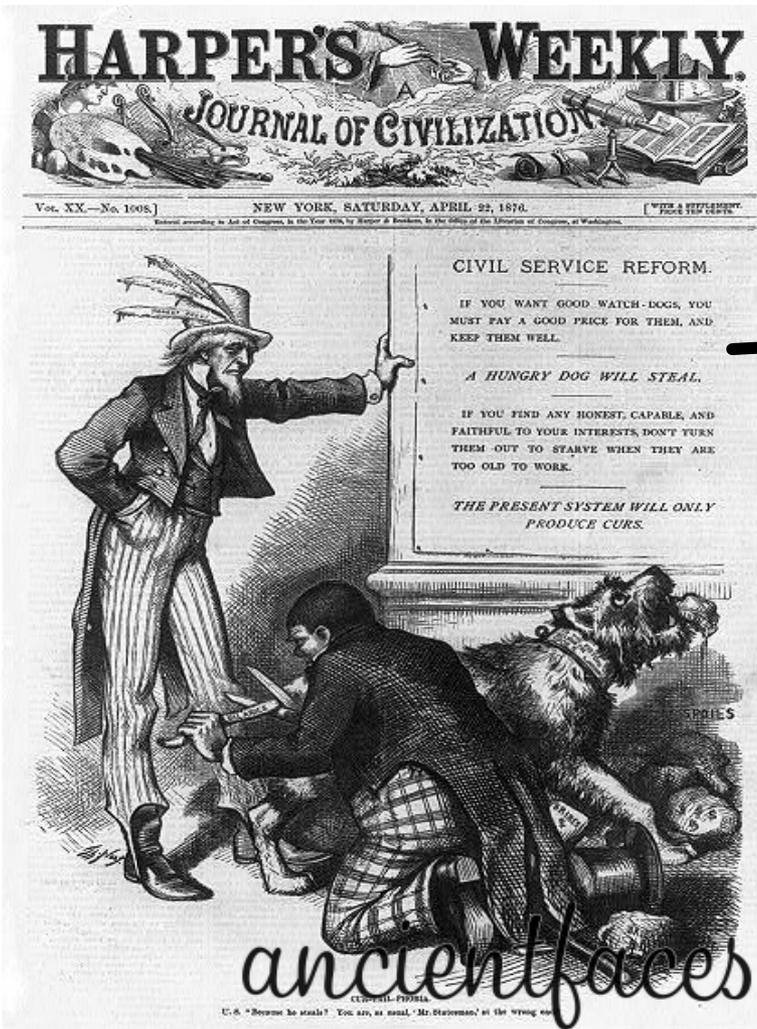
Topic Overview

- The Purpose of Civil Service
- Brief History of the Commission
- Jurisdiction of the Commission
- Administrative Hearings
- Anatomy of a Disciplinary Action
- Commission Decisions
- Judicial Review

The Purpose of Civil Service

To abolish the spoils system...

The Purpose of Civil Service



CIVIL SERVICE REFORM

If you want good watch dogs, you must pay a good price for them, and keep them well.

A HUNGRY DOG WILL STEAL

If you find any honest, capable, and faithful to your interests, don't turn them out to starve when they are too old to work.

THE PRESENT SYSTEM WILL ONLY PRODUCE CURS.

Harper's Weekly, April 22, 1876

The Purpose of Civil Service

- Purpose of a civil service system:
 - To avoid or eliminate political patronage (spoils system)
 - To promote the “merit principle” and create a merit-based system based upon:
 - Examinations
 - Job-related qualifications
 - Classifications of positions
 - Career-focused tenure

(See e.g., Government Code section 18500)

The Purpose of Civil Service (cont.)

- Early California Supreme Court cases-
 - 1941– ***Allen v. McKinley***, 18 Cal.2d 697
 - Eighteen SF tax employees challenged an open-exam for a new position, because the SF County Charter stated that “when practicable,” current employees should be promoted, rather than new employees hired through an open-exam system.

The Purpose of Civil Service (cont.)

- The *Allen* court held that:
 - This provision embodies one of the fundamental concepts of a sound civil service system;
 - All authorities agree that promotions are an essential part of a sound civil service system;
 - The purpose of civil service is twofold--to abolish the so-called spoils system, and to increase the efficiency of the service by assuring the employees of continuance in office regardless of what party may then be in power; and
 - Efficiency is secured by the knowledge on the part of the employee that promotion to higher positions when vacancies occur will be the reward of faithful and honest service. (*Allen v. McKinley, supra*, 18 Cal.2d at 705).

The Purpose of Civil Service (cont.)

- 1949--***Almassy v. L.A. County Civil Service System***, 34 Cal.2d 387
 - A probation officer in LA County challenged the validity of two promotional exams, both of which he failed. This was an early test of the authority of county civil service commissions (note that the date is 1949, the year the Enabling Law came into effect).
 - The officer lost the case, and court cited *Allen v. McKinley*.

The Purpose of Civil Service (cont.)

- The *Almassy* court held that:
 - Unquestionably, the ascertainment of fitness and merit for office is the primary objective of the civil service system;
 - A competent procedure for promotion is an essential part thereof;
 - The *Allen* court was correct that the purpose of the civil service system is:
 - "to abolish the so-called spoils system" in the matter of appointment in the service;
 - "to increase the efficiency" of employees therein "by assuring [them] of continuance in office regardless of what party may then be in power"; and
 - to increase the opportunity "for promotion to higher positions when vacancies occur [as] the reward of faithful and honest" work.

The Purpose of Civil Service (cont.)

- Section Recap:

- The purpose of civil service is:

- To eliminate the spoils system
- To establish a merit-based system
- To encourage promotion from within
- To encourage longevity of careers
- To match those with the skills with the job that needs them

Brief History of the Commission

Established 1949



Brief History of the Commission

- 1947—County Civil Service Enabling Law
 - Government Code sections 31100 -31117
 - Authorized Board of Supervisors to adopt a civil service system (section 31104)
 - Required approval of voters (Section 31105)
 - Required appointment of Commission (Section 31110)
 - Authorized Commission to issue subpoenas, administer oaths to witness before the Commission
 - Provided for election/appointment of Commissioners

Brief History of the Commission (cont.)

