

**CHAPTER 11<sup>1</sup>**  
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**DISMISSALS, SUSPENSION AND DEMOTION**

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**CHAPTER 11  
DISCIPLINARY ACTION AND APPEALS,  
DISMISSALS, SUSPENSION AND DEMOTION**

**11.1 DISCIPLINARY POLICY**

- A. Each employee shall receive fair, impartial, and consistent treatment during any disciplinary action, regardless of the employee's position, assignment, or personal status.
- B. The District shall apply generally accepted principles of just cause and due process when disciplinary action is taken. Just cause and due process includes, but is not limited to:
  - 1. Adequate notice to the employee of the rules and regulations to be followed.
  - 2. Adequate notice of penalties to be invoked for violations of rules and regulations.
  - 3. An investigation for fair and honest reasons, regulated by good faith on the part of the District, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.
  - 4. Adherence to all due process rights that is afforded the employee by law, by case decision, by a collective bargaining agreement that applies to the employee, or by the Rules of the Personnel Commission
- C. A regular classified employee shall be subject to disciplinary action only for cause as prescribed by this rule and only pursuant to the procedures outlined herein.

**REFERENCE: Education Code Section 45302**

**Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.**

**11.1.1 DEFINITION OF DISCIPLINE**

- A. Discipline is the suspension without pay, involuntary demotion, reassignment resulting in loss of pay or benefits, or dismissal of an employee for cause.
- B. Layoff or reduction in hours due to a lack of funds or lack of work is not disciplinary action.
- C. Reassignment of a regular employee by the governing board because of illness or injury is not disciplinary action.

**REFERENCE: Education Code Sections 45279, and 45302**

**Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.**

### **11.1.2 PROHIBITED ACTS RELATED TO DISCIPLINE**

No employee shall be suspended, demoted, dismissed, subjected to any form of disciplinary action as a form of sexual harassment or in any way discriminated against because of the employee's affiliations, race, color, national origin, age, marital status, sex, sexual orientation, disabling condition, ancestry, whistle blowing, employee organization membership or non-membership and legal activities related thereto, medical condition as defined in the Government Code, false claim action or religious or political beliefs or acts, except as legally provided in these Rules or as mandated by law.

**REFERENCE: Education Code Section 45302; Government Code Sections 12926, 12650 and 12653**

**Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.**

### **11.1.3 DISMISSAL OF CLASSIFIED SERVICE EXEMPT EMPLOYEES**

A substitute, limited-term, provisional, or other temporary classified employee may be released at any time during his/her assignment without regard to procedures set forth in this chapter.

## **11.2 IMPOSITION OF DISCIPLINE**

### **11.2.1 CAUSES FOR DISCIPLINARY ACTION**

- A. The following causes shall be grounds for disciplinary action:
1. Incompetency: inattention to or dereliction of duty, or dereliction in the performance of assigned duties and responsibilities.
  2. Inefficiency: the continuing inability or unwillingness to perform the regularly assigned duties and responsibilities of the position.
  3. Insubordination: knowingly refusing to perform lawful and reasonably assigned duties or refusing to perform those duties in accordance with established or prescribed procedures; any willful or persistent violation of the Education Code, or Personnel Commission Rules and Regulations, or the procedures adopted by the District or a department when such procedures are made known to the employee in writing.
  4. Knowingly falsifying or withholding any material information supplied to the District, including but not limited to, information required on application forms and employment records, or other official documents of the District.
  5. Use or possession of alcoholic beverages on District property or in District vehicles, or appearing for work under the effects of alcohol.

6. The use or possession of illegal controlled substance or restricted dangerous drugs, other than that prescribed by a state licensed physician or appearing for work under the effects of illegal or restricted dangerous drugs.
7. Engaging in political activities during assigned hours of duty.
  - a. "Engaging in political activities" includes door-to-door campaigning; placing campaign literature in/on vehicles on District facilities, parking lots, or adjacent streets, telephone solicitation or contacts; use of District time or materials for reproduction of campaign literature or materials; and, engaging fellow employees, students, or others in a discussion or debate regarding any candidate for public office or ballot measure.
  - b. "During assigned working hours" includes any and all time an employee is scheduled to be at his/her work site and/or engaged in District business and for which the employee is compensated by the District; including paid rest breaks.
8. Discourteous, abusive, or threatening treatment of the public, employees, or students, including discriminatory harassment; or malicious engagement in reprisals by managers or supervisors against employees, applicants, candidates, or eligibles who file a written or oral complaint regarding gross mismanagement or a significant waste of funds, an abuse of authority, a substantial and specific danger to public health or safety or who addresses the governing board, the Personnel Commission or any other governmental agency or body when it is in session or conducting official business.
9. Repeated unexcused absence or tardiness, abuse of leave privileges or absence without notification or authorization.
10. Abandonment of Position:
  - a. Absence of three (3) consecutive working days without notification or permission without a valid reason for absence without notification or permission.
  - b. Failure to return to work or notify the District within three (3) consecutive working days following an authorized leave of absence without notification or permission without a valid reason for absence without notification or permission.
11. The lack of insurability of an employee to drive a District vehicle when such is a requirement of the employee's position. Upon notification or confirmation by the District's insurance carrier, discipline under this section shall be handled in the following manner:
  - a. The District shall attempt to reassign the employee within the same class or to a vacant position in a related class not

