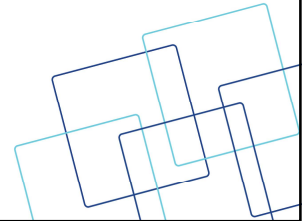**LS Lozano Smith**
ATTORNEYS AT LAW

Employee Evaluation and Discipline

Presented by: Eleanor M. Welke

Tulare County Office of Education – Law Seminars 2022-2023

September 14, 2022

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Presenter

Eleanor M. Welke

AT LOZANO SMITH

Eleanor M. Welke is Senior Counsel in Lozano Smith's Los Angeles office. She is a member of the Labor and Employment and Student Practice Groups. Ms. Welke provides legal advice to administration on personnel matters, including discrimination, retaliation, sexual harassment, disability accommodations, and the Americans with Disabilities Act. Ms. Welke has extensive experience representing clients in both California State and Federal Courts and in front of administrative bodies, including the Equal Employment Opportunity Commission, Department of Fair Employment and Housing, and the California Labor Commissioner.

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Overview

Lozano Smith

Introduction: Evaluations and Discipline - The Big Picture

Part 1 (Evaluations) and

Part 2 (Discipline)

- Top 5 Rules of Evaluations and Discipline
- The Documents
- The Meetings
- Timelines

Part 3: Why it All Matters

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Hide the Ball - Reflections

1. How did you feel while looking for the ball?
2. What did you think/feel as a result of the feedback you received?
3. How did the feedback you received affect how you felt about your performance?
4. How did the feedback you received affect how you felt about the individuals giving the feedback?

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EXERCISE NO. 1

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Evaluations

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PHONES UP

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Interactive Polling

1. Open a browser on your device
2. Go to: pollev.com/lozanosmith

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Which describes you the best?

| Writing evaluations is easy! I love giving feedback! | Writing evaluations is so hard. Sometimes, I just don't know what to say! | Evaluations? What evaluations? I don't have time for evaluations! | I'm indifferent. | None of the above. |

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PHONES DOWN

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Evaluation: The Big Picture

It's not a document. It's a process.

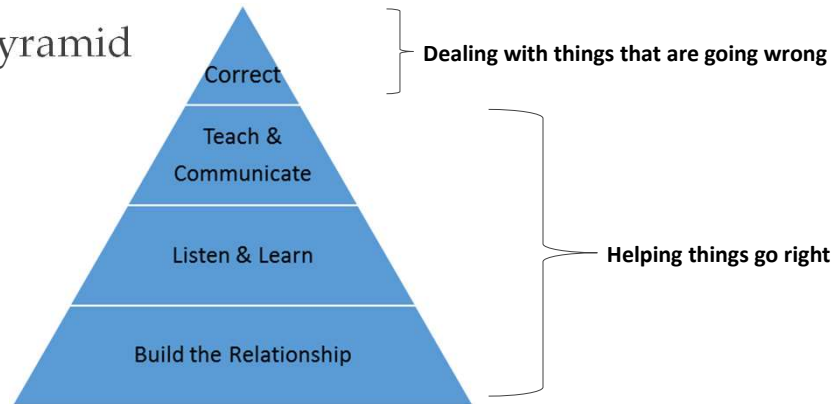Communication & Relationships

Ongoing Obligation

What are the goals?

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Communication & Relationships

The "Change" Pyramid

Correct

Teach & Communicate

Listen & Learn

Build the Relationship

Dealing with things that are going wrong

Helping things go right

Source: *The Anatomy of Peace: Resolving the Heart of Conflict.*
San Francisco, CA: Berrett-Koehler, 2006.

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Top 5 Evaluation Tips

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No surprises!

