

TRAINING



BULLETIN

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"Department Training Bulletins shall be used to advise members of current police techniques and procedures and shall constitute official policy."

DUE PROCESS HEARINGS

The purpose of this Training Bulletin is to set forth Department policy and procedures for offering *Skelly* Hearings to non-probationary members or permanent civil service employees facing disciplinary action. For the purpose of the Training Bulletin, the terms "member" or "employee" or "subject personnel" refer to a non-probationary member or permanent employee, unless otherwise specifically denoted. This Training Bulletin additionally sets forth the circumstances in which *Lubey* Hearings must be offered to probationary members/employees who are terminated for specific reasons that may result in stigma or that foreclose other employment opportunities.

SKELLY HEARINGS

The federal and state constitutions prohibit deprivation of life, liberty, and property without procedural due process. Courts have found that a member/employee's permanent civil service job is defined as "property." Accordingly, an employer seeking to deprive a civil service employee of pay must provide notice of the proposed discipline and an opportunity to respond at a pre-termination hearing¹. The hearing is not a full trial-type hearing. There is no right to representation by counsel or to confront or cross-examine witnesses.² A member/employee may instead choose to respond in writing and forego a hearing.

WHAT NOTICE MUST A MEMBER/EMPLOYEE RECEIVE?

The Department must provide an employee/member with notice of the proposed disciplinary action, the reasons for the action, a copy of the charges and the materials upon which the action is based. The use of the word "materials" does not require the Department to produce each and every document that is part of the Department's Internal Affairs investigation.³ What must be produced is the relevant supporting evidence. There is no requirement that the Department produce what an employee/member may contend is "exculpatory" evidence that was not relied upon by the Department in reaching its decision⁴.

WHO CAN SERVE AS A SKELLY OFFICER?

The pre-termination hearing must occur before a "reasonably impartial and noninvolved reviewer."⁵ The *Skelly* Officer must not be a potential witness or have had a role in initially recommending or investigating the allegations.

¹ A reclassification to a lower class does not constitute a demotion or require a *Skelly* Hearing. *Schultz v. Regents*, 160 Cal. App. 3d 768 (1984).

² *Skelly v. State Personnel Board*, 15 Cal. 3d 194.

³ *Gilbert v. City of Sunnyvale*, 130 Cal. App. 4th 1264 (2005).

⁴ *Id.* at 1280. *See also Holmes v. District Attorney*, 68 Cal. App. 4th (1998).

⁵ *Titus v. Civil Service Comm.*, 130 Cal. App. 3d 357 (1982).



SCOPE OF *SKELLY* OFFICER REVIEW

In determining whether reasonable grounds exist for proposed discipline, the *Skelly* Officer needs to consider the following:

- Did the Department adequately warn the member/employee of the consequences of his/her conduct?
- Did the Department investigate the allegation(s) before administering discipline?
- Was the investigation complete, fair, and objective?
- Did the investigation establish a preponderance of evidence to support the finding?
- Were the rules, orders, and penalties applied without bias?
- Is the proposed discipline just, considering the member/employee's past disciplinary record?

RESPONSIBILITIES OF A *SKELLY* OFFICER

Review of *Skelly* Documents

The *Skelly* Officer has a responsibility to review the *Skelly* letter, all the materials upon which the proposed discipline is based, and any response submitted by the member/employee.

When the member/employee requests a *Skelly* Hearing, but does not submit a formal response or attend the meeting, the *Skelly* Officer must still complete a review of the materials provided.

Scheduling the *Skelly* Hearing

A member/employee receiving a *Skelly* Letter needs to review the correspondence upon receipt. The *Skelly* Letter sets forth the member/employee's deadline for responding to the contents of the letter, orally or in writing. The *Skelly* Letter also advises the member/employee of the time and date for the *Skelly* Hearing.

The *Skelly* Officer, after conferring with the IAD Commander, may grant a reasonable extension for the member/employee to respond, based on the seriousness and complexity of the allegation(s).

Any requests from a subject member/employee or his/her representative regarding the proposed discipline, the *Skelly* file, additional documents, or the initial scheduling of the *Skelly* Hearing date shall be referred to the IAD Commander. All written correspondence received from a subject member/employee or his/her representative shall be forwarded to the IAD Commander.

Before the Meeting

The *Skelly* Officer shall:

- Be familiar with the City's Administrative Instruction 521;
- Disqualify themselves if directly connected to the initial recommendation for disciplinary action, were involved in the investigation, or serve in the member/employee's chain of command;
- Thoroughly review the pre-disciplinary *Skelly* letter and all attached materials, including the member/employees disciplinary history, and listen to audio recordings;



- Understand that the member/employee may have one (1) representative at the *Skelly* Hearing, who may be a union representative, attorney, or other individual. Make certain that if a representative will not be attending, the member/employee executes a written waiver of representation.
- Work with the member/employee or their representative to arrange for a mutually convenient time and location if rescheduling the *Skelly* Hearing is necessary;
- Remember the *Skelly* Hearing is not an evidentiary hearing. The member/employee is also entitled to the appeal process set forth in the applicable Memorandum of Understanding;
- Ensure adequate time is scheduled to allow the member/employee or their representative to fully respond to the allegation(s) and/or provide evidence of mitigating circumstances;
- Confer with the Office of the City Attorney to determine whether a City representative needs to attend and make appropriate scheduling arrangements; and
- Consult with Employee Relations or the Office of the City Attorney if procedural advice is needed.