- requiring operation of a motor vehicle with the prior approval of the Commission.
- b. If reassignment is not possible, then the employee may be demoted, pursuant to these Rules and Regulations.
  - c. If a position does not exist for a demotion to be accomplished, then the employee may be dismissed, pursuant to these Rules and Regulations.
12. Violation of local, state, or federal law or regulation which results in cancellation or suspension of a license required for the performance of assigned duties.
  13. Work-related dishonesty, theft, willful misuse of District property for personal gain, willful destruction or mishandling of District property, unauthorized use of District or student body property, theft, willful misuse for personal gain, or willful mishandling of office.
  14. Ethnic, racial, religious, or sexual harassment of another, or any conduct creating intimidation, ridicule, or an "abusive work environment," whether or not there is a loss of tangible job benefits. (Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal, visual or physical conduct of a sexual nature, made by someone from or in the work setting).
  15. Failure to obey a subpoena issued by the Personnel Commission and duly served, or any refusal to furnish testimony or documents, other than self-incriminating, at a hearing or investigation before or authorized by the Commission or governing board.
  16. Advocacy of the overthrow of the federal, state, or local government by force, violence, or other unlawful means.
  17. Offering anything of value or offering any service in exchange for special treatment in connection with the employee's job or employment, or the accepting of anything of value or any service in exchange for granting any special treatment to another person.
  18. Physical attacking or assaulting a student, a member of the public, another District employee, or a District official, except in self-defense.
  19. Defrauding the District by collecting sick leave or industrial accident/illness leave pay while working elsewhere for pay during his/her normal scheduled work assignment with the District without prior approval by the Personnel Commission and the governing board.
  20. Physical or mental inability to perform the tasks assigned to the employee's classification, with or without reasonable accommodation.

21. Failure to submit to involuntary drug testing requirements for classifications requiring a commercial drivers license or designated as safety-sensitive by state or federal courts.
  22. Working overtime without authorization.
  23. Withholding information needed for employment, insurance or other necessary purposes.
  24. Offering or accepting anything of value that creates a conflict of interest, or other similar act or omission.
  25. Unauthorized access to, creating, changing, or deleting of data or other information and/or use of same for personal or other unauthorized purposes or unauthorized release to others and/or violation of confidentiality or privacy.
  26. Violation of the District's Technology use policy.
  27. Refusal to comply with shift assignments, working hours, or work locations.
  28. Improper conduct, including deception or fraud, during a selection process.
  29. Persistent violation or refusal to obey safety rules or other procedures made applicable to the District by the governing board, or by any appropriate state or governmental agency.
  30. Unauthorized possession of a firearm or other weapon while on duty, whether or not on District property.
  31. Failure, within a reasonable time, to report injuries or damage to property which occurred while on assigned duty.
  32. Conviction of a
    - a. Sex offense as defined in Education Code Section 44010. Conviction of such offense shall result in dismissal.
    - b. Narcotics offense as defined in Education Code Section 44011. Conviction of such offense shall result in dismissal.
    - c. A crime for conduct arising directly out of the employee's work-related activities.
    - d. Crime involving moral turpitude.
    - e. A record of one (1) or more crimes which convictions indicates that the person is a poor employment risk for the particular job which the employee holds in the District.
- B. A plea, verdict, or finding of guilty, or a conviction following a plea of *nolo contendere* is deemed a conviction within the meaning of these Rules.

**REFERENCE: Education Code Sections 212.5, 230, 44010, 44011, 45302, 45303, and 45304; Government Code Section 1028; Penal Code Section 261; Health and Safety Code Sections 11054, 11056, 11355-11361, 11363-11368, 11377-11382, and 11550**

**Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.**

### **11.2.2 LIMITS ON DISCIPLINARY ACTION**

No disciplinary action shall be taken against an employee for any cause which:

- A. Is a prohibited act related to discipline as defined by these Rules, by statute, or by case decision.
- B. The employee's due process rights were violated unless disciplinary action or an alternate remedy for that violation of due process rights are otherwise permitted by law.
- C. Violates a collective bargaining agreement that applies to the concerned employee.
- D. Occurred prior to the employee becoming permanent,
- E. Occurred more than one year prior to the date of the Notice of Proposed Disciplinary Action unless such cause was concealed or not disclosed by the employee when it could be reasonably assumed that the employee knew he should have disclosed the facts to Bassett Unified School District or the District could be reasonably assumed to know or should have known about the acts upon which the discipline is based.
  - 1. This does not preclude consideration of events or circumstances beyond one year for the purpose of supporting the degree of disciplinary action or in establishing that progressive discipline had been used by the District.
  - 2. In the case of disciplinary action based on a criminal prosecution, the one year limitation on acts for which disciplinary action can be imposed commences on the date of final judgment, regardless of when the acts resulting in final judgment occurred.
  - 3. In the case of acts that are subject to criminal investigation, regardless of whether or not there is a prosecution, the one year limit on the imposition of disciplinary action is tolled if the District halts its investigation into disciplinary action during the time that a criminal investigation is pending.
  - 4. The District has the burden of establishing the tolling of the time limit.

**REFERENCE: Education Code Sections 45260, 45261 and 45302.**

**Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.**

### **11.2.3 PROGRESSIVE DISCIPLINE**

- A. Progressive discipline is the application of corrective measures by increasingly progressive degrees with actions that fit the nature of the problem, designed to motivate an employee to change substandard performance or conduct.