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Don't sugarcoat
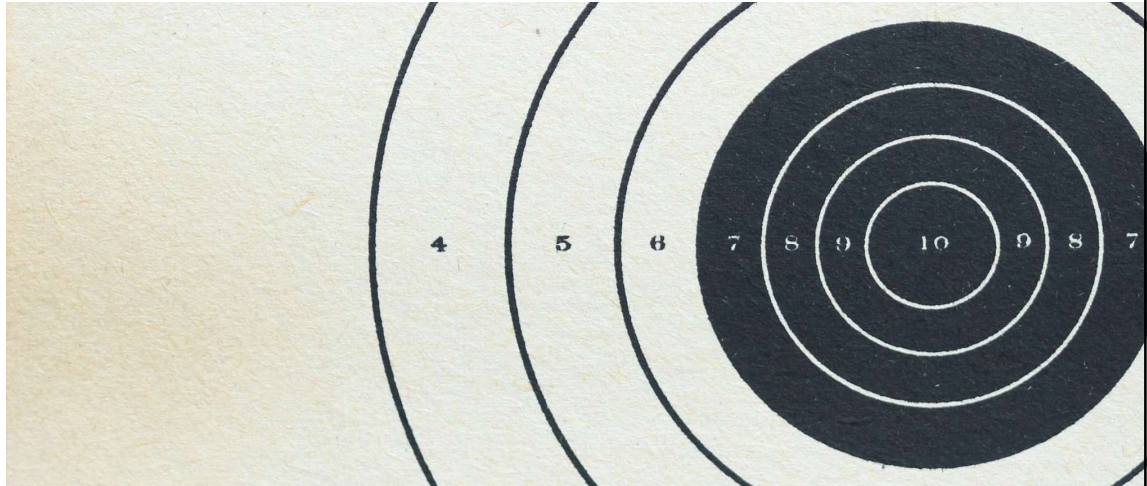

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Spend the time

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Words matter, good and bad

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Be specific

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Exercise No. 2

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Barriers and Solutions

1. Do you feel that your written evaluations are helpful to your employees?
   - Why or Why Not?
   - Do you have the information you need to write it?

2. What are the barriers to either the evaluation process or writing complete and thoughtful evaluation?
   - What is one tip to overcoming the barrier?

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The Evaluation Document
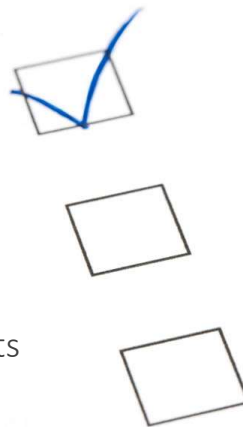
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**First,
Evaluate Yourself**

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Self-Evaluation Checklist

1. Get prior evaluations (1-2 years)

2. Look for patterns
   - ❑ Everyone Meets or Everyone Exceeds
   - ❑ Using the same comments

3. Look for "Top 5" Culprits

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The Evaluation

- Start with the prior year's evaluation

- Look at the goals and recommendations from prior year

- Review notes, emails, personnel documents from the prior year

- Where appropriate, get feedback from others

- Check your assumptions, biases

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The Evaluation

Try some of the following:

- Write the comments before you check the ratings box
- Do it with an old-fashioned pen and paper. Scribble. Be comfortable with a draft
- Commit to two sittings
- Try audio recording what you want to say on your phone
- Try not to repeat the words from the criterion
- Have a colleague review and comment

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Rating Scales

- Calibration discussions
- Read the descriptions of each category
- Make sure the comments explain and match the category

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Rating Scales

Any ratings below Satisfactory should include:

1	▪ Details to describe what needs improvement and/or what they are doing incorrectly.
2	▪ Recommendations on how to improve performance.
3	▪ Resources or tools available to the employee to remedy the performance problem.