- 1949—Voters approved Civil Service Commission Ordinance creating Commission
- SLO County Ordinance 2.40.10 – 2.40.150 established the Commission
- Commission duties include:
 - Prescribe, amend, repeal and enforce rules for the classified service, which shall have the force and effect of law.
 - Keep minutes of its proceedings and records of its examinations.

Brief History of the Commission (cont.)

- Make investigations concerning the enforcement and effect thereof and of the rules and efficiency of the service.
- Make an annual report to the Board of Supervisors.

(SLO Co. Ord., sec. 2.40.070).

Brief History of the Commission (cont.)

- Duties of the Personnel Director (Human Resources Director):
 - Administer the civil service system “under general supervision of the commission.”
 - Administer the civil service system pursuant to rules adopted by the Commission.
 - Provide a secretary to the Commission (to be approved by the Commission .
 - Prepare a budget for the Commission
 - Advise the Commission upon civil service matters
 - Maintain records of the Commission

SLO Co.Ord. sec. 2.40.70(b).

Brief History of the Commission (cont.)

- The Commission is required to provide rules for:
 - Classification of all positions.
 - Open examinations.
 - Creation of eligible lists from competitive examination.
 - For appointment of 1-10 persons standing highest on list.
 - For noncompetitive examinations for minor positions when competition is not practical.
 - For noncompetitive examination eligible lists.
 - For appointments from both competitive and noncompetitive lists.
 - For public advertisement of examinations. For rejection of candidates who fail to comply with Commission requirements, or otherwise have issues regarding qualifications.

Brief History of the Commission (cont.)

- For probationary periods.
- For provisional appointment of persons when no eligible list exists.
- For temporary appointments to nonpermanent positions.
- For transfer from one position to another.
- For reinstatement of permanent employees to their positions under certain circumstances.
- For promotions.
- For performance review and reporting.
- For grievance and complaint resolution.
- For adoption and amendment of rules after public notice and hearing.

(SLO Co.Ord. sec. 2.40.80).

Jurisdiction of the Commission

Responsibilities and Types of Cases Heard



Jurisdiction of the Commission (cont.)

- Responsibilities of the Commission:
 - **Civil Service Commission Rule 3.01:**
 - Prescribe, amend, repeal and enforce Civil Service Rules
 - Oversee administration of County Civil Service Program
 - Consider legitimacy of grievances and hear appeals and grievances
 - Conduct disciplinary hearings

Jurisdiction of the Commission (cont.)

- **Types of cases before Commission (Rule 4):**
 - **Grievances**
 - *A grievance is a dispute between one or more classified employees and the County involving the interpretation, application or enforcement of a County ordinance, rule, policy, practice or agreement (Rule 4.03(a)).*
 - **Appeals**
 - *An appeal is a request for a review of an action taken by either the Human Resources Director or the Appointing Authority as set forth in Rule 4.04(b) [Types of appeals].*

Jurisdiction of the Commission (cont.)

- Grievances and Appeals-General Conditions (Rule 4.02)
 - Right of Grievant of Appellant to participate, including to be present, prepare for proceedings
 - Right to representation of “any employee or group of employees”
 - Right to be free from retaliation for participating in grievances and appeals

Jurisdiction of the Commission (cont.)

- Scope of Grievances:
 - Not everything is “grievable”
 - The scope of grievance is “limited...to complaints of unfair or improper treatment in County employment and to matters specifically involving the interpretation or applications of ordinances, rules, policies, practices and agreements.” (Rule 4.03(b)).

Jurisdiction of the Commission (cont.)

- What is specifically not grievable (Rule 4.03(b)(1)-(3):
 - Matter which requires the amendment or change to the Board of Supervisor's Policies, including:
 - County Code and Resolutions of the Board of Supervisors
 - Commission Rules
 - Matters within the Employee Relations Policy formally adopted by the Board of Supervisors
 - Any action where there is already an appeal procedure to the Commission
 - Workers compensation matters

Jurisdiction of the Commission (cont.)

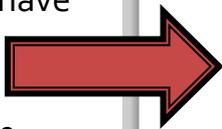
Grievance Form (available online)

Must include the following information:

Nature of Grievance – including specific facts and events that are the basis of the grievance.

Violation or Infraction – including the specific Civil Service Rule(s), Board of Supervisors regulation(s) or other law(s) you believe have not been followed.

Relief requested – list the specific remedy or solution you are seeking in order to solve this grievance.



COUNTY OF SAN LUIS OBISPO GRIEVANCE FORM

Personnel Department ■ County Government Center, 1055 Monterey St., Ste. D-250 ■ San Luis Obispo, CA 93408 ■ (805) 781-5959

Date _____ Your Job Classification Title _____
Name _____ Or Examination Title _____
Address _____ Department _____
City, State, Zip Code _____ Division _____
Telephone (805) _____ Representative (if applicable) _____

This form is required to be completed to state a **grievance** to the Civil Service Commission in accordance with Rule 4. Rule 4.05 GRIEVANCES states:

"The procedure established herein is limited to application to complaints of unfair or improper treatment in County employment and to matters specifically involving the interpretation or application of ordinances, rules, policies and agreement."

Review Civil Service Rule 4 in its entirety to ensure this form is filed within the time limits set forth in the Rules. If you have questions about the procedure, contact the Personnel Office for information. **DO NOT** contact members of the Civil Service Commission or Board of Supervisors prior to the date that your matter is scheduled for hearing.

Return the completed form in an envelope marked CONFIDENTIAL - Attention Personnel Director, County Government Center, 1055 Monterey St., Ste. D-250, San Luis Obispo, CA 93408.

Instructions: In the following space, continuing on the reverse side of this form, you are required to provide the following information. If necessary, continue on additional sheets of paper.

1. **Nature of grievance.** List the specific facts and events that are the basis of this grievance.
2. **Violation or infraction.** List the specific Civil Service Rule(s), Board of Supervisors regulations(s) or other law(s) you believe have not been followed.
3. **Relief requested.** List the specific remedy or solution you are seeking in order to solve or correct this grievance.

Important: Do not attach additional materials or evidence to this form. Please type or print legibly.

Jurisdiction of the Commission (cont.)