- B. The Commission shall consider whether or not progressive discipline has been used in determining whether a specific penalty is appropriate for the severity of the offense.
- C. Written warnings, letters of reprimand, and performance evaluations are considered to be part of progressive discipline.
- D. More serious offenses may justify imposing discipline at a higher level, including termination, than progressive discipline principles may otherwise require.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

**11.2.4 PROGRESSIVE DISCIPLINE - SUSPENSION**

- A. An employee may be suspended for up to thirty calendar days without pay. The proposed length of suspension shall be reasonably related to the seriousness of the alleged offense.
- B. An alternative to a part or all of a suspension may be the employee's participation in an approved employee treatment program. An agreement to such a program shall be in writing and stipulate sanctions if the employee does not fulfill the requirements of the agreement.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

**11.2.5 DEMOTION OR DISMISSAL**

If cause exists, an employee may be subjected to other forms of disciplinary action including demotion or dismissal.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

**11.2.6 IMMEDIATE SUSPENSION WITH OR WITHOUT PAY**

- A. If an employee presents any matters related to the health, safety and well being of the employee, students, fellow employees, or District property, the Superintendent or his designee may suspend the employee immediately with pay pending the initiation and completion of disciplinary action procedures. The Superintendent may end the suspension with pay to the employee or take action to suspend without pay in accordance with these rules.
- B. An employee may be immediately suspended with or without pay if charged with the commission of any sex offense or narcotics offense. The suspension shall continue for not more than ten days after the date of the entry of the court judgment. Any employee so suspended may receive compensation as provided for by law.

REFERENCE: Education Code Sections 44010, 44011, 45302, 45303 and 45304; Penal Code Section 261; Health and Safety Code Sections 11054, 11056.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

### 11.3. **NO DISCIPLINE WITHOUT NOTICE**

No probationary or permanent regular classified employee may be subjected to disciplinary action until the employee has received a "Notice of Proposed Disciplinary Action," and the employee has had an opportunity to respond to the charges.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

#### 11.3.1 **CONTENTS OF NOTICE OF DISCIPLINARY ACTION**

The Notice of Disciplinary Action shall contain statements in ordinary and concise language of:

- A. The nature of the disciplinary action taken (suspension, demotion, dismissal, etc.).
- B. The specific causes and sections of these Rules that the employee is accused of violating and upon which the disciplinary action is based.
- C. The specific charges, a description of the chargeable action(s) or omissions, including times, dates, locations in ordinary and concise language.
- D. The effective date(s) of the disciplinary action.
- E. A copy of charges and documentation to support the District's case against the employee.
- F. The employee's right to representation.
- G. The date that the disciplinary action will be acted on by the governing board.
- H. The employee's right to request that the action before the governing board be held in open session, if applicable.
- I. The employee's right to a *Skelly* hearing not sooner than 5 working days as provided for in these Rules and by law prior to the governing board acting on the discipline.
- J. A notice that the employee may forfeit his right to a *Skelly* hearing if he fails to respond within the time limits specified, and information on how to exercise his right to the *Skelly* hearing.

REFERENCE: Education Code Sections 45260 , 45261 and 45302; Government Code Section 54957.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

#### 11.3.2 **NOTICE SHALL BE IN WRITING AND SERVED ON EMPLOYEE**

- A. The Notice of Disciplinary Action shall be in writing and served in person or by Certified Mail "Return Receipt Requested" to the employee.

- B. This requirement will be deemed to have been met if the Notice of Disciplinary Action is sent Certified Mail to the last known home address on file in the Human Resources Office. Failure of the employee to retrieve delivered mail, or respond to notifications by the U.S. Postal Service of attempted delivery shall not be grounds for voiding notification, or the staying of the timelines outlined in these Rules.
- C. For purposes of this Rule, if a notice is mailed, the official date of receipt shall be the date that the employee receives the notice as evidenced by the return receipt showing delivery to the address on the envelope.
  - 1. The date on the return receipt showing deliver shall be deemed to be the official date of notification and the date that time requirements commence for the employee to respond.
  - 2. The employee may establish by a preponderance of the evidence that notice was not actually received as indicated by the return receipt.
  - 3. The District may establish by the preponderance of the evidence that the employee willfully evaded receipt of the notice, willfully failed to respond to notices by the postal service, or willfully failed to retrieve delivered mail.
- D. If the notice is personally served on the employee in lieu of service by mail, the employee shall sign a written acknowledgement that he received the notice in person. If the employee refuses to sign such an acknowledgement, two witnesses to the service may verify the service and the acknowledgement shall indicate the space provided for the employee's acknowledgement shall contain the notation "refused to sign."
- E. All other notifications to the employee pursuant to this Chapter shall conform to this Rule.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

## 11.4 **SKELLY HEARING**

### 11.4.1 **ACTION IF SKELLY HEARING NOT REQUESTED**

- A. If the employee does not respond to the charges within the five (5) working day period outlined in the Notice of Proposed Disciplinary Action, the Superintendent or designee may recommend to the Board that the proposed disciplinary action be approved.
- B. The Board shall have the power to accept, lessen, or reject the recommendation of the Superintendent. The Board shall not provide for a penalty or disciplinary action more severe than that

recommended by the Superintendent as specified in the Notice provided to the employee.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

#### **11.4.2 SKELLY HEARING BEFORE SUPERINTENDENT**

- A. If the employee submits a request to respond to the charges within five (5) working days after receipt of the Notice the employee shall have a right to meet with the Superintendent or designee, and the effective date of the proposed disciplinary action shall be stayed pending the outcome of the hearing process.
- B. The employee shall be allowed to respond to the charges prior to the Superintendent's recommendation of disciplinary action to the Board.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

#### **11.4.3 NOTIFICATION OF SKELLY HEARING TO EMPLOYEE**

Upon receipt of a request for a *Skelly* hearing, the Superintendent or his designee shall notify the employee in writing of the time, date, and place of the *Skelly* hearing. In the alternative, the notice of the *Skelly* hearing may designate a date, time and place of the *Skelly* hearing.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

#### **11.4.4 DESIGNEE FOR SUPERINTENDENT**

- A. The Superintendent may assign a designee to serve as the Skelly Hearing officer.
- B. That designee shall be an administrator who has the authority and authorization to accept, modify, or rescind the proposed disciplinary action.
- C. If the designee elects to modify the disciplinary action, such decision is binding on the Superintendent.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

#### **11.4.5 OPPORTUNITY TO RESPOND TO CHARGES**

- A. The employee shall have the opportunity to respond to all charges, provide reasons in mitigation of the penalty, or offer justification for his actions.

