

Sacramento County Civil Service Commission

Issue

The focus of this Grand Jury investigation is to determine if the processes and procedures of the Sacramento County Civil Service Commission (Commission) are adequate and appropriate when it considers the merits of appeals by County employees concerning disciplinary actions taken against them by their employers.

Reason for the Investigation

During the last six months, a great deal of public and media attention has been drawn to a number of decisions in which the Commission overturned the Sacramento County Sheriff's decision to dismiss several sheriff's deputies for misconduct. The Commission's actions resulted in these deputies being fully reinstated to duty. Public concern over these reinstatements caused the Grand Jury to initiate an investigation.

Method of Investigation

The Grand Jury interviewed all five members of the Commission.

The Grand Jury reviewed the following documents:

- Sacramento County Charter, Article XVI
- Rules of the Sacramento County Civil Service Commission.

The Grand Jury obtained the following documents pertaining to five cases appealed to the Commission which involved disciplinary action taken against sheriff's deputies:

- Notice of Final Order of Disciplinary Action
- Transcripts of Proceedings before the Hearing Officer
- Hearing Officer's Proposed Decision
- Transcripts of Proceedings before the Commission
- Commission's Final Decision and Order.

Background and Facts

Introduction

The Grand Jury has limited its examination of this matter to the underlying processes, procedures and interpretations of law under which the Commission conducts appeals of disciplinary actions. The Grand Jury reviewed the transcripts of five specific cases, and used these cases to understand the processes, procedures, and interpretations that affect the Commission's considerations and deliberations. However, the Grand Jury did not attempt to review the specific merits of any particular case or outcome.

The Commission's Charge and Current Composition

The Commission, consisting of five members, each appointed by one of the Sacramento County Board of Supervisors for alternating five year terms, is established under Article XVI of the Sacramento County Charter. Its mandate is to establish and enforce policy and rules governing classification of civil service positions and the recruitment, examination, and appointment of County employees. It is also charged with the responsibility to investigate and decide appeals from any phase of the employee selection process, from the classification plan, and from disciplinary actions against County employees. This Grand Jury review is specifically centered on how the Commission considers appeals by County employees concerning disciplinary actions taken against them by their appointing authorities.

The Commission has established its own rules on how to handle appeals of disciplinary actions. The Commission has considerable discretion in setting these rules and can amend its rules by majority vote.¹

Processes and Procedures Respecting Appeals from Disciplinary Action

Commission Rule 11.4 pertains to the causes for which disciplinary action may be taken against a County employee. No such action may be taken without good cause. "Good cause" is defined as any facts which, based on relevant circumstances, may be reasonably relied on by the appointing authority in the exercise of reasonable discretion as a basis for disciplinary action. An essential element of good cause is the exercise of "reasonable discretion" *by the appointing authority*. Good cause is lacking where the appointing authority's exercise of discretion is unreasonable, but it is not lacking on the mere basis that the Commission or the Commission's hearing officer would, under the same circumstances, have exercised its own discretion differently.

Certain behaviors are defined as constituting good cause per se. They include the following:

- Inexcusable neglect of duty

¹ Rule 1.5(a) and (b)

- Conviction of a felony
- Conviction of a misdemeanor which is of such a nature as to adversely affect the employee's ability to perform the duties and responsibilities of his position
- Discourteous treatment of the public
- Willful disobedience
- Incompetence
- Dishonesty
- Inexcusable absence without leave
- Failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the employee's agency or employment.

Once an employee has been served by his or her appointing authority (the head of the agency by which the individual is employed), with an order of disciplinary action, the employee is entitled to an informal hearing, known as a *Skelly* hearing, with the employer or the employer's designee, before the order becomes final.

After the employee has been served with a final order and decides to contest the action, he or she files a notice of appeal with the Commission. An appeal hearing is then conducted in due course by a hearing officer employed or contracted by the Commission to hear sworn testimony of witnesses on both sides of the question. The hearing officer is charged with determining whether the facts alleged in the order are true, whether such facts constitute good cause for discipline, and what discipline is appropriate in light of all relevant facts and circumstances.² Ultimately, the hearing officer prepares a Proposed Decision, including Findings of Fact, Conclusions of Law, and Proposed Disposition, and submits that document to the Commission.

