

Office of Retirement Services Discipline Policy 2.1.3

PURPOSE

The purpose of this policy is to explain various aspects of the City of San Jose's Office of Retirement Services' (ORS) disciplinary procedures for permanent City employees in the classified service. This policy includes an explanation of disciplinary procedures, the authorities under which disciplinary action is taken, definitions of informal and formal disciplines, and a summary of the rights of ORS employees who are subject to disciplinary action. ~~This policy provides general information for employees. Department managers and supervisors should consult with the City Manager's Office of Employee Relations for more information and assistance with disciplinary actions and procedures.~~

SCOPE OF APPLICATION

This Discipline Policy applies to all permanent ORS City employees in classified service. (Please note that this policy and the rights and procedures contained herein do **not** apply to temporary, probationary employees, unclassified employees, or other employees who are considered "at-will.") Various aspects of this policy may vary by Memorandum of Agreement (MOA), which will be noted throughout the policy. To the extent this policy conflicts with any provision in an applicable MOA, the provisions of the MOA shall prevail.

POLICY

~~It is the City's ORS CEO's policy to~~ The CEO of ORS shall administer discipline with the goal of correcting inappropriate conduct and/or substandard performance and to define a standard of conduct of ORS City employees. The appropriate use of discipline is essential to high employee morale and productivity and furthers the Boards of Administration for the Federated City Employees Retirement Plan and the San Jose Police and Fire Department Retirement Plan as well as the City's goal of providing excellent services to the community.

The City's ORS CEO's discipline process is based on the concept of progressive discipline. Under progressive discipline, the City ORS CEO takes progressively more severe action if the employee has not responded to previous instructions, warnings, or other lower-level actions. However, progressive discipline does not mean that the City ORS CEO must progress through all discipline steps in all cases. Certain conduct may be serious enough that the first incident may warrant a higher level of discipline, up to and including termination without progressive discipline.

AUTHORITIES

1. **AUTHORITY TO TAKE DISCIPLINARY ACTION.** The San Jose City Charter Sections 810.1(b), 701(a), 803.1, 805.1, 809.1 and 901 authorizes the ORS CEO **Appointing Authority** to discipline City employees employed in ORS. Moreover, the ORS CEO may also "suspend without pay, demote, discharge, remove or discipline any such employee in [ORS] subject to any applicable Civil Service provisions of the Charter and any Civil Service Rules adopted thereto." Id. § 810.1(c). Neither City Council nor the Mayor "shall in any manner dictate the appointment or removal of any" employee that the CEO is empowered to appoint. Id. § 810.1(d).

~~The City Manager is the Appointing Authority for all City employees, excluding professional employees in the City Attorney's Office, employees of the City Auditor's Office, employees of~~

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~~the Independent Police Auditor's Office, employees of the Office of Retirement Services, and employees appointed by the Mayor and City Council.~~

~~The City Manager delegates to the Director of Employee Relations the responsibility to review and approve formal disciplinary actions for City employees under the City Manager's appointing authority. The City Attorney, the City Auditor and the Independent Police Auditor are the Appointing Authorities for all employees in their Offices for which they have the authority to appoint under the City Charter. The applicable Appointing Authority.~~

The ORS CEO must approve any formal disciplinary action before the action is taken.

2. **CAUSE FOR DISCIPLINE.** Pursuant to San Jose Municipal Code 3.04.1370, an employee may be disciplined for any of the following causes:

- a. Malfeasance
- b. Misconduct
- c. Incompetence
- d. Failure to satisfactorily perform the duties of his/her position
- e. Failure to observe applicable rules and regulations
- f. Failure to cooperate reasonably with his/her superior officer or fellow officers or employees
- g. Fraud in securing appointment
- h. Inefficiency
- i. Inexcusable neglect of duty
- j. Insubordination
- k. Dishonesty
- l. Drunkenness on duty or drinking of alcoholic beverages
- m. Chronic alcoholism
- n. Use of narcotic or habit forming drugs without prescription
- o. Inexcusable absence without leave
- p. Conviction of a felony or conviction of a misdemeanor involving moral turpitude
- q. Discourteous treatment of the public or other employees
- r. Unlawful political activity
- s. Willful disobedience
- t. Misuse of city property
- u. Any violation of departmental conflict of interest codes approved by the City Council and adopted pursuant to Chapter 7 of the Political Reform Act of 1974 (Government Code 87100)
- v. Any other act, either during or outside of duty hours which is detrimental to the public service.

3. **AUTHORITY FOR FORMAL DISCIPLINARY ACTION**

a. **Suspension, Demotion or Dismissal.** San Jose Municipal Code 3.04.1350 through 3.04.1500 provides the legal basis for suspension, demotion or dismissal of City employees in the classified service.

b. **Step Reduction.** Memoranda of Agreement (MOA) provide the authority for this alternate form of discipline for employees represented by the following organizations:

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- i. Association of Building, Mechanical and Electrical Inspectors (ABMEI)
- ii. Association of Engineers and Architects, IFPTE Local 21 (AEA)
- iii. International Association of Firefighters, Local 230 (IAFF)
- iv. International Brotherhood of Electrical Workers, Local No. 332 (IBEW)
- v. International Union of Operating Engineers, Local 3 (OE#3)
- vi. Municipal Employees' Federation, AFSCME, Local 101 (MEF)

DISCIPLINARY PROCEDURES AND APPEAL PROCESS

Disciplinary procedures and the appeal process are set out in the San Jose Municipal Code, Sections 3.04.1350--3.04.1500. Certain appeals are also contained in applicable Memoranda of Agreements (MOA's).