- B. The *Skelly* hearing is not an evidentiary hearing. The employee is not entitled to call or examine witnesses.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

#### **11.4.6 RIGHT TO REPRESENTATION**

The employee may be represented in a *Skelly* hearing by a union representative, or any other person designated by the employee, except an attorney, unless the Superintendent or his designee agrees to representation by an attorney.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

#### **11.4.7 SUPERINTENDENT OR DESIGNEE'S DECISION**

- A. The Superintendent or designee shall issue a written decision within five (5) working days after the conclusion of the *Skelly* Hearing, to either implement the proposed disciplinary action, to modify the proposed disciplinary action, or to rescind and halt the proposed disciplinary action. The written decision shall either affirm the originally scheduled date for the governing board to act on the disciplinary action, or provide the employee with a date for action by the governing board.
- B. The Superintendent or designee shall be responsible for notification of the employee as to the findings of the *Skelly* hearing officer.
- C. Findings shall include a summary of the issues raised by the employee and a brief explanation of why the hearing officer made the decision that he did concerning the disciplinary action finally recommended.
- D. The Superintendent or designee shall not increase the disciplinary action from that recommended in the Notice of Proposed Disciplinary Action.
- E. If the employee and Superintendent or designee agree on an alternative course of action during the *Skelly* hearing, that agreement shall be in writing.
- F. If the agreed alternative action requires Board action, the Superintendent shall recommend to the Board that the alternative action be approved.
- G. The Board's decision to accept or reject the alternative action shall be final, subject to appeal as provided in this Chapter.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

## **11.5 ACTION BY GOVERNING BOARD**

### **11.5.1 ACTION BY GOVERNING BOARD**

- A. The employee shall have a right to address the governing board at the time that it considers the imposition of the disciplinary action.
- B. The employee does not have a right to call witnesses or cross-examine witnesses except as may be authorized by the governing board. The employee may address the governing board in accord with its normal rules for speaking on any matter that is before the governing board.
- C. If the governing board is acting on the disciplinary action in closed session, the employee shall be notified in writing at least 24-hours before the meeting to hear specific charges or complaints against any employee.
  - 1. This written notice pertains to any and all closed session conducted by the governing board when specific charges or complaints are being considered or reported to the governing board, including any report on specific content or findings of an on-going investigation.
  - 2. If the investigator or the district administrator bringing specific charges or complaints is present during a closed session “employee performance evaluation” of the employee under investigation, the district must prove by a preponderance of the evidence that the closed session on employee performance evaluation did not include any discussion of specific charges or complaints against the involved employee.
  - 3. The presence of the investigator in a closed session in which the employee is being discussed shall be prima facie evidence of hearing specific charges or complaints against the employee.
  - 4. Failure to provide the 24-hour written notice as required herein and by law may be appealed to the Commission separate from any other appeal of disciplinary action. If the district cannot establish by a preponderance of the evidence that all appropriate 24-hour written notices were provided to the employee, the Commission shall find that any action taken at the meeting is null and void.
- D. The governing board may implement the proposed disciplinary action, modify the proposed disciplinary action, or rescind and halt the proposed disciplinary action.

**REFERENCE: Education Code Sections 45260, 45261 and 45302; Government Code Section 54957.**

**Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.**

### **11.5.2 NOTICE OF ACTION BY GOVERNING BOARD**

- A. The Superintendent or designee shall notify the Personnel Director in writing of the final action by the governing board within ten (10) days of the final decision by the governing board.
- B. This notice is required whether or not the employee exercised his *Skelly* rights and whether or not the employee was present when the governing board took final action.
- C. The written notice shall state the final action taken by the governing board.
- D. The written notice shall contain the following:
  - 1. A copy of the written charges approved by the governing board.
  - 2. A copy of the Notice of Proposed Disciplinary Action provided to the employee and proof of service.
  - 3. A copy of the *Skelly* hearing officer's notice to the employee of the hearing decision as required herein if a *Skelly* hearing was conducted.
  - 4. A copy of the 24-hour written notice and proof of service.
- E. Upon receipt of this notice, the Personnel Director will provide the employee with the copy of the charges and inform the employee of their right to appeal to the Commission.

REFERENCE: Education Code Sections 45260, 45261 45302, and 45304.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

### **11.5.3 NOTICE OF RIGHT TO APPEAL**

- A. An appeal form shall accompany the Notice of Disciplinary Action which shall explain the procedure for a hearing and the signing and filing of which shall constitute a demand for a hearing and a denial of all charges.
- B. If the employee fails to return the appeal form within fourteen (14) days following the receipt of the notice by the employee, the disciplinary action by the governing board shall be deemed to be final.
- C. The employee shall include in the appeal his/her current mailing and residence address, and a daytime telephone number at which the employee may be contacted.
- D. The employee shall also provide the name of his/her legal counsel or representative and the address and telephone number of such counsel or representative.
- E. The appeal notice shall contain a notice that the Commission may sustain, reject, or modify the disciplinary action taken against the

employee; and that the Commission may not provide for discipline more stringent than that invoked by the governing board.

