

*CRC Trans. Ltr resp. to  
G.J. pdf*

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August 29, 2005

Honorable Michael Virga, Presiding Judge  
Sacramento County Superior Court  
County of Sacramento  
720 9<sup>th</sup> Street  
Sacramento, CA 95814

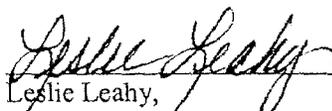
Re: Sacramento County Grand Jury 2004 – 2005 Final Report: Sacramento County Civil Service Commission

Dear Judge Virga:

Pursuant to Penal Code sections 933 and 933.05, the following specific responses to the Grand Jury 2004 - 2005 Final Report concerning the Sacramento County Civil Service Commission, Findings 1 - 6 and Recommendations 1- 6 are very respectfully submitted to the Presiding Judge of the Sacramento County Superior Court. As required by Statute, a copy of these responses has been provided to the Sacramento County Board of Supervisors.

The Commission appreciates the time and effort taken by the grand jury in its review, findings and recommendations to the Civil Service Commission.

Very truly yours,

  
Leslie Leahy,  
Executive Officer  
Civil Service Commission

COUNTY OF SACRAMENTO  
CALIFORNIA

RESPONSE TO 2004-2005 GRAND JURY REPORT

SACRAMENTO COUNTY CIVIL SERVICE COMMISSION (pp.1-5)

**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.

**Response:** The Commission disagrees partially with Finding 1. It is true that when there is a quorum of three commissioners, a unanimous vote is required for any Commission action, including on appeals from discipline. While the Commission agrees that attendance by its full membership is not only preferable, but clearly enhances the decision making process, the Commission disagrees that proceeding with a minimum quorum creates a "significant incentive" for concurrence to the degree that it is inconsistent with or impedes the exercise of independent judgment.

**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.

**Response:** The recommendation will not be implemented by any formal rule or policy change. The Commission agrees in principle that it is preferable in all actions, not just disciplinary matters, to have more than three commissioners present. However, requiring by formal enactment a super quorum of four commissioners is not warranted nor would it be reasonable. The benefit to the decision making process would be outweighed by undue delays and inefficiencies in handling Commission business. The Commission is philosophically in accord that a commissioner should not make a decision on the sole basis of reaching an accord, but should always exercise his or her independent judgment. In any case in which the quorum present believes that the matter should be heard by a greater number of members, the Commission can, and does, continue the matter for such further hearing. The Commission does not believe that the single incident cited is suggestive of a need for a structural change by redefining "quorum" as it is used by this and virtually all like bodies.

**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.

**Response:** The Commission disagrees wholly with Finding 2. The Commission believes that it gives appropriate weight to its consideration of historical consistency, which is merely one element among many relevant facts and circumstances considered in a given case. The Commission has no policy regarding consideration of historical consistency, both in the context of prior Commission action and as it relates to an issue of disparate treatment. Rather, when appropriately relevant to the deliberative process and helpful in the normal exercise of its discretion, the Commission will entertain

such considerations. Prior Commission action, if sound, informs but does not dictate the outcome of a current matter, and suitable regard for consistency and perspective does not command that prior errors be repeated.

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

**Response:** The recommendation will not be implemented by any formal rule or policy change. The Commission agrees that whether a discipline imposed is appropriate is to be decided in light of all relevant facts and circumstances in accordance with Rule 11.12(a). However, predetermining by formal enactment the weight to be given consideration of discipline imposed in like cases is not warranted, nor would it be reasonable to attempt to prescribe two tiers of deliberation, depending on the allegations made and whether the appellant is in a protected class. The appropriate weight, like that of all relevant factors, is determined by the particulars of the subject case. Consideration of disparate treatment is entirely appropriate in deciding whether discipline is excessive under the circumstances, and therefore an abuse of discretion. (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4<sup>th</sup> 95.) Attempting to eliminate or restrain the exercise of discretion by the hearing officer and the Commission in this regard would be improper and may likely constitute a violation of conventional standards for fair hearings. Unlike discipline matters, in which disparate treatment relates to the issue of the excessiveness of punishment, are cases of alleged discrimination in employment. In discrimination cases, "disparate treatment" means the intentional discrimination against one or more persons on prohibited grounds and is, in and of itself, the proscribed conduct. (*Teamsters v. United States* (1977) 431 U.S. 324, 335-336, fn. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396; *Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4<sup>th</sup> 1021, 1035-1037.)

**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.

**Response:** The Commission disagrees wholly with Finding 3. Civil Service Commission Rule 14.11 provides for and governs conflicts of interest: "If a member of the Commission determines that he or she should not participate in deliberations or vote in relation to a pending matter because of a conflict of interest, as soon as practical after the matter is called the member shall advise the chairperson of the member's inability to participate and the reasons therefore. The member shall thereupon leave the rostrum and refrain from any participation or discussion with any Commission member until the Commission has completed its consideration of, and action on, the matter."