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Dealing with Trending

Issues may trend up or down during a cycle

- Don't ignore the trend
- If it is trending down, mention it and state it is improving
- If it is trending up, note that it is a new issue that needs to be addressed
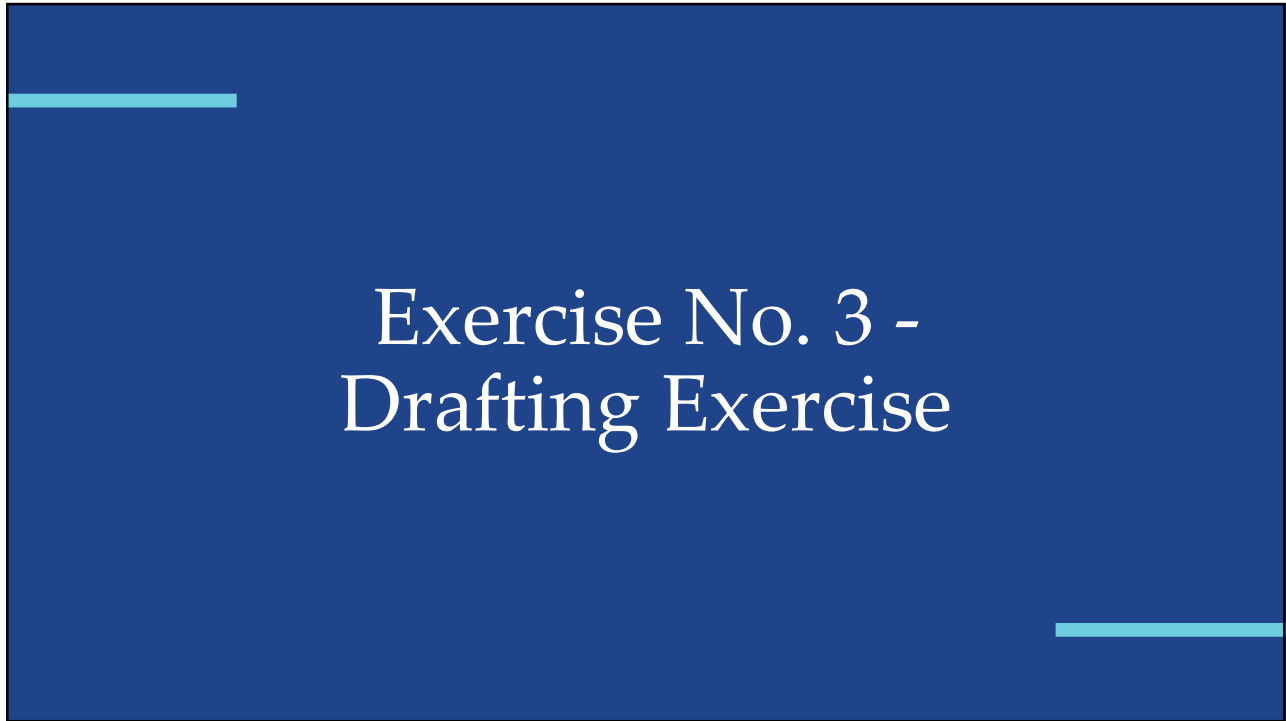
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Descriptive Words

- Achieves, accomplishes, solves, manages
- Provides, administers, implements
- Anticipates, supports, communicates
- Excels, exhibits, demonstrates, grasps
- Generates, monitors, directs
- Collaborates, creative, resourceful, inventive
- Takes responsibility, "owns"
- Or does not do the above

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Exercise No. 3 - Drafting Exercise

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The Meeting

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The Meeting

- Prepare for this
- Rehearse
- List the top three things you want them to hear

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The Meeting

- Check in.

- A little warm up or appropriate small talk?

- Look at their body language.

- Watch for changes in body language. What caused it?

- Consider your own body language.

- Put your phone away.

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How do you think your year went?

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The Meeting

- Start with a positive.

- Make it a conversation. Ask questions.

- Ask them what their goals are. What do they want to do better? Where do they want to go?

- What can you do better to support them? What can the organization do?

- End on a positive.

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Exercise No. 4 – The Evaluation Meeting Exercise

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Reflections on the Evaluation Meeting Exercise

- What were your take aways?

- Did it go the way you expected?

- What do you think you can do to improve on your evaluation meetings?

- As an employee, what do you hope to get out of your evaluation meetings?