Finally, a hearing is held before the Commission, where the issues contained in the proposed decision are argued by representatives of the County agency and of the employee. The commissioners may ask questions of the representatives at that time. The hearing and deliberations are normally conducted in closed session.³ After the hearing is conducted, the Commission makes its final order affirming, modifying, or revoking the Order of disciplinary action.

The Commission can sustain the proposed action, or it can decrease an order of disciplinary action; it cannot impose a more stringent action. The Commission's order is subject to review by the Superior Court in an action called Administrative Mandamus.

² Rule 11.12(a)

³ Rule 11.12(c) In all five cases reviewed by the Grand Jury, the hearing and deliberations were held in closed session.

Quorum of Three

In all five cases reviewed by the Grand Jury, the hearing before the Commission was conducted by a quorum of three commissioners. In such a case, the three commissioners must vote unanimously in order to prevent the case from having to be heard again.

All of the commissioners denied awareness of pressure to conform with the others in view of the consequences of a contrary vote. In one of the five cases reviewed by the Grand Jury, however, one of the members initially voted “no” on the motion to adopt the hearing officer’s Proposed Decision to reinstate a deputy sheriff who had been dismissed. The member who voted “no” then asked the Commission’s counsel what the effect would be of the single “no” vote. The Commission’s counsel explained that the case would have to be postponed to the next calendar. The member immediately changed the “no” to a “yes” vote, avoiding the necessity of a new hearing.

Use of Historical Consistency to Determine Appropriate Disciplinary Actions

The Commission tries to ensure that an individual employee is not “singled out” for a harsher discipline than was imposed in previous cases. However, no two cases are totally alike, taking into consideration the circumstances, employment history, years in service, remorse, and other factors in mitigation or aggravation.

In one case, for example, in which “conviction of a misdemeanor which is of such a nature that it adversely affects the ability of the employee to perform the duties and responsibilities of his position” was charged, great attention was centered on the discipline imposed in other cases based upon the same charge. Yet of the 19 cases selected to show that a lesser discipline was historically imposed, not one involved a conviction for conduct “of such nature,” as, or anything remotely similar, to the conduct of the deputy in the case then pending before the Commission. As a result, a new precedent was set for future cases involving the aggravated conduct in question, i.e., reinstatement with full back pay and benefits.

Finally, and perhaps more importantly, even assuming that two cases are substantially similar, the appropriate standard to be applied in a particular case is expressly prescribed; the discipline must be “appropriate in light of all relevant facts and circumstances,”⁴ i.e., of the facts and circumstances *of the case then pending before the Commission*. The fact that a lesser discipline was imposed in a prior case is not necessarily pertinent to the case at hand, and may, conceivably, have been too lenient. It is not incumbent upon the Commission to put itself in a position of having to decide whether a prior case upon which it relies as precedent, was rightly decided.

⁴ Rule 11.12 (a)

Lack of Recusal Policy

The Sacramento County Charter⁵ provides that the Commission shall provide for the impartial hearing and determination of appeals from disciplinary action.⁶

The Commission has no rule or formulated policy pertaining to recusal by a commissioner in the event of actual or potential bias or the appearance of bias for or against a party to an appeal. One commissioner explained that the practice with respect to recusal by a commissioner is to abide by the judgments of the other commissioners. The decision to recuse oneself from participation in a particular case must be made by the commissioner in question, and no one else.

The Commission Rules have Ceded Too Much Power to the Hearing Officers in Two Respects

First, the Commission has eliminated its ability to review a case based on the total available record, including the transcript of the hearing before the hearing officer. Once an appeal reaches the Commission, its own rules limit argument by the parties to the “four corners” of the hearing officer’s Proposed Decision.⁷ In this regard, the Commission, upon receipt of a Proposed Decision, may (1) adopt it in its entirety, (2) refer it back to the hearing officer for clarification, (3) reduce the disciplinary action and adopt the remainder of the Proposed Decision, (4) reject a proposed reduction in favor of the disciplinary action originally imposed, or a lesser disciplinary action, and adopt the remainder, or (5) reject the Proposed Decision in its entirety.⁸ Under these Rules, the Commission has no option to decide the case itself upon the record, including the transcript.⁹

All of the evidence which is introduced at the hearing before the hearing officer is included in the transcript of the hearing. However, not all of the evidence may be referred to in the hearing officer’s Proposed Decision. Any evidence, no matter how relevant and persuasive, that is not referred to in the Proposed Decision, remains unknown to the Commission. In effect, the Commission must decide the appeal only on the basis of the evidence that the hearing officer is willing to disclose in the Proposed Decision. The Commission has, in effect, ceded much of its authority and responsibility to its hearing officers.¹⁰ In this way, the hearing officer may effectively determine, not merely propose, the result of a case.