- Brief Overview (Three Steps) of Grievance Process (Rule 4.03(c):
 - Step 1 – Appointing Authority
 - Grievant files Grievance Form with Human Resources Director within:
 - 20 business days following event that led to dispute;
 - or within 20 business days after it is determined that the dispute cannot be resolved informally.
 - Appointing Authority investigates, confers with Grievant to resolve, prepares written reply, and serves on HR Director and Grievant
 - If grievance not resolved, proceed to Step 2

Jurisdiction of the Commission (cont.)

- Brief Overview (Three Steps) of Grievance Process (Rule 4.03(c):
 - Step 2 – Human Resources Director
 - Within 10 business days of service of Step 1 response, the Grievant may request Step 2 review by written notice to the Human Resources Director
 - Within 15 business days of service of Step 2 Notification, the Human Resources Director shall convene a meeting of the Grievant, Appointing Authority or designee, and any other necessary persons; shall document the meeting's outcome; and shall provide a copy to the parties.
 - If grievance not resolved, proceed to Step 3.

Jurisdiction of the Commission (cont.)

- Brief Overview (Three Steps) of Grievance Process (Rule 4.03(c):
 - Step 3 – Human Resources Director Routing Decision
 - Within 10 business days of service of the Step 2 response, the Grievant or may request Step 3 review by written notice to the Human Resources Director
 - Within 15 business days of service of Step 3 Notification, the Human Resources Director shall notify the parties of his or her routing decision and notify the parties of pre-hearing date and hearing date before the Civil Service Commission or the Board of Supervisors
 - A Grievant may appeal the Human Resources Director's routing decision to the Commission president within five days and the President's decision is final

Jurisdiction of the Commission (cont.)

- Final Grievance Issues (Rule 4.03(e) and (f))
 - Rejection of Grievance
 - The Human Resources Director may reject a grievance for processing “due to insufficiency of information” required by Rule 4.03
 - Failure to Respond
 - Should a Grievant fail to proceed with the next step of the grievance process, the grievance will be deemed withdrawn.
 - Should an Appointing Authority or the Human Resources Director fail to proceed, the grievance will be unresolved and the Grievant will proceed to the next level.

Jurisdiction of the Commission (cont.)

- Types of Appeals to Commission (Rule 4.04):
 - ***Grievance routing decision*** – the decision of the Human Resources Director regarding where to send the Step 3 Grievance
 - ***Classification action*** – appeal of the decision of the Human Resources Director regarding the placement of a position into a classification (either party may appeal)
 - ***Applicant disqualification*** – appeal of the decision of the Human Resources Director regarding the disqualification of an applicant for employment (applicant may appeal to Commission)
 - ***Examination administration*** – appeal of the decision of the Human Resources Director following an investigation of an alleged exam administration error, impropriety, or ambiguity in the exam process (exam candidate may appeal)

Jurisdiction of the Commission (cont.)

- Types of Appeals to Commission (cont.):
 - ***Medical or physical standards disqualification*** – appeal of the decision of the Human Resources Director regarding the disqualification of an applicant for employment for failure to meet medical or physical standards (applicant may appeal to Commission)
 - ***Eligible list rejection*** – appeal of the decision of the Human Resources Director to withhold, remove, or restore a person to or from an eligible list (candidate or employee can appeal)
 - ***Below satisfactory evaluations*** – appeal of the issuance of a performance evaluation with an overall rating of less than Satisfactory (employee can appeal)
 - ***Disciplinary actions*** – appeal of a Letter of Reprimand or final written order made by an Appointing Authority imposing discipline on an employee (employee can appeal)

Jurisdiction of the Commission (cont.)

- Types of Appeals to Commission (cont.):
 - ***Grievance rejection*** – appeal of the Human Resources Director's rejection of a grievance for insufficient information (employee can appeal)
 - ***Discriminatory probation rejection*** – appeal of the decision of an Appointing Authority to reject an employee during his or her probationary period (appeal based upon discrimination per Rule 16.02) (employee can appeal)
 - ***Discriminatory treatment*** – an allegation of discriminatory treatment as defined in Rule 16.02 (employee or applicant can appeal)

Jurisdiction of the Commission (cont.)

Commission Appeal Form

Must include:

- Appealable matter
- Specific facts
- Rule, regulation or law not followed
- Relief requested

COUNTY OF SAN LUIS OBISPO APPEAL FORM

Personnel Department ■ County Government Center, 1055 Monterey St., Ste. D-250 ■ San Luis Obispo, CA 93408 ■ (805) 781-5959

Date _____ Your Job Classification Title _____
Name _____ Or Examination Title _____
Address _____ Department _____
City, State, Zip Code _____ Division _____
Telephone (805) _____ Representative (if applicable) _____

This form is required to be completed to state an **appeal** to the Civil Service Commission in accordance with Rule 4. Rule 4.06 (a) indicates Appealable matters to be as such:

- (1) A classification action made by the Personnel Director, referred to in Rule 5.06;
- (2) A ruling by the Personnel Director, referred to in Rule 6.05;
- (3) A decision by the Personnel Director, made pursuant to Rule 8.05; and
- (4) A final written order made by an appointing authority pursuant to Rule 14.03(b).
- (5) A decision of the Personnel Director pursuant to Rule 4.05(b) Step 3(e) routing decisions.
- (6) A decision of the Personnel Director pursuant to a below satisfactory evaluation appeal under Rule 13.06.
- (7) A decision of the Personnel Director made pursuant to Rule 10.09 denying a rejected employee's name to the eligible list.

Review Civil Service Rule 4 in its entirety to ensure this form is filed within the time limits set forth in the Rules. If you have questions about the procedure, contact the Personnel Office for information. **DO NOT** contact members of the Civil Service Commission or Board of Supervisors prior to the date that your matter is scheduled for hearing.