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Evaluation Timelines

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Certificated Evaluation Timelines

Make sure to check the CBA for the following:

- Frequency and timelines of evaluations for <u>permanent certificated employees</u>:
- Timelines of evaluations for <u>probationary certificated employees</u>.
- Timelines for when pre-observation meetings, observations, and post observations meetings must be conducted.
- When copies of evaluations must be distributed.
- The number of classroom observations required.
- What must be included with the summary evaluation (*i.e.,* notes from evaluation, reports, etc.?)

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Classified Evaluation Timelines

Make sure to check the CBA for the following:

- The frequency of required evaluations of permanent employees:
- Timelines for evaluations of probationary employees
- Options when there is a negative evaluation (i.e., can you perform additional evaluations, etc.).

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Don't Forget Probationary Evaluations!!

These are sometimes forgotten and are essential to being able to establish the non-discriminatory and non-retaliatory basis for a non-reelection or a probationary classified release!

Failure to comply with the probationary evaluations as set forth in the collective bargaining agreements can lead to negative inferences in both civil litigation and administrative matters.
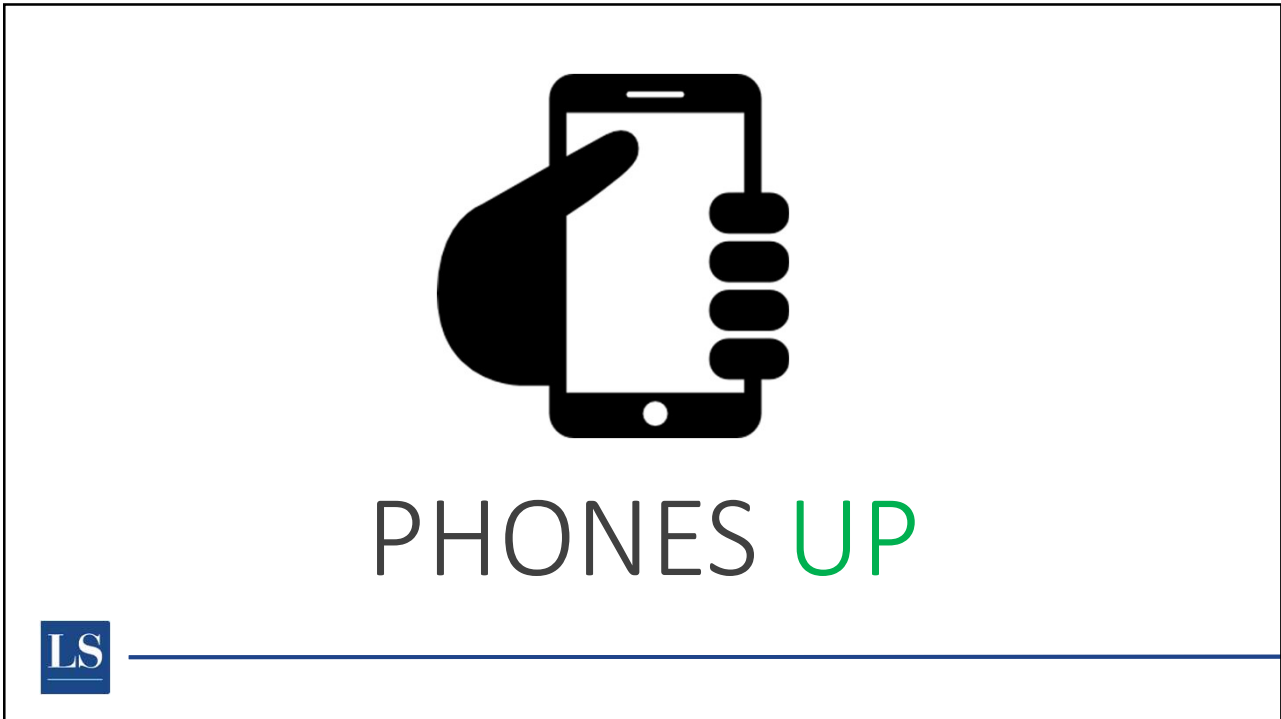
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Part 2: Discipline

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PHONES UP

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What is one word that comes to mind when you think of disciplining an employee?