- F. The appeal notice shall contain a notice of the employee's right to request the Personnel Commission to issue subpoenas for witnesses or other material evidence.
- G. The employee shall indicate on the appeal form the reasons for the appeal. Appeals can be made only on the following grounds:
  - 1. That the procedures set forth in these Rules have not been followed.
  - 2. That the disciplinary action was taken in violation of the employee's due process rights granted by these Rules, statute, or case decision.
  - 3. That the disciplinary action was based on one or more impermissible basis as outlined in these Rules.
  - 4. That the action taken was not in accord with the facts.
  - 5. That the penalty invoked by the District was excessive.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

## **11.6 APPEAL OF DISCIPLINARY ACTION**

- A. A classified employee shall have the right to appeal disciplinary action only as provided in these Rules.
- B. Appeals can be made only on the following grounds:
  - 1. That the procedures set forth in these Rules have not been followed.
  - 2. That the disciplinary action was taken in violation of the employee's due process rights granted by these Rules, statute, or case decision.
  - 3. That the disciplinary action was based on one or more impermissible basis as outlined in these Rules.
  - 4. That the action taken was not in accord with the facts.
  - 5. That the penalty invoked by the District was excessive.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

### **11.6.1 DISCIPLINE OF PROBATIONARY EMPLOYEE**

- A. A probationary employee who does not have permanent status in another classification, may be recommended for disciplinary action, including release from probation, for performance related deficiencies at any time after thirty days of service.
- B. A probationary classified employee recommended for disciplinary action who does not have permanent status in another classification, may request an administrative review by the Superintendent or

designee. The administrative review shall be completed prior to any final action being taken by the governing board.

- C. As part of the administrative review, the Superintendent or designee shall consider whether or not the probationary employee has received orientation to the position, including work schedule, work expectations, guidance and exaltation according to the district's administrative progressive discipline guidelines. Should the Superintendent or designee find the supervisor has not documented or completed the steps of the administrative progressive discipline guidelines, the Superintendent or designee may reverse the discipline recommendation of the supervisor and return the probationary employee to full work status without discipline.
- D. The Superintendent or designee's decision is final unless the employee charges that the recommended discipline is based on the employee's affiliations, race, color, national origin, age, marital status, sex, sexual orientation, disabling condition, ancestry, employee organization membership or non-membership, and legal activities related thereto, medical condition as defined in the Government Code, false claim action, or religious or political beliefs or acts, except as legally provided in these Rules. In which case, the probationary employee may then appeal to the Personnel Commission.
- E. In any appeal to the Personnel Commission under this Rule, a probationary employee is limited to an investigation by the Personnel Commission, and is not entitled to a full evidentiary hearing.
- F. At any time during or following the conclusion of an investigation as provided herein, the Commission may order a full evidentiary hearing if it finds that there is sufficient reason to find that disciplinary action was based on one or more of the impermissible grounds and finds that a full evidentiary is appropriate to resolve the issues.

**REFERENCE: Government Code Sections 12926, 12950 and 12953, Education Code Sections 45301, 45305**

**Section Revised: First reading 4/3/07; Second reading and adoption 5/1/07. Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.**

#### **11.6.2 PERMANENT EMPLOYEE IN PROBATIONARY PROMOTIONAL POSITION**

- A. A permanent classified employee who has not served the full probationary period for the class to which promoted, and who is subjected to disciplinary action that would result in the separation of the employee from the permanent classified service shall have the right to an appeal or investigation as provided for herein.
- B. A permanent classified employee who has not served the full probationary period for the class to which promoted, and who is subjected to disciplinary action that would result in a demotion to a

lower class in which regular status had previously been held, shall have the right to request an investigation by the Commission as provided for herein.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

### **11.6.3 BURDEN OF PROOF**

The burden of proof in all hearings and proceedings, based on any disciplinary action of any employee, shall remain with the District. The District may take disciplinary based on a preponderance of the evidence standard.

REFERENCE: Education Code 45305, 45311, 45312

## **11.7 CONDUCT OF HEARING**

### **11.7.1 RIGHT TO REPRESENTATION**

- A. The governing board and the appellant shall be allowed to be represented by legal counsel or other designated representatives.
- B. The employee shall be required to attend the Commission Appeal Hearing, even if the employee's designated representative appears on his/her behalf. If the employee fails to appear, the employee will be deemed to have forfeited his/her rights to further appeal and the Personnel Commission shall allow the governing board's disciplinary action to stand.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

### **11.7.2 PRE-HEARING CONFERENCE**

- A. Prior to the Personnel Commission's formal hearing, the Personnel Director, or the hearing officer, if one was designated, may hold a pre-hearing conference with the Board's representative and the appellant's representative or the appellant if the appellant is representing himself or herself.
- B. Such pre-hearing conference shall include but not be limited to submission of witness lists, documents required for submission into evidence, and determination as to length of time necessary for the hearing and such other documents as the Personnel Director or the hearing officer may require.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

### **11.7.3 LIST OF WITNESSES**

A list of witnesses to be called by each party and a list of persons authorized to attend the hearing shall be submitted to the Personnel Commission Office at least five (5) working days prior to the date of the hearing.

REFERENCE: Education Code Sections 45260, 45261, 45305, 45306, 45307

#### **11.7.4 APPOINTMENT OF HEARING OFFICER**

- A. The Personnel Commission may authorize a hearing officer to conduct any hearing or investigation for which the Commission itself is authorized by the Education Code and/or these Rules to conduct, including disciplinary action.
- B. The Commission may employ by contract or as professional experts or otherwise any such hearing officer, and may adopt and amend such Rules and procedures as may be necessary to effectuate this section of the Rules.
- C. Any such hearing officer conducting such hearing or investigation may administer oaths, subpoena and require the attendance of witnesses and the production of books or papers, and cause the deposition of witnesses to be taken in the manner prescribed by law for like depositions in civil cases in the Superior Court of this State.
- D. The Commission may instruct such hearing officer to present findings or recommendations.
  - 1. The Commission may accept, reject, or amend any of the findings or recommendations of the hearing officer.
  - 2. Any rejection or amendment of findings or recommendations shall be based either on a review of the transcript of the hearing or investigation, or upon the results of such supplementary hearings or investigations as the Commission may order.