*Return the completed form in an envelope marked CONFIDENTIAL - Attention Personnel Director,
County Government Center, 1055 Monterey St., Ste. D-250, San Luis Obispo, CA 93408.*

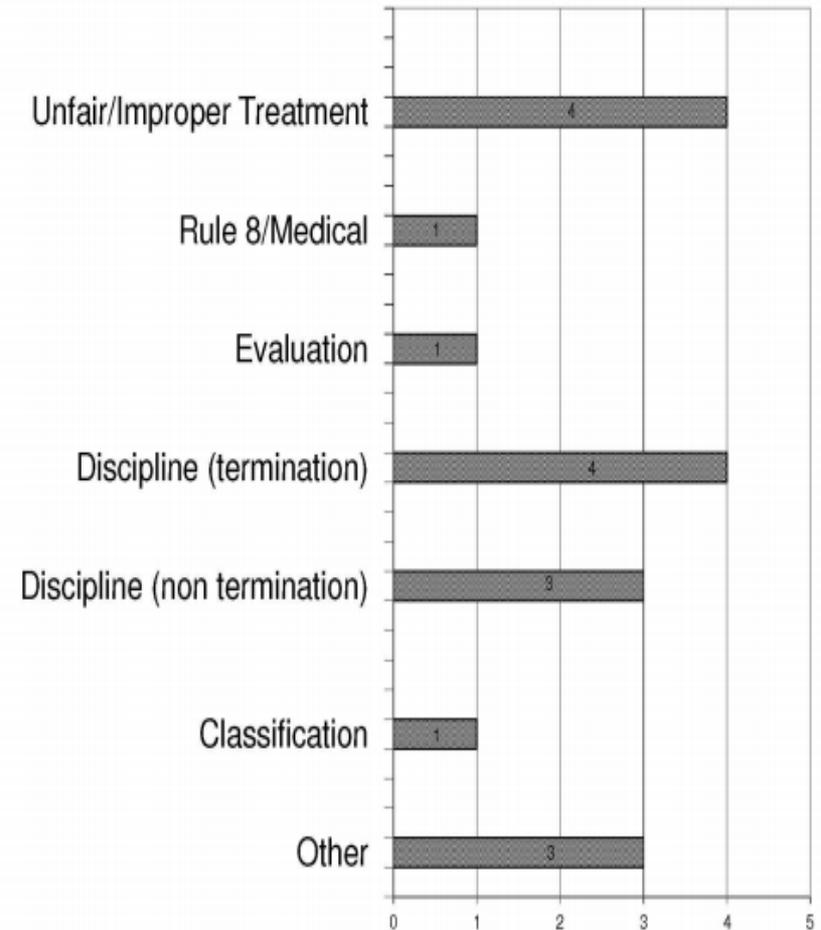
Instructions: In the following space, continuing on the reverse side of this form, you are required to provide the following information. If necessary, continue on additional sheets of paper.

1. **Nature of appeal.** List the specific facts and events that are the basis of this appeal.
2. **Violation or infraction.** List the specific Civil Service Rule(s), Board of Supervisors regulations(s) or other law(s) you believe have not been followed.
3. **Relief requested.** List the specific remedy or solution you are seeking in order to solve or correct this matter.

Important: Do not attach additional materials or evidence to this form. Please type or print legibly.

Jurisdiction of the Commission (cont.)

- **Fiscal Year 2010 – 2011**
- **Grievances and Appeals by Type**
- (source Commission Annual Report FY 2010/2011)



Jurisdiction of the Commission (cont.)

- Fiscal Year
- 2010 – 2011

- (source Commission Annual Report FY 2010/2011)

Appeals and Grievances

Rejected by Human Resources (Timeliness, non-appealable or non-grievable issues)	3
Resolved prior to Commission (withdrawn, dismissed, resolved per agreement)	6
Pending	5
Findings and Decisions	3
Total Grievances and Appeals filed	17

Administrative Hearings

Rules for Appeals and Commission Hearings



Administrative Hearings (cont.)

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He 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 v. State Personnel Board (1975) 15 Cal. 3d 194, 207; emphasis added.

Administrative Hearings (cont.)

- Sources of rules for Commission hearings
 - **Commission Procedural Guidelines, Section VI** – prehearing rules and procedures before hearing and submission of evidence
 - **Rule 4.05 – Hearings of the Commission** – rules for producing evidence and presenting at hearing
 - Rules of Administrative Law and Procedure
 - Case Law and other persuasive authority

Administrative Hearings (cont.)

- Post Appeal/Prehearing Matters
 - Prehearing Meeting (Comm. Proc. Guid., Sec. VI, A, 1) – parties meet with Commission Secretary to do the following:
 - Stipulations:
 - Enter stipulations regarding legal issues not in dispute
 - Enter stipulations regarding legal issues the Commission is to resolve
 - Enter stipulations regarding facts that are not in dispute
 - Enter stipulations regarding factual issues the Commission is to resolve

Administrative Hearings (cont.)

- Documentary evidence (“discovery”):
 - Parties must make every effort to submit to Commission Secretary 7 business days before hearing
 - Must be legible and able to be reproduced
 - Must provide original and 8 copies if colored text
 - Must redact confidential information
 - Commission Secretary will number and provide hearing packets to Commission no later than 5 business days before hearing and pre-mark exhibits:
 - Appellant’s Exhibits marked as “A”
 - Respondent’s Exhibits marked as “R”
 - Joint Exhibits marked as “J”
 - Commission Exhibits marked as “C”

Administrative Hearings (cont.)

- Witnesses
 - Commission Secretary may assist upon request of a party anticipating difficulty in obtaining a witness who is an officer or employee of the County:
 - The Secretary shall contact the officer and employee and apprise the officer and employee in lieu of issuing a subpoena, the Secretary is requesting the officer or employee's attendance at the hearing for the purpose of providing testimony to the Commission. In the event that the Secretary is unable to secure the attendance of a witness informally, if the party does not desire to utilize the services of the Secretary, or if the proposed witness is not a County officer or employee, the party may have the witness subpoenaed in accordance with Rule 4.07(l).

Administrative Hearings (cont.)

- Subpoenas
 - Commission has legal authority to issue subpoenas for witnesses and production of documents (*subpoena duces tecum*) (Ord. 2.41.010(c) and (d)).
 - Party requesting subpoena shall:
 - Obtain and complete subpoena form from Human Resources Director and Instructions for Service
 - Pay fees for SLO County Sheriff to serve subpoena
 - Limit of 10 subpoenas unless:
 - Requesting party can show good cause for more
 - Testimony of witnesses will not be cumulative

Administrative Hearings (cont.)

