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PRESENTATION BEFORE MVMSA BOARD OF DIRECTORS

TRAINING SESSION

MAY 8, 2004

AGENDA

- 1. Introductions**
 - A. Introductions**
 - B. Pre-Test**
- 2. Representation Rights**
 - A. General Rights**
 - B. Rights During Investigations**
 - C. C. Rights When Facing Discipline**
 - D. Meet and Confer**
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 - A. Policy Enforcement**
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GOVERNMENT CODE SECTION 3525-3539.5

3525. This chapter shall be known, and may be cited, as the Bill of Rights for State Excluded Employees.

3526. The purpose of this chapter is to inform state supervisory, managerial, confidential, and employees otherwise excepted from coverage under the Ralph C. Dills Act by subdivision (c) of Section 3513 of their rights and terms and conditions of employment, and to inspire dedicated service and promote harmonious personnel relations among those representing state management in the conduct of state affairs.

3527. As used in this chapter:

(a) "Employee" means a civil service employee of the State of California. The "State of California" as used in this chapter includes such state agencies, boards, and commissions as may be designated by law that employ civil service employees, except the University of California, Hastings College of the Law, and the California State University.

(b) "Excluded employee," means all managerial employees, as defined in subdivision (e) of Section 3513, all confidential employees, as defined in subdivision (f) of Section 3513, and all supervisory employees, as defined in subdivision (g) of Section 3513, and all civil service employees of the Department of Personnel Administration, professional employees of the Department of Finance engaged in technical or analytical state budget preparation other than the auditing staff, professional employees in the Personnel/Payroll Services Division of the Controller's office engaged in technical or analytical duties in support of the state's personnel and payroll systems other than the training staff, employees of the Legislative Counsel Bureau, employees of the Bureau of State Audits, employees of the Public Employment Relations Board, conciliators employed by the State Conciliation Service within the Department of Industrial Relations, and intermittent athletic inspectors who are employees of the State Athletic Commission.

(c) "Supervisory employee organization" means an organization which represents members who are supervisory employees under subdivision (g) of Section 3513.

(d) "Excluded employee organization" means an organization which includes excluded employees of the state, as defined in subdivision (b), and which has as one of its primary purposes representing its members in employer-employee relations. Excluded employee organization includes supervisory employee organizations.

(e) "State employer" or "employer," for purposes of meeting and conferring on matters relating to supervisory employer-employee relations, means the Governor or his or her designated representatives.

3528. The Legislature hereby finds and declares that the rights and protections provided to excluded employees under this chapter constitute a matter of important concern. The Legislature further finds and declares that the efficient and effective administration of state programs depends upon the maintenance of high morale and the objective consideration of issues raised between excluded employees and their employer.

3529. (a) Except for supervisory employees as defined in subdivision (g) of Section 3513, excluded employees shall not hold any office in an employee organization which also represents nonexcluded employees.

(b) Excluded employees shall not participate in the handling of grievances on behalf of nonexcluded employees. Nonexcluded employees shall not participate in the handling of grievances on behalf of excluded employees.

(c) Excluded employees shall not participate in meet and confer sessions on behalf of nonexcluded employees. Nonexcluded employees shall not participate in meet and confer sessions on behalf of supervisory employees.

(d) The prohibition in subdivisions (b) and (c) shall not apply to the paid staff of an excluded or supervisory employee organization.

(e) Excluded employees shall not vote on questions of ratification or rejection of memoranda of understanding reached on behalf of nonexcluded employees.

3530. Excluded employee organizations shall have the right to represent their excluded members in their employment relations, including grievances, with the State of California. Excluded employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of excluded employees from membership. This section shall not prohibit any excluded employee from appearing on his or her own behalf or through his or her chosen representative in his or her employment relations and grievances with the State of California.

3531. Supervisory employees shall have the right to form, join, and participate in the activities of supervisory employee organizations of their own choosing for the purpose of representation on all matters of supervisory employer-employee relations, as set forth in Section 3532. Supervisory employees also shall have the right to refuse to join or participate in the activities of supervisory employee organizations and shall have the right to represent themselves individually in their employment relations with the public employer.

3532. The scope of representation for supervisory employees shall include all matters relating to employment conditions and supervisory employer-employee relations including wages, hours, and other terms and conditions of employment.

3533. Upon request, the state shall meet and confer with verified supervisory employee organizations representing supervisory employees. "Meet and confer" means that they shall consider as fully as the employer deems reasonable such presentations as are made by the verified supervisory employee organization on behalf of its supervisory members prior to arriving at a determination of policy or course of action.