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PHONES DOWN

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Exercise No. 5

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Roadblocks to Discipline

What Roadblocks
do you experience
with discipline?

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Why is it Important to Document Misconduct?

Make your documentation solid as a house made with BRICS by following the Yellow BRICS Road.

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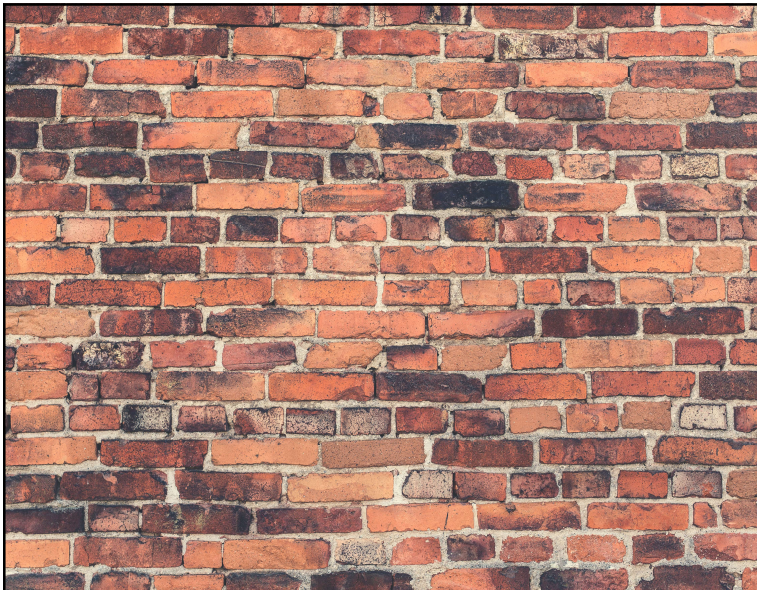49

5 Steps for Effective Documentation: BRICS

B – Background

R – Rule

I – Importance

C – Corrective Actions

S – Statement of Rights

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Step #1 – B
Background

Provide complete background information:

- Identify deficient conduct.
- Use complete descriptions – time, place, location, persons present.
- Use accurate facts.
- Avoid sole reliance on hearsay and unreliable sources of information; get confirmation.

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Meet Seth - The Forgetful and Clumsy Bus Driver: Background

Okay	**Better**	**Best**
You forgot to fill out your bus inspection reports. You also damaged the golf cart without reporting the damage to your supervisor and lied about what happened.	You failed to complete your bus inspections and turn in your bus inspection reports on six different occasions over the last six weeks. In addition, you damaged the golf cart by backing into a pole, failed to report the incident to your supervisor, and then were dishonest with your supervisor when you were asked how the damage occurred.	On July 15, 17, 18, 24, 25 and 27, 2022, you failed to perform your required daily bus inspections and failed to complete and turn in the daily bus inspection reports.

On July 19, 2022, at approximately 11:30 a.m., you reversed the golf cart without looking over your shoulder and ran the golf cart into the side of Building B, causing damage to the side of Building B and the golf cart.

On July 19, 2022, you failed to report the golf cart incident and that you caused damage to Building B and the golf cart to your supervisor.

On July 20, 2022, you were dishonest with your supervisor when you were asked how the damage to the golf cart occurred and you told her that you did not know what happened. Later that same date, you were shown security camera footage of the incident on July 19, 2022, at which time you admitted that you caused the damage to the golf cart and that you were previously dishonest with your supervisor. |

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Step #2 – R
Rule, Expectation or Principle Violated

Rules violated may include:

- Board Policy
- Education Code or other law
- Job description or requirements
- Supervisor's directives and Remediation Plans
- Collective Bargaining Agreement
- Standards of Performance

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The Forgetful and Clumsy Bus Driver: <u>Rule</u>

