

ACADEMIC EMPLOYEE DISCIPLINE/DISMISSAL

The most important elements to consider when attempting to discipline an academic employee are:

- a. documentation;
- b. evaluation; and
- c. procedures to be followed.

Grounds and procedures for disciplining permanent academic employees (regular employees) are set forth in Education Code Section 87660 et seq.

1. Grounds

Education Code Section 87732 states,

No regular employee shall be dismissed except for one or more of the following causes:

- a. immoral or unprofessional conduct;
- b. any violation of Article 4 (commencing with Section 1140) of Chapter 3 of Title 1 of Part 4 of the Penal Code;
- c. dishonesty;
- d. incompetency;
- e. evident unfitness for service;
- f. physical or mental condition which makes him or her unfit to instruct or associate with students;
- g. persistent violation of or refusal to obey the school laws of the State or reasonable regulations prescribed for the government of the community colleges by the Board of Governors or by the Governing Board of the Community College District employing him or her;
- h. conviction of a felony or of any crime involving moral turpitude; and
- i. conduct specified in Section 1028 of the Government Code (i.e., knowing membership in the Communist Party or of any organization which advocates the overthrow of the government of the United States by force or violence).

2. Procedures

Any contract or regular employee is subject to dismissal and the imposition of penalties on the grounds and pursuant to procedures set forth in Division 7, Chapter 3, Article 4 of the Education Code. (Education Code Section 87666)

The importance of following the code to the letter cannot be over stressed.

Probably the most frequent cause for discipline of an academic employee falls under the category "unprofessional conduct" [E.C. 87732 (a)]. Termination or discipline may not be acted on until the requirements of E.C. Section 87734 are met. These are:

- a. a "written 90-day notice";
- b. specifying the nature of the unprofessional conduct (or incompetency);
- c. with such particularity as to furnish the employee an opportunity to correct his/her faults and overcome the grounds for such charge; and

- d. the written notice shall include a recent evaluation.

Failure to meet the above requirements can mean that the 90-day period has to start over again. It is extremely important that when the charges are written, they not only spell out carefully the basis for bringing the charges, but that they are specific as to time, date and event triggering such charges.

This does not mean that the Governing Board cannot suspend an employee immediately for sex or narcotics offenses (E.C. Section 87670 and E.C. Section 87736), or for the other causes listed in E.C. Section 87732. However, procedural due process must be given. (See below.)

At the end of the 90-day period (please notice that under the code this means the preceding term or half school year, thus disallowing summer as part of the ninety day period), if the employee has not met the standards of improvement, procedures for suspension or dismissal may be initiated. (E.C. Section 87737 discusses the procedure for serving notice of the intent to initiate discipline.)

If improvement has been achieved, it is very important to keep all the documentation of the 90-day notice in the employee's personnel file. If the employee's conduct slips again, a new 90-day notice must be filed. Incorporate the charges from the first 90-day notice into the second notice in order to keep the statute of limitations from precluding their admissibility.

3. Determination of "Cause" Guidelines

Even though "cause" is defined in the Education Code, the terms, as applied to a given situation, are really very vague. The following guidelines should be observed if you wish to succeed in the disciplinary action.

- a. Is the conduct on which the imposition of discipline is to be based reasonably related to the safe and efficient performance of the job? (This is referred to as "nexus.")
- b. Was the employee given adequate forewarning of the negative consequences of the conduct?
- c. What impact does the conduct have on students, faculty, classified staff, administration, and/or community?
- d. Is the proposed disciplinary imposition timely? Has the conduct been going on for some time without reprimand? Without mention on evaluations? In other words, has the conduct actually been condoned?
- e. What, if any, extenuating circumstances surround this conduct? What response or motivation for the conduct has the employee provided?
- f. What prior help or assistance has been given to the employee in this area? Has everything been documented?
- g. Has a thorough and fair investigation been conducted before the initiation of the discipline?
- h. Was there sufficient evidence resulting from the investigation to prove the employee guilty of the charges?
- i. Are all rules, orders and discipline applied evenhandedly to all employees?
- j. Is the degree of discipline reasonably related to the seriousness of the offense?

Briefly summarized, the considerations are nexus, notice, fair and thorough investigation, proof, equal treatment, and appropriateness of proposed penalty.

4. Due Process

In all relations with employees, due process must be observed. Essentially, this means that the employee must be given NOTICE of the charges and the intent to act upon them, and OPPORTUNITY TO RESPOND.

It is important at each step of discipline, whether it is at the beginning of progressive discipline or at the stage where there is actual intent to dismiss, that all notice requirements in the various applicable sections of the code be observed. The most effective way to give notice is by personal service.

In the case of actual intent to suspend or dismiss, the employee has an opportunity to demand a hearing. When the situation reaches this stage, it is advisable to seek legal advice, because the chances are that the employee is also represented by counsel at this stage and mistakes can be crucial to the success or failure of the proposed disciplinary action.

5. Right to Union Representation

An employee has the right to union representation when he/she reasonably believes that the question of discipline might arise at a meeting with a supervisor or management. Government Code Section 3543.1(a) provides that:

Employee organizations shall have the right to represent their members in their employment relations with public school employers...[emphasis added] P.E.R.B. case law has provided interpretations of the scope of that provision, but when in doubt, it is advisable to permit the presence of a representative. Keep in mind that the employee is not entitled to a particular representative; especially if that means that a meeting must be postponed at the employee's option. If the employee is represented, it is often advisable for the administrator to have another person present also.

California case law has also upheld the right of an employee to have representation at a meeting dealing with a disputed evaluation. In an appellate decision [205 CalRptr 523, (1984)] the California Court of Appeal, First District, held that even though union representation should not be granted in the absence of showing that the employee had reasonable fear of discipline, an investigatory meeting conducted in an intimidating atmosphere before a high-level District administrator constituted circumstance exceptional enough to warrant granting employee's request for such representation. When it comes to litigating, each case will have to be decided on its own merits.

The collective bargaining agreement in effect should also be carefully studied concerning any provisions with respect to representation.

6. Evaluations

The most important aspect of evaluation is **DO IT!** Everyone knows that evaluations should be geared toward improving performance rather than being punitive in nature, but the problem with what is being done for the most part is that evaluations are either marked "satisfactory" without comments, or speak only in glowing terms of an employee's performance while "everyone knows" that the employee has major problem areas. When the time comes for imposition of discipline for poor performance, there is nothing either in the evaluations or in the employee's personnel file to substantiate the charges.

Another major problem with evaluations is failure to adhere to the procedures set forth in the collective bargaining agreement. This could pertain to failure to follow time lines, failure to hold pre-evaluation conferences and/or post-evaluation conferences if these are required under the contract, failure to conduct work station observation if required under the contract, etc.

A recent evaluation must be included in any disciplinary action such as suspension or dismissal pursuant to provisions of the Education Code.

7. Conclusion

It is possible to suspend or terminate a regular (tenured) academic employee. However, in order to make this possible, there must be **ADEQUATE DOCUMENTATION, EVALUATIONS**, and extreme care must be taken to follow all **PROCEDURES** carefully. Don't expect to terminate an employee on the first infraction of rules--use progressive discipline whenever appropriate, and make sure that there is documentation in the employee's personnel file.

Education Code 87669 87732
Government Code 1028