REFERENCE: Education Code Sections 45260, 45261 and 45312

#### **11.7.5 DISQUALIFICATION OF HEARING OFFICER OR COMMISSIONER**

- A. A hearing officer, the Personnel Director, or Personnel Commission member shall voluntarily disqualify himself and withdraw from any appeal in which he cannot accord a fair and impartial hearing or consideration, or for which a conflict of interest may exist.
- B. Any party may request the disqualification of any hearing officer, the Personnel Director, or Personnel Commission member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded.

- C. If the Personnel Commission determines that there is sufficient grounds for disqualification, it may elect to disqualify the hearing officer, Personnel Director or Personnel Commission member.
- D. Where the disqualification request concerns a Personnel Commission member, the issue shall be determined by the other members of the Commission. However, no Commission member shall withdraw voluntarily or be subject to disqualification if his/her disqualification would prevent the existence of a quorum qualified to act in that particular appeal.
- E. The Personnel Director shall not advise or make recommendations the Commission if he is the party who brought the action against the employee.

REFERENCE: Education Code Sections 45260, 45261, and 45266.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

#### **11.7.6 COUNSEL FOR THE PERSONNEL COMMISSION**

- A. The Personnel Commission may seek and appoint legal counsel as part of its appeal and investigatory hearing duties.
- B. To avoid any conflict of interest, the legal counsel shall not be the same legal firm representing the governing board, nor shall the Board and the Commission be represented by members of the same legal firm in a hearing held or investigation conducted pursuant to these Rules and Regulations.
- C. All reasonable costs associated with the use of such legal counsel by the Personnel Commission in hearings shall constitute a legal charge against the governing boards' general funds, whether or not the money or costs for legal services appear in the Commission's budget.

REFERENCE: Education Code Sections 45260, 45261, 45313.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

#### **11.7.7 TIME AND PLACE OF HEARING**

Upon receipt of the appeal notice, the Personnel Commission shall determine the date, time, and place of the hearing on appeal. The appeal hearing shall be held within the boundaries of the District.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

#### **11.7.8 ALL HEARINGS SHALL BE RECORDED**

- A. All hearings under the authority of this Chapter shall be electronically recorded in such a manner that a verbatim written transcript can be produced if necessary.

- B. Either party may request that the hearing be recorded by a court reporter, in which case the party making the request shall bear the cost. If both parties make such a request, the cost shall be equally shared by the parties.
- C. If a court reporter is used to record the hearing, the requesting party shall provide a copy of the transcript of the hearing to the Commission at no cost to the Commission.
- D. Upon request of any party, or as otherwise provided by law, a copy of the electronic recording will be provided upon payment of a reasonable fee to cover the costs.
- E. The Commission is not obligated to provide a transcribed copy of the electronic recording, but may order that the tape be transcribed.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

#### **11.7.9 ORAL EVIDENCE BY OATH ONLY**

Oral evidence shall be taken only on oath or affirmation.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

#### **11.7.10 SUBPOENA OF WITNESSES/EVIDENCE**

- A. The Personnel Commission or its hearing officer may, and shall if requested by either party, subpoena witnesses and/or require the production of records, documents, or other material evidence. The Personnel Director shall issue the subpoenas on behalf of the Commission or its hearing officer. Subpoenas shall be delivered to the requesting party for service.
- B. Requests for subpoenas shall be filed with the Personnel Commission Office at least five (5) working days prior to the date of the hearing.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

#### **11.7.11 ABILITY TO EXAMINE EVIDENCE**

Each party shall have the following rights as it relates to examination of witnesses and evidence:

1. To call and examine witnesses.
2. To introduce exhibits.
3. To cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examinations(s).
4. To attempt to impeach any witness regardless of which party first called the witness to testify.
5. To rebut all evidence presented by the opposing party.

6. To receive timely notice by means of service evidenced by a proof of service under declaration of perjury of all motions, briefs, or other filings with the Commission, the hearing officer if one has been appointed, and with any court.
  - a. Failure of either party to timely serve the other party as indicated above may serve as grounds for dismissal with prejudice upon motion of the party not properly served unless there is a finding of following an evidentiary hearing that there was good cause for the failure to serve notice.
  - b. For all purposes herein, the Commission is considered a party for the purpose of service, including when the Commission has appointed a hearing officer and failure to serve a copy of the required documents may also serve as a basis to dismiss the action with prejudice against the party not serving the Commission.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

#### **11.7.12 APPELLANT MAY BE CALLED TO TESTIFY**

The appellant may be called to testify and be cross-examined just as if he/she had testified on his/her own behalf.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

#### **11.7.13 ADMISSION OF EVIDENCE**

- A. The hearing need not be conducted according to the technical rules relating to evidence and the examination of witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious business; regardless of the existence of any common law or statutory rule which might cause the evidence to be objected to or ruled out if presented in a criminal or civil procedure before a court of law.
- B. Hearsay evidence may be used for the purpose of explaining or providing supplemental evidence, but shall not be sufficient in and of itself to support a finding by the Personnel Commission or its hearing officer unless it would be admissible over objection in a civil action in a court of law. Employee evaluations, which are not based on facts or which are based on undocumented charges, may not be introduced as evidence.
- C. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing.
- D. Irrelevant and unduly repetitious evidence may be excluded by the Commission or the hearing officer.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

**11.7.14 GRANTING OF CONTINUANCE**

The Personnel Commission or its hearing officer may, prior to or during the hearing, grant a continuance for reason(s) believed to be sufficient or important to reaching a fair and proper conclusion.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