Okay	**Better**	**Best**
Forgetting to perform your daily bus inspections and failing to report incidents to your supervisor violates District Policies and Procedures.	Failing to perform your daily bus inspections and complete your daily bus inspection reports violates District BP 4218. In addition, you failed to report to your supervisor that you had an incident with the golf cart and then lied to your supervisor about it when questioned, which also violates District BP 4218.	Failing to perform your daily bus inspections and complete your daily bus inspection reports, failing to report that you backed the golf cart into the flagpole, causing damage to the vehicle and Building B, and being dishonest with your supervisor regarding that incident all violate District BP 4218 and the District's Bus Driver Handbook. District BP 4218 requires that you perform the duties of your position efficiently and attentively and that you do not exhibit carelessness or negligence in the performance of your position, your duties, or the care or use of District property. Your conduct violated the District's policies and procedures and risked the safety of District students and staff. In addition, you have exhibited a similar pattern of failing to complete your bus inspections and reports, and being dishonest about those failures, during the 2021-2022 school year. On March 3, 2022, you were orally directed by your supervisor to ensure that you perform those job duties daily. Your conduct outlined above directly violates these past directives as well.

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Step #3 – I
Importance of the Matter to the School/District

Consider:
• What's the Big Deal? • Why is it important to: 　• Students 　• Co-workers, supervisors 　• Parents 　• District resources (e.g.: Time, Money, Facilities, Equipment, and Technology) 　• School/District's image as a public entity

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The Forgetful and Clumsy Bus Driver : Importance

Okay	Better	Best
It is important to the operation of the District that you perform all your job duties daily and exercise care in the operation of District vehicles.	It is important to the operation of the District that you perform all your job duties daily, exercise care in the operation of District vehicles, and honestly report any incidents that occur to your supervisor. Both students and other staff members are impacted when you fail to do so.	It is important to the operation of the District that you perform all your job duties daily, exercise care in the operation of District property, and timely and honestly report any accidents that occur to your supervisor. The safety of both our students and staff members are directly impacted when you do not complete your bus inspections and bus inspection reports as they could reveal a safety hazards that would require the District to take the vehicle out of circulation for repairs. In addition, your failure to timely report the accident that occurred with the golf cart and your failure to be honest with your supervisor regarding that incident causes the District to lose faith in your ability to carry out the duties of your position and negatively impacts the District's ability to provide safe and reliable transportation for its students and staff. This includes reporting safety concerns in a timely manner so that the District can ensure they are immediately corrected and that all vehicles are maintained in a safe condition.

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Step #4 – C
Corrective Action Required/Commendations

Options:

- Suggest specific corrections
- Reiterate the expected standard
- Directives
- Remediation Plan
- Commendations

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The Forgetful and Clumsy Bus Driver: Corrective Action

Okay	**Better**	**Best**
Perform your bus inspection, complete the reports, and be honest with your supervisor.	Effective immediately, you are to perform your bus inspections daily and complete all your bus inspection reports daily. You are also directed to operate all District vehicles with the utmost care, report accidents that occur, and be honest with your supervisor at all times.	Effective immediately, you are directed do the following: • Honestly and timely report any accidents that occur during your workday immediately to your supervisor; • Honestly respond to inquiries from your supervisor; • Comply with all District policies and regulations, including all policies and procedures regarding the safe operation of District vehicles; • Perform your daily bus inspections and complete your daily bus inspection reports during each of your workdays. • Submit your daily bus inspection reports to your supervisor for their signature at the conclusion of your each of your shifts; • Review the District's Board Policy 4218 and the District's Bus Driver Handbook no later than **October 5, 2022**; • Meet with your supervisor no later than **October 15, 2022**, to discuss your review of these documents and progress regarding these directives.

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Step #5 – S
Statement of Rights

Explain employee rights:

- The right to a hearing or conference
- The right to representation
- List consequences of continued misconduct
- Right to prepare a written response
- Other legal rights

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Exercise No. 6 - Drafting Exercise

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Reminders: Goals for Effective Documentation

- Create accurate documents that support personnel decisions, instead of ambiguous documents that undermine decisions.

- Use evaluations consistently and fairly.

- Develop a consistent system for evaluating and disciplining employees and use it.

- Check provisions of the Collective Bargaining Agreement and Board Policies and Regulations for evaluation and discipline procedures.