3534. The state employer shall allow a reasonable number of supervisory public employee representatives of verified supervisory employee organizations reasonable time off without loss of compensation or other benefits when meeting and conferring with representatives of the state employer on matters within the scope of representation for supervisory employees.

3535. The Department of Personnel Administration may adopt rules and regulations for the administration of excluded employer-employee relations, including supervisory employer-employee relations, under these provisions. Such rules and regulations may include provisions

for:

(a) Verifying that an excluded employee organization does in fact represent excluded employees.

(b) Verifying the official status of excluded employee organization officers and representatives.

(c) Access of excluded employee organization officers and representatives to work locations.

(d) Use of official bulletin boards and other means of communication by excluded employee organizations.

(e) Furnishing nonconfidential information pertaining to excluded employee relations to excluded employee organizations.

(f) Any other matters as are necessary to carry out the purposes of this chapter.

3536. The state may adopt reasonable rules and regulations providing for designation of the management and confidential employees of the state and restricting these employees from representing any employee organization, which represents other employees of the state, on matters within the scope of representation. Except as specifically provided otherwise in this chapter, this section does not otherwise limit the right of excluded employees to be members of and to hold office in an excluded employee organization.

3537. Every excluded employee organization shall submit an annual registration statement on or before July 1 of each calendar year to the Department of Personnel Administration. The registration statement shall, at a minimum, list the name of the organization, its affiliations, headquarters, and other business addresses, its principal business telephone number, a list of principal officers and representatives, and a copy of its organization bylaws.

3538. The state employer and excluded employee organizations shall not interfere with, intimidate, restrain, coerce, or discriminate against supervisory employees because of their exercise of their rights under this article.

3539. The enactment of this chapter shall not make Section 923 of the Labor Code applicable to state employees.

3539.5. The Department of Personnel Administration may adopt or amend regulations to implement employee benefits for those state officers and employees excluded from, or not otherwise subject to, the Ralph C. Dills Act.

These regulations shall not be subject to the review and approval of the Office of Administrative Law pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2). These regulations shall become effective immediately upon filing with the Secretary of State.

REPRESENTATION RIGHTS IN INVESTIGATIVE INTERVIEWS AS DETERMINED BY THE COURTS

Robinson v. State Personnel Board (1979) 97 Cal App 3d 994

"We conclude that a state employee has a right to union representation at a meeting with his superiors held with a significant purpose to investigate facts to support disciplinary action and may not be dismissed for attempted exercise of that right. ..."

NLRB v. WEINGARTEN, INC., (1975) 420 U.S. 251

The employer violated 8 (a) (1) of the National Labor Relations Act because it interfered with, restrained, and coerced the individual right of an employee, protected by 7, "to engage in . . . concerted activities for . . . mutual aid or protection . . .," when it denied the employee's request for the presence of her union representative at the investigatory interview that the employee reasonably believed would result in disciplinary action.

LYBARGER v. CITY OF LOS ANGELES (1985) 40 Cal. 3d 822, 829

The peace officer must be told:

".. .among other things that although he had the right to remain silent and not incriminate himself, (1) his silence could be deemed insubordination, leading to administrative discipline, and (2) any statement made under the compulsion of the threat of such discipline could not be used against him in any subsequent criminal proceeding."

race, religious creed, color, national origin, ancestry, disability, marital status, sex, or age, against the public or other employees while acting in the capacity of a state employee.

(x) Unlawful retaliation against any other state officer or employee or member of the public who in good faith reports, discloses, divulges, or otherwise brings to the attention of, the Attorney General, or any other appropriate authority, any facts or information relative to actual or suspected violation of any law of this state or the United States occurring on the job or directly related thereto.

19574. (a) The appointing power, or its authorized representative, may take adverse action against an employee for one or more of the causes for discipline specified in this article. Adverse action is valid only if a written notice is served on the employee prior to the effective date of the action, as defined by board rule. The notice shall be served upon the employee either personally or by mail and shall include: (1) a statement of the nature of the adverse action; (2) the effective date of the action; (3) a statement of the reasons therefor in ordinary language; (4) a statement advising the employee of the right to answer the notice orally or in writing; and (5) a statement advising the employee of the time within which an appeal must be filed. The notice shall be filed with the board not later than 15 calendar days after the effective date of the adverse action.

19575. (a) The employee has 30 calendar days after the effective date of the adverse action to file with the board a written answer to the notice of adverse action. The answer shall be deemed to be a denial of all of the allegations of the notice of adverse action not expressly admitted and a request for hearing or investigation as provided in this article. With the consent of the board or its authorized representative an amended answer may subsequently be filed. If the employee fails to answer within the time specified or after answer withdraws his or her appeal the adverse action taken by the appointing power shall be final. A copy of the employee's answer and of any amended answer shall promptly be given by the board to the appointing power.