- **Commission Hearings**
 - President presides over hearing (Comm. Proc. Guid., Sec. VI, B)
 - Party with initial burden of proof begins presentation of case
 - Direct examination
 - Cross examination
 - Examination by Commissioners
 - Party without initial burden of proof presents case
 - Direct examination
 - Cross examination
 - Examination by Commissioners
 - Rebuttal witness *if good cause shown*
 - Summations

(See Comm. Proc. Guid., Sec. VI, B)

Administrative Hearings (cont.)

- **Rule 4.05 –The Commission Hearing**
 - Notice of Hearing – parties are to work with Human Resources Director to select mutually agreeable dates
 - If no agreement, the Commission will set a date
 - Hearing can be continued upon good cause showing to Human Resources Director
 - Failure of a grievant or appellant to appear without good cause shall be deemed a withdrawal of his or her grievance/appeal and consent to the prior ruling or action (Rule 4.05(c)).

Administrative Hearings (cont.)

- **Rights of parties at hearing:**
 - Be represented by legal counsel or otherwise represented at such hearings and;
 - Testify under oath and;
 - Question under oath any witnesses or other persons involved in or related to the matter being considered and;
 - Impeach any witnesses before the Commission and;
 - Present such affidavits, exhibits, and other evidence as the Commission deems relevant to the inquiry; and
 - Argue his/her own case and
 - Receive a copy of recordings or transcripts of statements made during investigations and which were relied upon in taking the action, pursuant to *Skelly v. State Personnel Board*.

Administrative Hearings (cont.)

- Rule 4.05 –The Commission Hearing
 - Rules of Evidence for Commission Hearings (Rule 4.05(d))
 - Informal rules –not conducted by formal rules evidence such as in court
 - Relevant evidence shall be admitted regardless of existence of any law that would render it inadmissible
 - Hearsay evidence may be admitted for any purpose but if a party timely objects, it cannot support a finding of the Commission
 - Privileges apply as in a civil action
 - Rules of official or judicial notice are same as in a civil action
 - Commission may ***exclude evidence*** that is irrelevant or repetitious
 - Oral evidence must be under oath or affirmation

Anatomy of a Disciplinary Action

Causes, Defenses and Penalties



Anatomy of a Disciplinary Action

- Types of Disciplinary Actions (Rule 14.01)
 - Types:
 - Demotions
 - Suspensions
 - Dismissals
 - Reduction in compensation
 - Employees who have attained Permanent Status (passed probation)
 - Must “consult with” HR Director and County Counsel prior to imposing final discipline

Anatomy of a Disciplinary Action

- Grounds for Disciplinary Actions (Rule 14.02)
 - Similar to Government Code section 19572 (State Personnel Board)
 - 16 different grounds
 - Grounds are usually defined by law
 - Pleading incorrect grounds will likely result in dismissal of charges (or inability to prove elements)
 - Appointing authority must prove the elements of its cause of action by “preponderance of evidence” (Rule 4.05(h))

Anatomy of a Disciplinary Action

- **Preponderance of the Evidence**: As the California Supreme Court held in *Skelly v. Superior Court* (1975) 15 Cal.3d 194, 204, fn. 19:
 - At such hearing, the appointing power has the burden of proving by a preponderance of the evidence the acts or omissions of the employee upon which the charges are based and of establishing that these acts constitute cause for discipline under the relevant statutes. ..The employee may try to avoid the consequences of his actions by showing that he was justified in engaging in the conduct upon which the charges are based.

Anatomy of a Disciplinary Action

- Definitions of Causes for Discipline—
 - Importance of knowing definition of cause for discipline to be charged
 - Appointing authority must prove elements
 - The lesson of “Intemperance”
 - Government Code section 19572(h) under State Civil Service Act – “*intemperance*” is grounds for discipline

Anatomy of a Disciplinary Action

- **QUIZ: What is intemperance?**
 - *Losing one's temper in front of others?*
 - *Lack of restraint?*
 - *Habitual intoxication or drunkenness?*
 - *Angry outburst at your supervisor?*



Anatomy of a Disciplinary Action

- State Personnel Board defined this term finally in 1995:
 - Intemperance has been listed as a cause for discipline since the first State Civil Service Act was enacted in 1913. [Civil Service Act, Ch. 590, June 16, 1913.]
 - SPB Precedential Decision, *Sharp-Johnson*, 95-14 addressed this issue

Anatomy of a Disciplinary Action

- State Personnel Board held:
 - When appellants Sharp and Johnson engaged in a series of childish and disruptive confrontations in DMV's mass mailing department, the ALJ erred in finding that "appellants' conduct demonstrated a lack of restraint which he found to constitute intemperance."
 - The Board rejected the ALJ's Proposed Decision in part to examine whether "intemperance" as used in Government Code § 19572, subdivision (h), could be construed to include all excessive behavior or whether "intemperance" as used in the statute refers solely to conduct arising out of the use of alcohol.

Anatomy of a Disciplinary Action

- State Personnel Board concluded:
 - Although intemperance has never been defined in the Civil Service Act or Government Code, conduct identified as habitual intemperance was cited as a ground for divorce as early as 1870, [Act of March 12, 1870, ch. CLXXXVIII, 1870 Cal. Laws], and defined in 1872.
 - The legislature defined "habitual intemperance" as: that degree of intemperance from the use of intoxicating liquor, which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon an innocent party. [Civil Code § 106 (repealed 1969)].

Anatomy of a Disciplinary Action

- Thus, as early as 1872, intemperance was defined in the law as conduct arising out of the use of intoxicating liquor. Consequently, we think it only reasonable that when the legislature specified intemperance as a cause for discipline in 1913, the legislature meant intemperance due to the use of alcohol rather than any excessive behavior or lack of restraint. (*Sharp-Johnson*, SPB Precedential Decision 95-15).

Anatomy of a Disciplinary Action

- Definitions of Commission Rule 14.02 Causes for discipline:
 - Any reason specified in Rule 6.03 regarding disqualification of applicants for employment and removal from eligible list
 - **(b) Incompetence** -- Defined as the “Absence of qualifications, ability or fitness” to perform duties (*Pollack v. Kinder* (1978) 85 Cal.App.3d 833, 839).