During the Hearing

The *Skelly* Officer shall:

- Introduce him/herself and all parties in attendance;
- Explain the meeting is an informal opportunity for the member/employee or their representative to respond to the allegation(s) and facts described in the *Skelly* Letter;
- Advise all parties that all the materials in the *Skelly* file have been reviewed;
- Review the contents of the *Skelly* Letter and supporting documentation to make sure the member/employee or their representative has received and reviewed the allegation(s), facts, and supporting documentation;
- Proceed with the meeting by asking the member/employee or their representative to respond to the allegation(s) in the *Skelly* Letter and allow them to present their arguments;
- Listen carefully to what the member/employee or their representative has to say;
- Avoid asking questions unless necessary to clarify information that has been presented.
- Maintain control of the proceeding;
- Honor reasonable requests for breaks;
- Take good notes and carefully document any objections the member/employee or their representative may raise;
- Contact IAD if new information concerning the member/employee's misconduct comes to light so that IAD may consider whether the information requires additional investigation; and
- Inform the member/employee or their representative that the matter will be taken under consideration and a written recommendation will be submitted to the Chief of Police.



The *Skelly* Officer:

- Shall not suggest the manner (oral or written) in which the employee must respond to the proposed allegation(s);
- Shall not argue with the member/employee or their representative;
- Shall not allow the member/employee or their representative to ask questions about the case or the Department's actions leading up to the proposed discipline;
- Shall not allow the member/employee or their representative to audio record the hearing unless both parties agree to record the meeting;
- Shall not make a settlement offer, agree to any settlement, or give any indication that the Department may agree to compromise the case; and
- Shall not communicate the *Skelly* recommendation to the member/employee or their representative.

After the Hearing

- Decide whether the information provided by the member/employee or their representative requires changes to the Department's recommendation;
- Maintain confidentiality and only discuss the case with those who qualify on a need-to know-basis; and
- Submit a written recommendation to the Chief of Police within 14 calendar days of the *Skelly* Hearing. If the submission deadline cannot be met, a request for an extension must be approved by the Chief of Police.

PREPARING THE *SKELLY* RECOMMENDATION

- The *Skelly* Officer prepares and submits a written recommendation to the Chief of Police describing the allegation(s), the documents reviewed prior to the hearing, and a brief summary of the points raised in opposition to the proposed discipline. The *Skelly* Officer recommends if the proposed discipline should be sustained, modified, or rescinded.

Any documents submitted by the member/employee or their representative before, during, or after the hearing shall be included in the *Skelly* file.

The Chief of Police or designee has final authority to determine whether to accept or reject the *Skelly* Officer's recommendation.

***LUBEY* HEARINGS**

An at-will member or probationary employee has no property interest in employment. However, such a member/employee suffers a deprivation of a liberty interest if the member/employee is discharged for reasons that impose stigma or that are likely to limit future employment opportunities.⁶ For that reason, a probationary member/employee who is terminated for reasons that could result in such consequences is entitled to a post-termination "name-clearing" hearing.⁷ *Lubey* Hearings are conducted in the same way as *Skelly* hearings.

⁶ *Holmes v. Hallinan*, 68 Cal. App. 4th 1523 (1998).

⁷ *Lubey v. City and County of San Francisco*, 98 Cal. App. 3d 340 (1979).

APPENDIX
Skelly Recommendation Exemplar

Hearing Date/Time:	<i>(Day, date, beginning and ending time)</i>
Hearing Officer:	<i>(Name and rank of Skelly Officer)</i>
Subject:	<i>(Name of subject employee)</i>
Representative:	<i>(Name of representative in attendance)</i>
Allegation:	<i>(Succinct description of allegation(s))</i>
MOR Violation:	<i>(Applicable violation and title)</i>
Proposed Discipline:	<i>(Level of Discipline in Skelly Letter)</i>
Recommended Discipline:	<i>(Level of discipline recommended)</i>

Pre-Hearing Review

(List all Departmental publications reviewed before the Skelly Hearing.)

Example:

I reviewed Departmental General Order M-3, Complaints Against Department Personnel and Procedures; Departmental Discipline Policy (TB V-T); Departmental Discipline Matrix (TB V-T Appendix), *Skelly* Process (TB V-T.4); and the entire *Skelly* file prepared by the Internal Affairs Division.

Post-Hearing Review

(List materials reviewed after the Skelly Hearing)

Hearing Summary

(Synopsis of what occurred and material points discussed during the Skelly Hearing.)

Analysis/Assessment

Provide a detailed analysis and assessment of the IAD finding and whether there is a preponderance of evidence to support it.

Level of Discipline

Determine whether the level of discipline is just and consistent with the seriousness of the allegation(s). Discuss if there are mitigating/aggravating circumstances present that would change the level of discipline.

Conclusion / Recommendation

Provide an affirmative statement concurring or dissenting with the finding; and provide an affirmative statement whether the proposed level of discipline is appropriate.

(Insert 5 Spaces and Signature Blocks)

Name of Skelly Officer
Rank
Unit of Assignment

Anthony W. Batts
Chief of Police