19575.5. At any time before an employee's appeal is submitted to the board or its authorized representative for decision, the appointing power may with the consent of the board or its authorized representative serve on the employee and file with the board an amended or supplemental notice of adverse action. If the amended or supplemental notice presents new causes or allegations the employee shall be afforded a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further answer unless the board or its authorized representative so orders. Any new causes or allegations shall be deemed controverted and any objections to the amended or supplemental causes or allegations may be made orally at the hearing or investigation and shall be noted in the record.

at the hearing or investigation and shall be noted in the record. 19578. (a) Except as provided in Section 19576, whenever an answer is filed to an adverse action, the board or its authorized representative shall within a reasonable time hold a hearing. The board shall notify the parties of the time and place of the hearing. The hearing shall be conducted in accordance with the provisions of Section 11513 of the **Government Code**, except that the employee and other persons may be examined as provided in Section 19580, and the parties may submit all proper and competent evidence against or in support of the causes.

19583. (a) The board shall render a decision within a reasonable time after the hearing or investigation. The adverse action taken by the appointing power shall stand unless modified or revoked by the board. If the board finds that the cause or causes for which the adverse action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the adverse action and it may order the employee returned to his or her position with appropriate restoration of backpay and lost benefits either as of the date of the adverse action or as of such later date as it may specify. The decision of the board shall be entered upon the minutes of the board and the official roster.

19583.5. (a) Any person, except for a current ward or inmate of the California Youth Authority or the Department of Corrections, with the consent of the board or the appointing power may file charges against an employee requesting that adverse action be taken for one or more causes for discipline specified in this article. Charges filed by a person who is a state employee shall not include issues covered by the state's employee grievance or other merit appeals processes. Any request of the board to file charges pursuant to this section shall be filed within one year of the event or events that led to the filing. The employee against whom the charges are filed shall have a right to answer as provided in this article. In all of these cases, a hearing shall be conducted in accord with this article and if the board finds that the charges are true it shall have the power to take any adverse action as in its judgment is just and proper. An employee who has sought to bring a charge or an adverse action against another employee using the grievance process, shall first exhaust that administrative process prior to bringing the case to the board.

(b) This section shall not be construed to supersede Section 19682.

19589. Letters of reprimand shall be removed from the personnel file of the state employee and destroyed not later than three years from the date the letters were issued.

**GOVERNMENT CODE
SECTION 19590-19592**

19590. Notwithstanding Article 1 (commencing with Section 19570), persons who have been designated as managerial employees under Section 3513 from the beginning of their current appointment, but whose positions are not in the career executive category, shall hold their appointments subject to the following adverse action process:

(a) The employee may be demoted, dismissed, or otherwise disciplined under this section for any of the causes specified in Section 19572, but shall not be disciplined for any cause constituting prohibited discrimination as set forth in Sections 19700 to 19703, inclusive.

(b) At least 20 days prior to the effective date of the disciplinary action, the appointing power shall give the employee written notice of the proposed action setting forth the reasons for the action, the effective date of the action, the right of the employee to answer the notice orally or in writing within 10 days of receipt of notice, and the employee's appeal rights. Within 15 days after the effective date of the disciplinary action, a copy thereof shall be filed with the board.

(c) The board, at the written request of a disciplined managerial employee filed within 30 days of the employee's receipt of the notice of the disciplinary action, may investigate with or without a hearing the reasons for the action.

If the adverse action taken against the employee was a disciplinary action other than demotion or dismissal, the board shall, after the investigation or hearing, affirm, reduce, or overturn the action of the appointing power.

If the adverse action taken against the employee was a demotion or dismissal from state civil service, the board shall, after the investigation or hearing and subject to Section 19592.5, affirm or reduce the action, restore the employee to the position from which he or she was demoted, or reinstate the employee to the position from which he or she was dismissed or to a position to which he or she could have transferred.

The decision of the board to modify the action of the appointing power pursuant to this subdivision shall be taken only if the board determines, after investigation or hearing, that there is no substantial evidence to support the reason or reasons for disciplinary action, or that the disciplinary action was made in fraud or bad faith. In any such proceeding, the disciplined managerial employee shall have the burden of proof. Subject to rebuttal by the employee, it shall be presumed that the action was free from fraud and bad faith and that the statement of reasons in the notice of disciplinary action is true.