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Due Process – Progressive Discipline

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Progressive Discipline & Documentation
You can't go from 0 to 60 in one step…

Discipline

Your

Progress

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Progressive Discipline

Dismissal

Suspension

Written Reprimand

Memorandum of Counseling

Verbal Warning

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Letter of Reprimand

This is a letter that serves to reprimand an employee for misconduct. The letter is placed in the employee's personnel file and the employee is provided 10 days to respond to the letter. The employee's response is also placed in the personnel file.

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45/90-Day Notice – Certificated Employees ONLY

Must be given notice prior to filing charges of dismissal or suspension for <u>unprofessional conduct (45 days) / unsatisfactory performance (90 days)</u>.

Specify nature of misconduct/poor performance, and list specific instances.

Purpose: give employee opportunity to correct faults and overcome grounds for charge.

Notice must attach most recent evaluation of teacher.

(Ed. Code, §§ 44938 (a) & (b)(2).)

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Suspension (without Pay) or Demotion
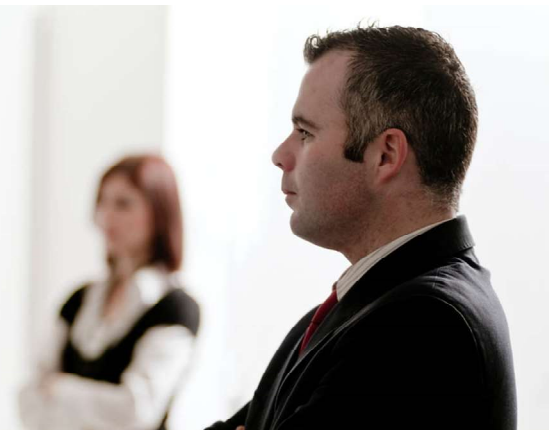
A suspension or demotion is generally applied when there has been progressive discipline leading up to suspension/demotion. However, some conduct can warrant a suspension/demotion. A pre-disciplinary "Skelly" meeting is required for any suspension or demotion action resulting in an immediate loss of pay and is generally recommended in all cases.

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Certificated Employees Dismissal Process

(General Rule: First look to the collective bargaining agreement)

• Examples of Grounds (See Education Code section 44932)

• 4–year rule: termination must usually be based on acts occurring within 4 years of termination

• Three-person hearing panel

• Panel's decision <u>binding</u>

• Estimated cost of termination process can exceed $100,000

• Attorney fees to teacher if District loses

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Classified Employees Statement of Charges for Suspension/Dismissal

(General Rule: First look to the collective bargaining agreement)

• Examples of Grounds (See AR 4218) – Not an Exhaustive List
• **Charges cannot include conduct that has occurred more than two years earlier.**
• Employee must be provided notice of the statement of charges and an opportunity to respond.
• Employee is entitled to a pre-disciplinary *Skelly* meeting.
• Following the pre-disciplinary *Skelly* meetings, if the recommendation is upheld, the employee is provided with a copy of the formal written charges including a request for hearing form.
• Classified employees may request a hearing.
• Hearing will be before the Board or a hearing officer.

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Flowchart of a Typical Dismissal Process

| Pre-Skelly Notice | Pre-Disciplinary Skelly Meetings (Meeting with Supervisor and Skelly Meeting) | File Charges | Serve Charges on Employee | Hearing |