Anatomy of a Disciplinary Action

- Other examples of incompetence:
 - "Incompetency is generally found when an employee fails to perform his or her duties adequately within an acceptable range of performance." (*Fortunato Jose* (1993) SPB Dec. No. 93-34 at p.3)
 - Incompetence is generally more than one incident/error, but a "pattern" of lack of ability/performance. (*MD* (1995) SBP Dec. No. 95-10)
 - Repeated failure by police officer to meet incident reporting standards IS incompetence (*MS* (1994) SPB Dec. No. 94-19)
 - NOT incompetence when drunk employee (off-duty) crashes car in agency parking lot and damages sign, because NOT on duty and NOT related to work performance (*Rey* (1999) SPB Dec. No. 99-10).

Anatomy of a Disciplinary Action

- Definitions of Commission Rule 14.02 Causes for discipline:

- **(c) Inefficiency** — A charge of inefficiency is most often appropriate “*when an employee continuously fails to achieve a set level of productivity or fails to produce an intended result with a minimum of waste expense or unnecessary effort.*” (RB, (1993)SPB Dec. No. 93-21)

Anatomy of a Disciplinary Action

- Other examples of inefficiency
 - CHP officer did NOT commit “inefficiency,” when he used state car and time to inappropriately visit civilian several times. (*SK (1995) SPB Dec. No. 98-05*).
 - NOT inefficiency when employee has unexcused absences (*Carver (1996) SBP Dec. No. 96-18*).
 - Repeated failure to meet incident reporting standards is inefficiency (*MS (1994) SPB Dec. No. 94-19*).

Anatomy of a Disciplinary Action

- Definitions of Commission Rule 14.02 Causes for discipline:
 - **(d) Inexcusable neglect of duty** — “The intentional or grossly negligent failure to exercise due diligence in the performance of a *known* official duty.” (UN, SPB Dec. No. 93-10)

Anatomy of a Disciplinary Action

- **Other examples of inexcusable neglect of duty**
 - Employees committed inexcusable neglect of duty when:
 - State Police officer drove fast through intersection, while failing to turn on lights/siren (*DM (1995) SPB Dec. No. 95-10*)
 - CHP committed inexcusable neglect of duty when he visited civilian during work hours, did not document and failed to notify dispatch of his whereabouts (*KS (1998) SPB Dec. No. 98-05*)
 - Correctional officer neglected duty when she failed to follow protocol and unnecessarily disciplined an inmate in front of other inmates, thus causing unnecessary commotion and disturbance (*WE (1999) SPB Dec. No. 99-09*).

Anatomy of a Disciplinary Action

- **Employees must be aware of *known duty*:**
 - Staff analyst violated “chain of command” policy by sending out work-related concerns to outside agency/personnel (*Betz (1996) SPB Dec. No. 96-10*) [no evidence employee “knew” of this policy]
 - Bridge engineer used state computers and phone for personal business and committed “inexcusable neglect” since employee knew of duty to only use state equipment for official purposes (*Crovitz (1996) SPB Dec. No. 96-19*)

Anatomy of a Disciplinary Action

- **Definitions of Commission Rule 14.02 Causes for discipline:**
 - **(e) Insubordination** – “In summary, to support a charge of insubordination, an employer must show mutinous, disrespectful or contumacious conduct by an employee, under circumstances where the employee has intentionally and willfully refused to obey an order a supervisor is entitled to give and entitled to have obeyed. A single act may be sufficient to constitute insubordination if it meets the above test.” Richard Stanton (1995) SPB Dec. No. 95-02 citing *Coomes v. State Personnel Board* (1963) 215 Cal.App.2d 770

Anatomy of a Disciplinary Action

- **Examples of insubordination:**
 - Employee failed to submit to a sobriety test when ordered to do so (*Flowers v. State Personnel Board* (1985) 174 Cal.App.3d 755)
 - Correctional officer found to be insubordinate for one incident of refusing to work her scheduled hours (*Martin v. State Personnel Board*, 132 Cal.App.3d 460)
 - CHP officer found to be insubordinate for refusing to cooperate during an administrative investigation (*Fout v. State Personnel Board* (1982) 136 Cal.App.3d 817)
 - Insubordination found when state employee purposely communicated confidential information after he was specifically ordered not to release the information (*Black v. State Personnel Board* (1955) 136 Cal.App.2d 904)

Anatomy of a Disciplinary Action

- **Definitions of Commission Rule 14.02**

- Causes for discipline:**

- (f) **Dishonesty** – “intentional misrepresentation of known facts, willful omission of pertinent facts, or a disposition to lie, cheat or defraud.” (*Marc Shelton* (1994) SPB Dec. No. 94-19)

Anatomy of a Disciplinary Action

- **Examples of dishonesty:**
 - Falsifying incident report, lying to investigators is “dishonesty” (*Aguilar* (2009) SPB Decision 09-01)
 - Hiding towels and lying to security guard is “dishonesty” even when employee was “off-shift” (*Nguyen* (1999) SPB Dec. No. 99-01)
 - Employee was not dishonest when he subjectively believed he could answer “no” to a pre-employment question asking whether he had been fired from any previous position (on advice from legal counsel, and reasonable subjective belief) (*Toby* (2001) SPB Dec. No. 01-04)

Anatomy of a Disciplinary Action

- **Definitions of Commission Rule 14.02**

- Causes for discipline:**

- (g) **Inexcusable absence without leave** – when the employee is absent from work or a work related assignment or permission (*Frances Gonzales* (1993) SPB Dec. No. 93-13, pp. 3-4; *Haji Jameel* (2005) SPB Dec. No. 05-02, p. 16).

Anatomy of a Disciplinary Action

- **Sustaining charge of “inexcusable absence without leave” –**
 - In *Frances P. Gonzalez*, (1993) SPB Dec. No. 93-13, the Board sustained this charge for an otherwise good employee who had back problems. The Board held:
 - An employee's failure to meet the employer's legitimate expectation regarding attendance results in an inherent harm to the public service. The tardiness of one employee, if tolerated, adversely affects the morale of those who meet their obligations. The nature and extent of the particular harm in the instant case was established through the testimony of appellant's supervisor, Douglas Hoffman. Thus, the harm to the public service resulting from appellant's excessive tardiness is clear (*Gonzalez*, (1993) SPB Dec. No. 93-13, p. 4).