19590.5. Notwithstanding Section **19590**, a managerial employee who, without a subsequent break in service due to a permanent separation, has previously served with permanent status in a nonmanagerial state civil service position, may be dismissed from state service only as provided in Article 1 (commencing with Section 19570) . Similarly, a managerial employee who has served in a state civil service managerial position for a combined period of at least 12 months, may be dismissed from state service only as provided in Article 1 (commencing with Section 19570). Section **19590** shall apply, however, to a dismissal action against a managerial employee who does not have previous permanent status as described in this section, if the dismissal action is taken during the first year of his or her service in a state civil service managerial position or positions.

19591. Any employee demoted pursuant to Section **19590** shall, as specified by Section 19140.5, have the right to be reinstated to his or her former civil service position.

19592. When action is taken under this article, the provisions of this article and related board rule shall constitute the entire disciplinary action and review process, except that the provisions of Sections 19574.1, 19583.5, and 19584 shall also apply in a manner consistent with the provisions of this article.

19592.5. Notwithstanding any other provisions of law, when a demotion action is taken against a managerial employee who was hired from outside of state civil service pursuant to Section 18930, and the action is taken during the first year of his or her service in a state civil service managerial position or positions, he or she may only transfer, reinstate, be reduced in class or demoted to other positions designated as managerial.

DO's AND DON'T's OF POLICY ENFORCEMENT

1. DO acquaint yourself with the policies and procedures that you will be expected to follow yourself and for which you will be expected to hold your subordinates accountable.
2. DO maintain copies of the policies and procedures you are responsible for and make sure they are accessible to you at all times.
3. DO timely update and file any changes, revisions or deletions of policies and procedures for which you are responsible.
4. DO timely notify your subordinates of changes or revisions in existing policies or procedures and any new policies or procedures you learn of.
5. DO document the date when you receive a new policy, a revision or a change regarding a policy or procedure.
6. DO document when you share or discuss a policy with a subordinate. Subordinates may be asked to sign and date a form acknowledging receipt of the policy.
7. DO document when you discuss a policy with a superior, especially if the superior has provided an interpretation, described an exception or otherwise suggested anything other than full and literal compliance with the policy. A memo or email to the superior to confirm the information you received (or your understanding of it) is an effective tool in this regard.
8. DO expect your subordinates to abide by established policies and protocols and hold them accountable if they do not.
9. DO expect to abide by established policies and protocols and to be held accountable if you do not.
10. DO enforce policies consistently with all employees.
11. DON'T be selective (disparate) in your enforcement of policies.
12. DON'T become lax in your enforcement of policies. Your failure to require subordinates to abide by policies can be a cause for disciplinary action against you.
13. DON'T assume someone else has reported a policy violation that you have observed and/or reported. Make sure to report the breach to someone responsible and document your reporting.
14. DON'T assume that a new employee in your work unit has been informed of policies that you know are important. Obtain documentation from a previous supervisor of the employee or have them review the policies in your presence and obtain the required documentation.
15. DON'T rely upon an "everybody else is doing it" excuse to keep you out of trouble if you don't adhere to policy requirements.
16. DON'T expect "I was too busy" or "I forgot" to be accepted as valid reasons that you or a subordinate failed to adhere to policy requirements.
17. DON'T dismiss or ignore any report or complaint about a violation of discrimination, sexual harassment or threat and violence policies.
18. DON'T leave yourself exposed. Document reports or complaints, report them to your superior and document your reporting as well as their directions or response.
19. DON'T assume that the department will provide you with counsel or other defense if they and you are accused of a policy violation.
20. DON'T go it alone. At the slightest hint of a policy violation investigation, obtain representation.

(THE BAD)

Dec 12 - Martin was Late for work today. When I saw him enter the office, I reminded him that he should do a Better job getting himself ready in the morning.

Dec 13 - Martin did not report for work this morning. When he called in he told Cindy he was not feeling well. When I called his house, there was no answer.

Dec 16 - Martin arrived [ate again this morning. I was not able to speak with him when he first arrived. I reminded him aboutt his absence Cast Friday. I mentioned that I was not able to reach him By phone. He said he had gone to the drug store. I advised Martin that in the future, he needed to do a Better job of reporting his absences. I reminded him that he was 10 minutes late this morning. He said there was an accident on the highway and it was not his fault.

Dec 17 - I delivered a counsel nig memo to Martin. He thanked me.