**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.

**Response:** The recommendation is currently implemented by Rule 14.11.

**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.

**Response:** The Commission agrees partially with Finding 4. The Rules do not provide for a hearing *de novo* by the Commission and limit the proceedings to consideration of the proposed decision and, as relevant, issues of prejudice caused by the unavailability of material evidence and prior discipline of the employee. (Rules 11.12(c),(f).) "All relevant facts and circumstances" relating to a case heard by a hearing officer would be contained in the administrative record, of which the reporter's transcript is only a part. This complete record can and will be considered if a judicial remedy is sought by a party through an administrative writ. (Code Civ. Proc. §1094.5.) However, as is permitted by the Charter and Rules, the Commission provides for the impartial hearing and determination of appeals by use of hearing officers, subject only to its final approval. Nothing in the Charter's provision for delegation of the administrative hearing to a hearing officer suggests the voters intended to provide a party with two evidentiary hearings – the first before a hearing officer and then a rehearing before the Commission. The Rules properly design a system providing for a single evidentiary hearing. The proposed decision of the hearing officer is required by the Rules to be in such form that it may be adopted by the Commission as the decision in the case and its contents are limited to specific factual findings relating to the facts alleged in the order of discipline, facts asserted by the appellant for purposes of defense or mitigation, determinations of any legal issues, whether the facts found constitute good cause for discipline and the appropriate discipline in light of all relevant facts and circumstances, and an order affirming, modifying or setting aside the disciplinary action. (Rule 11.12(a).) The Commission's Rules permit the hearing officer to act as the final arbiter of the factual findings. The Commission's role is to review the hearing officer's proposed decision for final approval, require clarification as desired, and change non-factual determinations and the order of disciplinary action as consistent with the facts of the case. Therefore, the Commission has not limited its ability to make a duly informed final decision, but permits the hearing officer to act as the final arbiter of the factual findings.

**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.

**Response:** The recommendation will not be implemented. Such a plan has both budget and personnel implications that are within the province of the Board of Supervisors rather than this Commission. The Commission chooses instead to conduct a more thorough review of Sections 11 and 12 of the Civil Service Rules. The purpose of the review will be to consider how and whether to amend the Rules to preserve or create options in how the Commission might conduct hearings with or without hearing officers. The Commission will complete its review on or before December 31, 2005.

**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.

**Response:** The Commission agrees partially with Finding 5. The proceeding before the hearing officer is the evidentiary hearing on the appeal. At the hearing before the Commission, oral argument is limited as stated in Finding 5. However, it is an overstatement to say that the hearing officer's determinations as to all issues of evidence, procedure, or law are not subject to review by the Commission. Rather, the Commission's review is limited by the contents of the proposed decision and the factual findings made therein. Within that context, and so long as consistent with the factual findings, the Commission may change non-factual determinations. The intent of Rule 11.12(c) is to bar attempts to relitigate the case before the Commission. The Commission has authority to accept or reject, in whole or in part, the proposed decision, and can refer the matter back to the hearing officer for clarification or, as appropriate, order a new hearing. Therefore, the Commission disagrees that too much authority has been ceded to 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.

**Response:** Unless there are changes implemented as a result of the review referred to in the Response to Recommendation 4, this recommendation will not be implemented. It would not be reasonable to permit the Commission to entertain argument of matters that are outside the scope of the proposed decision, nor possible to reach a reasoned conclusion based on mere unsubstantiated arguments alone.

**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."

**Response.** The Commission disagrees wholly with Finding 6. While reasonable persons may hold contrary opinions as to the correctness of a given decision by the Commission or its hearing officer, only the courts can authoritatively decide whether there was improper conduct or error in the application of law by a hearing officer or the Commission. None of the reviewed cases were reversed by a court of law. They are final and presumed correct.

**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:** The recommendations will not be implemented by any formal rule or policy change. Whether or not proof of actual discredit or actual adverse consequence is proper may be entirely dependent on the facts of the particular case. The proof that will or will not be required in a given case is largely determined by the allegations in the order of discipline. The appointing authority has broad discretion to decide on the theory of the case and to plead the matter in any way he or she sees fit. However, if the employer alleges facts, but fails to prove them, then those unproven facts cannot be used to support a finding of good cause or the appropriateness of the discipline. In the case of allegations of failure of good behavior or of a misdemeanor conviction, it is up to the appointing authority to decide how the claims will be pled and proven. There must be some evidence supportive of a reasonable inference. Permitting the hearing officer to relieve a party of his burden of proof is inimical to a fair and impartial hearing process.

A party who believes the hearing officer or the Commission has erred in its findings of facts or law may challenge the decision by seeking an administrative writ pursuant to Code Civ. Proc. §1094.5.