⁵ Charter, Article XVI, §71H(d)

⁶ See *Gai v. City of Selma* (1998) 68 Cal.App.4th 213.

⁷ The sole exception is where new pertinent evidence could not with due diligence have been offered into evidence at the time of hearing.

⁸ Rule 11.12 (d)

⁹ Compare the State Civil Service Act (Gov. Code §19582 (c)) and the California Administrative Procedure Act (Gov. Code §11517 (c)(2)(E)).

¹⁰ A public agency endowed with a public trust is simply not allowed to yield its discretionary authority to an employee or contractor without recourse. 71 Ops.Cal.Atty.Gen. 266, 268-271 (1988); 63 Ops.Cal.Atty.Gen. 240, 242-243 (1980)

Second, the Commission has not only limited any argument before the Commission to the content of the Proposed Decision, but has further restricted any argument relating to evidentiary, procedural, or legal issues which were raised or could have been raised at the hearing, including any description of evidence which was accepted or rejected by the hearing officer, or the weight of the evidence, or the credibility of any witness.¹¹

Thus, whether (1) highly relevant evidence was rejected by the hearing officer, or (2) an allegation was proven by a preponderance of the evidence, or (3) a prescribed procedure relating to the hearing was followed, or (4) legal issues, presumably including constitutional issues, were correctly decided by the hearing officer, are all beyond the scope of argument to the Commission which will have no part of any such discussion. The decisions of the hearing officers in all those matters are absolutely beyond the purview of the Commission.

The Elements of Each Cause for Disciplinary Action Should be Properly Interpreted by the Hearing Officers and the Commission

Based upon its review of the cases referred to above, the Grand Jury believes that the Commission's review process failed to ensure that the following prescribed causes for disciplinary action were properly applied in one or more cases:

- Civil Service Rule 11.4(p) (Failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the employee's agency or employment)
- Civil Service Rule 11.4(j) (Conviction of a misdemeanor which is of such a nature as to adversely affect the employee's ability to perform the duties of his position).

The critical point in each of these two causes, is that the words "is of such a nature that," and "is of such a nature as," respectively, may not be ignored.¹²

Beginning with the Rule regarding the failure of good behavior, it is well settled law that it is not incumbent upon the County employer to prove an actual discredit to the agency. It is sufficient that the failure of good behavior is "of such a nature" as to result in a discredit to the agency.

Similarly, the Rule regarding conviction of a misdemeanor does not require proof of an actual adverse affect upon the employee's ability to perform his duties. It is sufficient that the conviction is "of such a nature" as to result in an adverse affect upon such performance.

A third of a century ago, the California Supreme Court¹³ interpreted the meaning of the following cause for discipline under the State Civil Service Act:¹⁴ "Other failure of good

¹¹ Rule 11.12 (c)(2)

¹² It is a fundamental rule of legal construction that no provision may be interpreted in such a manner as to render some of its words superfluous. (82 Ops.Cal.Atty.Gen. 90, 99 (1999))

behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing power or to the person's employment."

The court held that under that terminology the words "causes discredit" cannot be construed literally, and that public knowledge of the behavior in question is not an element of the offense. Thus, the Supreme Court explained, the charge of "Failure of good behavior which is of such a nature that it causes discredit to the agency" pertains to the conduct, not to publicity. Hence, it would be unnecessary, for example, to introduce newspaper articles concerning the employee's behavior to prove actual discredit to the agency.

The same reasoning would apply to the cause for disciplinary action pertaining to conviction of a misdemeanor. Proof by positive evidence of some degree of actual adverse affect upon the employee's ability to perform the duties of his position is not germane to the case. Even without the introduction of positive proof, it may in a particular case be reasonably inferred¹⁵ that an employee's usefulness in the exercise of all or any part of the full scope of his duties has been affected.

Findings and Recommendations

Finding 1. The votes of three of the five commissioners are required to decide an appeal from disciplinary action. Therefore, where only three hear an appeal, all three must vote unanimously to reach a decision. In such a case, there is a significant incentive for each of the three commissioners to reach the same decision. Such an incentive is inconsistent with the duty of each commissioner to exercise his or her individual judgment and consideration.