Dec 18 - Martin was away from his desk from for a long time. I walked over to his desk and asked him where he had Been. He replied, "On Break." I told him that it seemed like an unusually long Break. He said he had taken some things down to the mailroom and then stopped accounting to ask about his overtime pay for Cast month. I told him he should have let somebody know. Martin called in at 1:10 and said that he was not feeling well, had gone home for his lunch and would be unable to return. I asked him what was wrong with him. He said, "I already told you, I'm not feeling well." I think maybe something else is Bothering Martin. He is usually more reliable.

Dec 19 - Martin out sick.

Dec 20 - Martin out sick.

Dec 30 - I met with Martin this morning. I advised him that I had concerns that he had Been sick just Before his Christmas vacation. I told him there could be consequences for his attendance pattern. 3-Ce said something about getting an attorney. I asked him what he meant. 3-Ce swore at me and acted mean. Other employees heard him yelling at me.

Dec 31 - Martin did not show today.

Jan 6 - Something needs to Be done about this situation with Martin.

(ISN'T IT UGLY?)

Dec 12 - Martin was 37 minutes late for work today. When I saw him enter the office, I asked him to step into my office after he arranged his things. He came into my office at about 8:43. I informed him that I had noticed him having a problem with being late lately. He said today was the only time. I told him that he was 8 minutes late yesterday morning and was 15 minutes late coming back from lunch last Friday. I asked him to please take note and ensure that he was on time coming to work in the morning and after his breaks and lunch.

Dec 13 - Martin did not report for work this morning. He called in at 9:37 and spoke with Cindy. He asked Cindy to tell me that he was not feeling well and would not be in. I tried to call Martin's home at 11:15 to inquire about the Simons complaint. There was no answer. I tried again at 1:35 and there was no answer.

Dec 16 - Martin arrived for work 10 minutes late this morning. I was in a meeting in my office with June and was not able to speak with him when he first arrived. At 9:15 I asked Martin to come into my office. I questioned him about his absence last Friday. He said he was ill. I mentioned that I was not able to reach him by phone. He said he had gone to the drug store and then spent the rest of the day at his girlfriend's house drinking tea and trying to get better.

I advised Martin that in the future, he needed to speak with me if he was going to be absent and mentioned that I needed information about the Simons case. I told him that he could leave a voice mail if I did not answer but that calling a co-worker to report that he was ill or otherwise not coming in was not acceptable.

I reminded him that he was 10 minutes late this morning. He said there was an accident on the highway and it was not his fault. I reminded him that he is responsible for allowing sufficient time to get himself to work on time every day and told him that he would be receiving a counseling memo regarding his tardiness.

Dec 17-1 delivered counseling memo to Martin. I asked him if he had any questions. He asked if he could speak to his Union steward about it. I told him that he was free to seek counsel from anyone he wanted and also suggested that he might want to either seek assistance from our employee assistance program or a time manager if he was having problems that were interfering with his work habits. He sarcastically thanked me for my motherly advice.

Dec 18 - Martin was away from his desk from 9:55 until 10:45. I walked over to his desk at 11:00 and asked him where he had been. He replied, "On break." I reminded him that breaks are only 15 minutes and that he was gone from his desk for almost an hour. He said he had taken some things down to the mailroom and then stopped accounting to ask about his overtime pay for last month. I advised him that if he was going to be away from his desk for an extended period of time, he needed to let me know. He said I was trying to smother him.

Martin called in at 1:10 and said that he was not feeling well, had gone home for his lunch and would be unable to return. I asked him what was wrong with him. He said, "I already told you, I'm not feeling well."

Dec 19 - Martin called in sick at 8:03.

Dec 20 - Martin called in sick at 8:10

Dec 30 - I met with Martin this morning in my office at 9:00. I advised him that I had concerns that he had called in sick for 2 Vz days prior to his vacation during Christmas week. I advised him that his recent problems with tardiness and questionable absences had prompted me to prepare a leave control memo for him. I told him that further failings could result in disciplinary action. I went over the requirements in the memo and asked Martin if he had any questions. He said he would let his attorney ask me questions. I asked him what he meant. He said, "you'll fucking figure out what I mean when I'm through suing your fat ass for harassment!" I told him that he had no right to speak to me in that manner. He said, "You have no goddamned right to keep fucking with me!" and stormed out of the office.

A few minutes later, Cindy and Raquel came into my office and asked what was wrong with Martin. I asked them what they meant. Cindy said they had heard him yelling at me. Raquel said, "I can't believe he cursed at you like that."

Dec 31 - Martin did not show for work this morning. He did not call in.

Jan 6 - I sent a memo to Human Resources this morning asking that Martin be disciplined for his attendance irregularities and his insubordinate behavior on December 30. I have included copies of my notes, Martin's attendance records and other relevant materials.