**11.7.15 RULING ON OBJECTIONS**

The Personnel Commission or its hearing officer shall rule on all objections raised by either party.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

**11.7.16 ORDER OF PRESENTATION OF EVIDENCE**

Each side will be permitted an opening statement, District's representative first, and closing arguments, appellant or his/her representative last. The District shall be first in presenting its witnesses and evidence in an effort to support its charges, and then the appellant or his/her representative will present his/her witnesses and evidence in defense.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

**11.7.17 EXAMINATION OF WITNESSES**

- A. Each side will be allowed to examine and cross-examine witnesses.
- B. The Commission or its hearing officer may, at its discretion, exclude witnesses not under examination except for the appellant, District representative, the Personnel Director, and their respective counsels or designated representatives.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

**11.7.18 SWORN AFFIDAVITS**

- A. Where possible, all witnesses shall give testimony orally at the hearing.
- B. However, if in the opinion of the Commission or its hearing officer, a witness has good and sufficient reason for being unable to be present, written testimony will be accepted under the following conditions:
  - 1. Such evidence shall be submitted by sworn affidavit of the witness. The affidavit shall be confined to a statement of facts bearing on the case and within the knowledge of the witness, and shall not contain any conclusions of the witness, except that a witness who

qualifies as an expert may express his/her opinion based upon the facts, which he/she has recited.

2. Copies of all such affidavits shall be filed with the Personnel Commission Office or the hearing officer at least five (5) working days prior to the date of the hearing, and may be inspected by the other party to the hearing, who shall be notified of the filing of such affidavits.
3. Neither party has objections to the submission of the affidavit(s) into evidence. Either party, upon request, may require the attendance of the witness who has given the sworn affidavit for purposes of cross-examination. A continuance may be necessary in order to secure the attendance of the witness.
4. The Personnel Commission or hearing officer may reject any such affidavit submitted which fails to comply with any of the foregoing conditions.

**REFERENCE: Education Code Sections 45260, 45261 and 45302.**

#### **11.7.19 DELIBERATION AND FINDINGS OF HEARING OFFICER**

- A. Whether the hearing is held in open or closed session, the hearing officer, if one is appointed by the Personnel Commission, or the Personnel Commission, if serving as the hearing officer, shall deliberate on the evidence presented in closed session.
- B. The Personnel Commission or its hearing officer shall determine the relevancy, weight, and credibility of the evidence and testimony presented.
- C. The findings of the Commission or hearing officer shall be based upon the preponderance of evidence.
- D. The hearing officer shall submit his/her written recommendations and findings of fact to the Personnel Director within a reasonable period of time.
- E. Upon receipt of the hearing officer's written recommendations and findings of fact, the Personnel Director shall contact the Chairperson of the Personnel Commission to schedule a meeting of the Commission to consider the findings and recommendations of the hearing officer.
- F. In all cases assigned to a hearing officer, a proposed decision shall be prepared in a form to be adopted by the Commission as its decision in the case. Commission staff will notify the appellant, his/her representative and the District's representative of the date of the meeting when the Commission will consider its decision on the appeal. Copies of the proposed decision shall be made available upon request to the appellant and representatives after the Commission has received it at a regular Commission meeting. If either representative

believes that the Commission should give further consideration to the decision, he/she shall submit a written request to the Personnel Commission with a copy to the opposing representative detailing reasons for further consideration and the remedy sought. The hearing officer may be present during the consideration of the case by the Commission and, at its request, may advise the Commission. The Commission may accept, reject, or amend any of the findings or recommendations in the proposed decision. Any rejections or amendment shall be based either on a review of the transcript of the hearing or investigation, or upon the results of such supplemental hearing or investigation as the Commission may order. If a further investigation or hearing is ordered, the Commission may decide the case itself or may refer the case to the same or another hearing officer for the purpose of taking additional evidence. If the case is referred to a hearing officer, he shall file another proposed decision.

- G. In all cases in which the Commission is deliberating on the decision of the hearing officer, the Commission shall meet in closed session.

REFERENCE: Education Code Sections 45260, 45261, 45266, and 45305.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

#### **11.7.20 INVESTIGATION BY COMMISSION.**

- A. Except when the regular employee requests a hearing, or as otherwise provided by the Rules, the Commission may decide to conduct an investigation in lieu of a hearing.
- B. If the Commission decides to conduct an investigation, it will appoint one of its members to serve as the investigating officer who, with the assistance of the Personnel Director or a professional expert hired for such purposes, will review all of the evidence provided by both the District and the employee, and conduct such additional investigation as the investigating officer deems necessary to obtain the facts. In all cases, the employee and the appointing authority recommending discipline will be interviewed by the investigating officer as part of the investigation.
- C. The investigating officer may direct the Personnel Director or professional expert to conduct investigative activities, including interviews of witnesses, collection of documents and records, and preparation of summaries of the activities completed by the Personnel Director. The Personnel Director or professional expert, under the supervision of the investigating officer, may assist in preparing a draft report for final review and approval by the investigating officer.
- D. The investigating officer shall then submit a draft report of the investigation and tentative findings to the District and the appellant.

Both parties will have 10 days to submit objections to the draft report and findings to the investigating officer.