Anatomy of a Disciplinary Action

- **Definitions of Commission Rule 14.02**

- Causes for discipline:**

- (h) **Discourteous treatment of the public or other employees** – can be threatening comments, rude and condescending comments, and even abruptly leaving a meeting (*Bill Balvanz* (1996) SPB Dec. No. 96-16).

Anatomy of a Disciplinary Action

- **Examples of discourteous treatment of the public or other employees:**
 - Correctional officer committed “discourtesy,” when she called a fellow employer a “rat snitch,” ignored orders from a superior, and then she belittled an inmate in front of others. (*WE* (1999) SPB Dec. No. 99-09).
 - Discourteous treatment sustained when off-duty correctional officer struck wife because peace officers are held to high-standard to uphold law at all times (*JH* (2003) SPB Dec. No. 03-05)

Anatomy of a Disciplinary Action

- **Definitions of Commission Rule 14.02 Causes for discipline:**
 - (i) **Improper political activity** – No State Personnel Board cases on this – when an employee kept placing political literature in a waiting room of his state office he committed “improper political activity” (*Gipner v. State Civil Service Commission of California* (1936) 13 Cal.App.2d 100)
 - *See Conduct unbecoming of an employee in public service*

Anatomy of a Disciplinary Action

- **Definitions of Commission Rule 14.02**
Causes for discipline:
 - **(j) Willful disobedience** – For an employee to commit willful disobedience, he or she must violate a specific order or command (*Peters v. Mitchell* (1963) 222 Cal.App.2d 852, 862). In addition, there must be an intent to violate the order or command (*Coomes v. State Personnel Board* (1963) 215 Cal.App.2d 770, 775).

Anatomy of a Disciplinary Action

- **Difference between “insubordination” (Rule 14.02(e) and “willful disobedience” (Rule 14.02(j):**
 - The court in *Coomes v. State Personnel Board* highlighted the difference between insubordination and willful disobedience, which are often confused with each other:
 - So far as they are distinguishable, dictionary definitions indicate that disobedience connotes a specific violation of command or prohibition, while insubordination implies a *general course of mutinous, disrespectful or contumacious conduct*. In the statute, the term ‘disobedience’ is modified by the adjective ‘willful,’ but the ground of insubordination is without a modifying adjective. *Still, the latter term carries a volitional coloration which excludes the notion of accidental or even negligent conduct.* (*Coomes*, (1963) 215 Cal.App. 2d 770, 775).

Anatomy of a Disciplinary Action

- **Examples of “willful disobedience” :**
 - Theft of paper towels (state property) by employee from State Printing Plant when department issued a memo about theft of property and employee knew the rules and a memo is “willful disobedience” (*Nguyen* (1999) SPB Dec. No. 99-01). NOTE however that this employee was found NOT to be insubordinate.
 - Refusal to provide doctor’s note is not “willful disobedience” (*Carver* (1996) SPB Dec. No. 96-18)
 - Use of state computers and phone for personal business is “willful disobedience” when employee was explicitly told not to do so (*Crovitz* (1996) SPBN Dec. No. 96-19)

Anatomy of a Disciplinary Action

- **Definitions of Commission Rule 14.02**

- Causes for discipline:**

- **(k) Misuse of County Property** – Theft or intentional misuse of state property, for non-state purpose, and usually (but not always) for personal gain (*Robert Boobar* (1993) SPB Dec. No. 93-21).
- Note however that “personal gain” is NOT a required element

Anatomy of a Disciplinary Action

- **Examples of Misuse of County Property –**
 - When a CHP officer lost his radio extender, he should have been charged perhaps with inexcusable neglect of duty, but not misuse of state property. (*Robert Boobar* (1993) SPB Dec. No. 93-21).
 - "Misuse of state property" may also connote improper or incorrect use, or mistreatment or abuse of state property. (*Id.*)

Anatomy of a Disciplinary Action

- **Examples of Misuse of County [state] Property –**
 - In *Flowers v. State Personnel Board* (1985) 174 Cal. App. 3d 753, the Court of Appeal affirmed the dismissal of a correctional officer who had been charged with misuse of state property based on evidence that he removed a public address system from the facility in which he worked, telling another correctional officer that the system belonged to him.
 - In *Wilson v. State Personnel Board*, (1974) 39 Cal. App. 3d 218, the court noted that the appellant, a fish and game warden, had misused state property when he used his patrol vehicle for personal business.

Anatomy of a Disciplinary Action

- **Examples of Misuse of County [state] Property –**
 - *Ernest Dale Switzer* (1992) SPB Dec. No. 92-14, we found that a fire apparatus engineer had misused state property when he used state time and a state vehicle to facilitate a private business arrangement between an inmate he supervised and another party who did not work for the state.

Anatomy of a Disciplinary Action

- **Examples of Misuse of County [state] Property –**
 - **CHP Officer firing gun at fleeing suspect –** (*WM (1994) SPB Dec. No. 94-26*). The Board held:
 - Generally speaking, misuse of state property does not occur when an employee uses state property for the purpose for which it was intended even if there is some other element of error attached to the use. For example, if a state worker used the state telephone to conduct personal business during state time, a department might file charges under the Government Code § 19572, subdivision (p) misuse of state property because the worker was not using the telephone for the purpose it was intended – state business. If, however, the same state worker, used the telephone to communicate with another employee about a work assignment but, in the course of the conversation, made abusive comments, the worker might be found to have been discourteous, but he would not have misused the telephone...

Anatomy of a Disciplinary Action

- **Definitions of Commission Rule 14.02**

- Causes for discipline:**

- (I) **Violations of County or departmental rules or policies** – similar to willful disobedience. Must be a known policy or rule.

Anatomy of a Disciplinary Action

- **Definitions of Commission Rule 14.02 Causes for discipline:**
 - (m) **Conduct unbecoming an employee in the public service** – a failure of behavior or conduct that is connected to and reflects poorly upon the public service.
 - Requires harm to or impairment of the public service.
 - Sort of a “catch all provision”
 - SPB calls it “other failure of good behavior” (Gov. Code § 19572(t))

Anatomy of a Disciplinary Action

- Best defined by Court of Appeal in *Yancey v. State Personnel Board* (1985) 167 Cal.App.3d 478:
 - There must be more than a failure of good behavior before the Board may discipline an employee [for conduct unbecoming]. The misconduct must be of such a nature as to reflect upon the employee's job. In other words, the "misconduct must bear some rational relationship to his employment and must be of such character that it can easily result in the impairment or disruption of the public service. [Citations.] The legislative purpose behind [this sections] was to discipline conduct which can be detrimental to state service. [Citations.] It is apparent that the Legislature was concerned with punishing behavior which had potentially destructive consequences." [Citations]. The Legislature did not intend "... to endow the employing agency with the power to dismiss any employee whose personal, private conduct incurred its disapproval.'" [Citations] (*Yancey, supra, 167 Cal.App.3d at 483*).