Recommendation 1. A minimum of four commissioners should hear appeals from disciplinary action except in the event of compelling circumstances. In no case should a vote be changed for the sole purpose of reaching a decision.

Finding 2. The Commission affords too much consideration in its determination of proper discipline to historical consistency. This policy is at odds with its duty to determine in each case the discipline which is "appropriate in light of all relevant facts and circumstances" of that case.

Recommendation 2. The Commission should determine whether the discipline imposed is appropriate in light of all relevant facts and circumstances of the case under review, and should afford less weight to consistency of the proposed disciplinary action with

¹³ *Nightingale v. State Personnel Board* (1972) 7 Cal.3rd 507, 513-514

¹⁴ Gov. Code §19572(t)

¹⁵ An inference is the result of reasoning from evidence. It does not fall outside the record, but is simply a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. (Evid. Code §600(b); and Cf., 74 Ops.Cal.Atty.Gen. 70, 71n3 (1991))

disciplines imposed in previous cases. The exceptions are cases involving substantial claims of discrimination based on race, sex, religion or national origin.

Finding 3. The Commission's Rules do not define a formal recusal policy to be followed in the event of an actual, potential, or appearance of, bias in a particular case.

Recommendation 3. The Commission should adopt and enforce a recusal policy to be followed in the event of actual, potential, or the appearance of bias. Each commissioner should be independently responsible under the policy for the decision to recuse or not to recuse himself or herself from each particular case.

Finding 4. The Commission, by its own rules, does not allow itself the ability to consider information contained in the full transcript of a disciplinary appeal hearing before a hearing officer. The transcript contains "all relevant facts and circumstances" which the Commission should be able to consider in making a final decision. The hearing officer's proposed decision may contain only those facts and circumstances deemed pertinent to that officer's proposed decision, and rarely contains "all" of the relevant facts and circumstances. By limiting the basis for its review only to the material in the hearing officer's proposed decision, the Commission has limited its ability to make a duly informed final decision.

Recommendation 4. The Commission should amend its rules to preserve its option to consider information contained in the full transcript of the case under appeal, and to maintain its option to hear any case with or without a hearing officer, or if previously heard by a hearing officer, to rehear the case with or without a hearing officer.

Finding 5. The Commission, by its own rules, has precluded any argument on appeal from a disciplinary action relating to evidentiary, procedural, or legal issues which were raised or could have been raised before the hearing officer, or to the weight of the evidence, or the credibility of a witness. Thus, the hearing officer's determinations as to all issues of evidence, procedure, or law, including the weight of the evidence, or the credibility of witnesses, are not subject to review by the Commission. By refusing to consider any such argument, the Commission has ceded too much of its authority and responsibility to exercise its own judgment in making a final decision, to the discretion of the hearing officer.

Recommendation 5. The Commission should amend its rules to allow for argument before the Commission relating to evidentiary, procedural, and legal issues, raised before the hearing officer, including descriptions of evidence, weight of the evidence, and credibility of witnesses.

Finding 6. Improper interpretations as to the elements of proof were applied in one or more of the cases reviewed related to the following causes for disciplinary action:

- (a) "Failure of good behavior . . . which is of such a nature that it causes discredit to [the employee's] agency or employment", and

- (b) “Conviction of a misdemeanor which is of such a nature as to adversely affect the employee’s ability to perform the duties and responsibilities of his position.”

Recommendation 6. The Commission:

- (a) should not require proof of actual discredit to the employee’s agency, when deciding whether there was a “Failure of good behavior . . . which is of such a nature that it causes discredit to the [employee’s] agency or employment”, and
- (b) should not require proof of an actual adverse affect upon the employee’s ability to perform the duties of his position, when deciding whether there was a “Conviction of a misdemeanor which is of such a nature as to adversely affect the employee’s ability to perform the duties and responsibilities of his position.”

Response Requirements

Penal Code sections 933 and 933.05 require that specific responses to both the findings and recommendations contained in this report be submitted to the Presiding Judge of the Sacramento Superior Court by September 30, 2005, from:

- **The Sacramento County Civil Service Commission, Findings 1 - 6; Recommendations 1 - 6.**

(It should be noted that Grand Juror Marilyn A. Isenberg recused herself from any participation in the investigation, discussion, preparation, editing, or approval of this report.)