- E. The investigating officer shall then submit a final report to the Personnel Commission, with findings and recommendations, for final action by the Commission as otherwise approved by these Rules. The final report shall have attached to it any objections to the draft investigation report
- F. The final report shall contain findings of fact, conclusions, and recommendations concerning the actual violations of the Rules, if any, that support disciplinary action, and the appropriate penalty to be assessed.
- G. The findings of the investigating officer shall be based on a preponderance of the evidence.
- H. The appellant has a right to legal counsel only when being interviewed as part of the investigation, at any hearings conducted by the Commission, and to prepare objections to the investigation officer's draft report.
- I. The appellant has no right to cross examine those being interviewed, to call witnesses for testimony, or to demand that the investigating officer consider certain evidence or interview certain witnesses. However, the appellant may submit a written request that certain persons be interviewed by the investigating officer along with a summary of the relevant evidence to be provided by the witness for the investigating officer to consider as part of the investigation. In addition, the appellant may submit documentary evidence or may request that the investigating officer obtain or review certain documentary evidence.
- J. The findings of the investigating officer may include a recommendation that the Commission conduct a full evidentiary hearing pursuant to these Rules in lieu of making other findings or recommendations.
- K. The investigating officer has authority to subpoena witnesses, require the production of records or information pertinent to the investigation, and may administer oaths.

REFERENCE: Education Code Sections 45260, 45261, 45305, 45306, 45307, and 45311.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

## **11.8 FINAL DECISION OF COMMISSION**

### **11.8.1 DELIBERATION OF PERSONNEL COMMISSION**

- A. The Commission, after it concludes the hearing, may deliberate its decision(s) in closed session.

- B. No persons other than members of the Personnel Commission, its legal counsel, the Personnel Director, or Commission staff shall be permitted to be present during deliberations. If the Personnel Director was the administrator initiating the disciplinary action, or if the Director acted on behalf of the governing board in the presentation of the case at any level of the appeal process, or if the Director served as a witness in the proceedings involving substantive issues of fact, the Director of Classified Personnel shall also be excluded from the Commission's deliberations.

REFERENCE: Education Code Sections 45260, 45261 and 45302.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

### **11.8.2 DECISION OF PERSONNEL COMMISSION**

- A. The Personnel Commission shall render its judgment as soon after the conclusion of the hearing or report of the hearing or investigation as possible. The decision(s) of the Commission shall be in writing and shall set forth which charges, if any, are sustained. If a hearing officer or investigator officer has provided the Commission with a report, the Commission need only indicate what findings or recommendations that it is modifying or rejecting, and a brief summary of the reasons for doing so.
- B. The Personnel Commission may sustain, modify or reject any or all of the charges filed against the employee. The Commission may sustain, modify, or reject the disciplinary action invoked against the employee. However, the Commission may not invoke more stringent discipline against the employee than that invoked by the governing board should it sustain any or all of the Board's charges.
- C. The Commission's written decision(s) shall contain findings of fact, a determination of the issues presented, and the penalty imposed (if any). The findings may be stated in the language of the pleading or included by reference thereto.
- D. If the disciplinary action is not sustained, the Commission's order shall set forth the effective date that the employee is to be restored or reinstated to his/her former position and/or status; such date to be set forth at any time on or after the date that the disciplinary action was invoked.
- E. Copies of the Commission's decision(s) shall be delivered to the parties personally or transmitted to them by Certified Mail Return Receipt Requested. The requirement for notification of the employee will be deemed to have been met if the decision is sent, Certified Mail, to the last known home address on file with the District or to the designated representative. Failure of the employee to retrieve delivered mail, or respond to notifications by the U.S. Postal Service of

attempted delivery shall not be grounds for voiding notification. For purposes of this Rule, if a notice is mailed, the second working day following the postmark date of the notice shall be considered to be the official date of receipt.

- F. The Commission's decision shall constitute final action by the Commission when it is approved at a subsequent regular Commission meeting.
- G. If the Commission either sustains a suspension or modifies a dismissal, or other disciplinary action, to a suspension, such days of suspension shall be served on working days in which the employee is normally assigned.

**REFERENCE: Education Code Sections 45260, 45261, and 45307**

**Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.**

### **11.8.3 DECISION SHALL INCLUDE CONSIDERATION OF JUST SETTLEMENT**

Following its determination of the facts and findings relative to the disciplinary action invoked against the employee, the Commission shall consider such other matters as it deems necessary and proper to effect a just settlement of the appeal, including, but not limited to:

1. The granting of seniority credit for any or all of the off-duty time pending restoration or reinstatement.
2. Expunge from the employee's personnel file and record any causes or charges that are not sustained by the Commission.
3. Awarding of compensation for all or part of the legitimate expenses incurred for pursuit of the appeal.
  - a. Such compensation may not be awarded if the parties agree to a final action in writing before the Commission renders a final decision, unless that agreement provides for such compensation.
  - b. Such compensation may not be awarded if the District is ultimately sustained in the disciplinary action that is imposed, regardless of whether or not all factual findings were sustained.
  - c. Such compensation may not be awarded for factual findings that the Commission ultimately sustained.
  - d. The extent to which the District complied with an employee's due process rights if violation of those rights resulted in charges for factual findings or discipline being dismissed or modified.
  - e. The Commission may designate a hearing officer to make a recommendation to the Commission on awarding such compensation, including, but not limited to, what proportion of the appeal should be compensated, if any, as well as what specific compensation should be covered, if any.

REFERENCE: Education Code Sections 45260, 45261, and 45307.

Section Revised: First Reading 2/16/08, Second Reading and Adoption 3/4/08.

**11.8.4 BOARD SHALL COMPLY WITH COMMISSION DECISION**

- A. Upon receipt of the Commission's written decision the governing board shall forthwith comply with the provisions thereof.
- B. When the governing board has fully complied with the Commission's decision, it shall so notify the Commission in writing.
- C. If the governing board fails and/or refuses to fully comply with the Commission's written decision(s) and order(s) as required by these Rules and Regulations and legal statutes, the Commission shall seek judicial action to ensure compliance.

REFERENCE: Education Code Sections 45260, 45261, and 45307.