Anatomy of a Disciplinary Action

- **Examples of conduct unbecoming an employee in the public service:**
- The conduct of an instructor at a correctional facility who was convicted for an off-duty DUI has sufficient “nexus” to the job position to warrant discipline. (*Lori Ann Mills* (1993) SPB Decision No. 93-36).
- CHP Sergeant's “personal visits to a woman while on duty constituted a failure of good behavior, which bears a rational relationship to his employment and is of such a character that it can easily result in the impairment or disruption of the public service.” (*SK* (1998) SPB Dec. No. 98-05).
- State police officer in uniform, in state car, while failing to turn on siren/lights, sped through intersection. Discipline sustained as there was sufficient nexus, and poor reflection on job/department (*MB*, (1995) SPB Dec. No. 95-10).

Anatomy of a Disciplinary Action

- **Definitions of Commission Rule 14.02**
Causes for discipline:
 - **2011 Additions**
 - (n) Negligence
 - (o) Unauthorized release of confidential information from official records
 - (p) Overall unsatisfactory performance evaluation as defined in Rule 13.04
 - Unsatisfactory ratings are cause for discipline (Rule 13.04(b))
 - Failure to improve unsatisfactory ratings is cause for discipline (Rule 13.04(b)).

The Commission's Decision

The Process of Rendering a Decision



The Commission's Decision

- **Hearing Alternative: Submission of Written Argument**
 - Rule 4.05(g) provides that if the facts of a grievance or appeal are not in dispute, the parties may agree to submit the matter on written argument
 - The Commission retains discretion to set the matter for hearing
- **Written Hearing Briefs**
 - Either party may submit a written hearing brief containing the “law applicable to the facts”

The Commission's Decision

- **Recording of Hearing**
 - Rule 4.05(j) provides that the hearing shall be recorded “via auditory recording” and a copy shall be made available to the parties
 - A party may request stenographer if the requesting party pays the costs
- **Findings and Decision of Commission**
 - After the close of the hearing, Commission adjourns to closed session to “deliberate and issue written evidentiary findings and a decision”
 - In an appeal hearing, the Commission shall “affirm, revoke, or modify the order action or ruling.”
 - In a grievance hearing, the Commission will rule on the dispute
- **Distribution**
 - The Decision shall be served promptly upon the Grievant/Appellant, the Appointing Authority, and other interested persons

Judicial Review of the Commission's Decision

Petition for Writ of Administrative Mandate



Judicial Review of the Commission's Decision

- **Commission Decisions are reviewable in court**
 - **Rule 4.05(i)(3) provides :**
 - In those cases where a party to the hearing is entitled to a judicial review of the Commission's findings and decisions, the petition to the reviewing court shall be in accordance with the then existing law governing the reviewing court.
- **Petition for Writ of Administrative Mandate (Code of Civil Procedure section 1094.5)**
 - **Superior court reviews Commission Decision**
 - **Limited to review of administrative record**

Judicial Review of the Commission's Decision

- **Common Grounds for Petition for Writ of Administrative Mandate:**
 - Commission proceeded without jurisdiction
 - Commission proceeded in excess of its jurisdiction
 - Petitioner did not receive a fair trial
 - Commission abused its discretion in a prejudicial manner
 - Commission failed to proceed by law
 - Commission's findings are not supported by the evidence in the record
 - The findings do not support the decision

Judicial Review of the Commission's Decision

- Court's review of Commission decision is based upon "**substantial evidence test**":
 - It is well-established that an employer's right to discipline or manage its employees ... is not a fundamental vested right entitling the employer to have a trial court exercise its independent judgment on the evidence. [Citations.]" (*Los Angeles County Dept. of Parks & Recreation v. Civil Service Com.* (1992) 8 Cal.App.4th 273, 279) **Therefore, the trial court was required to utilize the substantial evidence test in reviewing the commission's decision.** (*County of Los Angeles v. Civil Service Com.* (1995) 39 Cal. App. 4th 620, 633).

Judicial Review of the Commission's Decision

- **Substantial evidence** is defined as:
 - Relevant evidence that a reasonable mind might accept as adequate to support a conclusion (*California Youth Authority v. State Personnel Bd.* (2002) 104 CA4th 575, 128 CR2d 514; *Desmond v. County of Contra Costa* (1993) 21 CA4th 330)
 - "Evidence of ponderable legal significance... reasonable in nature, credible, and of solid value." (*Young v. Gannon* (2002) 97 CA4th 209, 225; *Newman v. State Personnel Bd.* (1992) 10 CA4th 41, 47)

Judicial Review of the Commission's Decision

- **Remedies available from trial court:**
 - Deny petition and uphold Commission Decision
 - Grant petition and:
 - Set aside decision
 - Remand to Commission for further proceedings

Judicial Review of the Commission's Decision

- **Court cannot assess penalty:**
 - Court cannot set or “fix” a penalty, but must remand back to the agency
 - Courts will not interfere with penalty of Commission unless a very apparent abuse of discretion took place (See *Landau v Superior Court* (2000) 81 CA4th 191, 218, (quoting from *Maxwell v Civil Serv. Comm'n* (1915) 169 Cal 336)
 - A test often used by the courts to determine if there has been an abuse of discretion is whether reasonable minds could differ as to the propriety of the penalty. If reasonable minds could differ, the agency's penalty determination will be upheld. (*Landau v. Superior Court* (2000) 81 CA4th 191; *Lake v Civil Serv. Comm'n* (1975) 47 Cal.App.3d 224, 228)

THANK YOU!



Steven L. Simas

www.simasgovlaw.com

ssimas@simasgovlaw.com

805.547.9300