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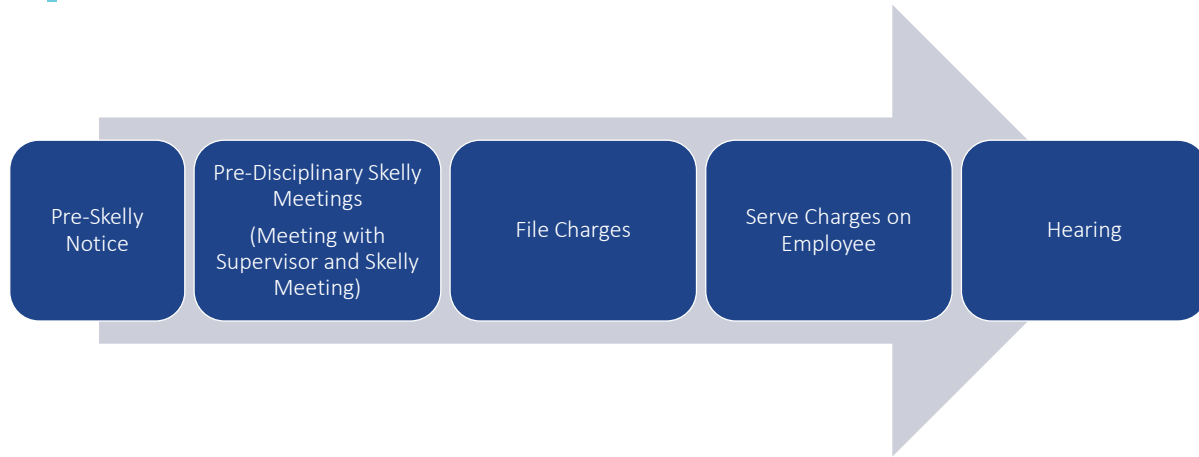
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Other Related Issues to Discipline

- Retaliation / Discrimination
- Hostile work environment
- Workplace bullying
- Simultaneous medical condition / issues
- FMLA or other leaves of absence
- Union President -> Concerted activity
- Whistleblower

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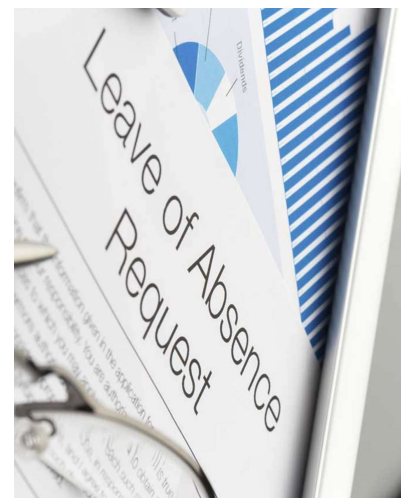
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Pros and Cons for Suspensions & Dismissals

Costs

Time

Money

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Part 3: Why it All Matters

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What the Documents in an Employee's File Say *and Do Not Say* Matters… A Lot.

- An employee's whole file will (should) be reviewed in detail before making an employment decision such as discipline, probationary release, dismissal, suspension.
- We will look to make sure that there is documentation supporting the employment decision, preferably contemporaneous documentation and progressive discipline.
- Make sure that there is nothing in the file (or not in the file) that may be concerning (*i.e.,* that may impact the ability to move forward with action or create liability).

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What and How You Communicate to Your Employees Matters… A lot.

- Properly documenting performance issues, both the good and the bad, helps avoid an employee feeling surprised when they receive a "needs improvement" mark on their evaluation.
- Properly document and communicating specific feedback, both good and bad, gives employees the tools that they need to improve and, hopefully, succeed.
- Providing clear and unequivocal evaluations and communicating well with your employees builds relationships and helps things go right instead of correcting when things go wrong.

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Document, Document, Document...

- When an employer has a consistent practice of documenting employment issues as they arise, it plays a big role in preventing and (if you cannot prevent them) defending claims.

- Lack of documentation has a significant effect on ability to move forward with discipline, probationary release, etc.

- Lack of documentation impacts the employer's ability to defend a civil lawsuit after discipline is imposed.

- Lack of documentation impacts the likelihood that the discipline is upheld if an administrative writ is filed.

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Takeaways

Make the Time

Plan
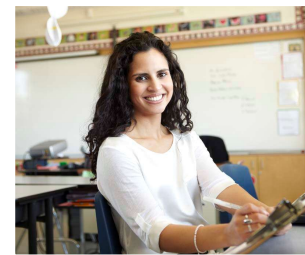
Don't forget the goals

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What is one word that describes a take-away for you on what you learned from today's training?

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Questions

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- Scholarships

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