TYPES OF DISCIPLINE

The ~~City's ORS CEO's~~ disciplinary system is based on progressive discipline. In progressive discipline, the ~~City ORS CEO~~ takes progressively more severe action if the employee has not responded to previous actions. However, certain conduct and circumstances may be serious enough to warrant severe disciplinary action, up to termination, without prior lower level discipline.

The ~~City's ORS CEO's~~ disciplinary actions are divided into "informal" and "formal" actions:

1. INFORMAL DISCIPLINARY ACTIONS

Informal disciplinary actions vary from formal disciplinary actions in that they do not involve any monetary punitive actions and employees are not entitled to all of the appeal procedures which are applicable to formal discipline.

- a. **Counseling** is an informal one-on-one communication with an employee and is used for several purposes. Counseling may be designed to develop the employee's skills, abilities, and understanding of the job and/or may clarify standards and rules, evaluate the employee's strengths and challenges, seek information, or solve problems. It may also be the immediate corrective reaction when minor misconduct or poor performance is observed. The supervisor should document the date and subject of discussion for future reference.
- b. **Documented Oral Counseling (DOC)** is a written confirmation of verbal notification that performance or behavior needs improvement and a warning of potential future discipline if there is no improvement. Generally, counseling is administered by the first line supervisor and subsequently documented in a memo to the employee. The memo should document the discussion and the improvement expected in the employee's conduct or performance. The memo should be given to the employee and a copy should be kept in the supervisor's employee file and should not go into the employee's permanent personnel file. After one year, if the problem does not reoccur, the memo should be removed from the employee's supervisory file. However, the supervisor should note the date and subject of discussion for future reference and the underlying conduct should be noted in the employee's performance appraisal for that rating period.

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- c. **Written Reprimand/Letter of Reprimand (LOR)** is warning that certain conduct or performance is unacceptable, and formal disciplinary action will occur unless the performance or conduct improves. It differs from a DOC in that a written reprimand is placed in the employee's permanent personnel file. It should be used to correct specific inadequate performance or unacceptable conduct where oral counseling has not corrected the problem, or in cases where a more formal written record is appropriate.

Employees may submit a rebuttal to a Letter of Reprimand within thirty (30) days. The rebuttal will be kept in the employee's permanent personnel file. Additionally, employees represented by the San Jose Police Officers' Association (POA) and the San Jose Firefighters, IAFF, Local, 230 are entitled to certain appeal rights for Letter of Reprimands. Please refer to those MOA's for more information.

2. FORMAL DISCIPLINARY ACTIONS

In response to serious misconduct, a pattern of poor performance or when informal disciplinary action has not corrected the behavior, formal disciplinary action may be necessary. When any of the following disciplinary actions are to be taken, there are specific due process requirements and appeal rights. Formal discipline includes the following levels of disciplinary action:

- a. **Salary Step Reduction** is a decrease in salary of one or more steps (2.5%, 5%, 7.5%, 10%, etc.) for a specified period of time or until a certain event occurs (e.g., reinstatement of driver's license). This action is applicable only to employees represented by the bargaining units specified under the above Authorities Section 3b.
- b. **Suspension** is unpaid time off from work for a specified number of work hours or workdays. Time spent on suspension is excluded from service time for layoff seniority purposes.
- c. **Demotion** is removal from one classification and appointment to a classification with a lower salary range.
- d. **Dismissal** is termination from City employment.

SUMMARY OF PROCEDURES FOR FORMAL DISCIPLINARY ACTION

Formal disciplinary actions ~~are may be~~ coordinated between the ~~Department Director~~ ORS CEO and the City Manager, at the ORS CEO's discretion. ~~(unless the issues involve an employee under the appointing authority of the City Attorney, the City Auditor, or the Independent Police Auditor).~~ The ~~City Manager (or other applicable Appointing Authority)~~

ORS CEO makes the ultimate decision to impose discipline and on the level of discipline imposed.

~~The City Manager delegates to the Director of the Office of Employee Relations the responsibility to review and approve formal disciplinary actions for City employees under the City Manager's appointing authority. It is the employee's department's~~ ORS CEO's responsibility to prepare the required documents before submitting a recommendation to the City Manager (through the Office of Employee Relations).

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The ~~Office of Employee Relations~~ ORS CEO may, in certain situations, conduct an investigation as a confidential personnel matter and shall determine the procedures for doing so before the investigation.

The following are procedures involved in formal discipline. Please note that not all of these procedures apply to informal discipline.

1. **Investigation/Documentation.** An inquiry, investigation, and/or other documentation is completed by ~~the Department or the Office of Employee Relations~~ ORS, or by an external investigator as appropriate, in accordance with the Investigation Principles Policy, Section 2.1.4 of the City Policy Manual. ~~Department~~ ORS managers and supervisors should consult with the ~~Office of Employee Relations~~ ORS CEO for more information and assistance with investigations and/or necessary documentation.

Under certain limited circumstances, ~~departments~~ ORS may request to the ~~Appointing Authority~~ ORS CEO that an employee be placed on Administrative Leave, pending investigation for possible disciplinary action. Guidelines and procedures for Administrative Leave are specified in Section 4.2.3 of the City Policy Manual.

This relates to all investigations, not just those related to classified employees.

2. **Recommended Discipline.** ~~The Department's~~ ORS CEO's recommendation for formal discipline is forwarded to the City Manager (through the Office of Employee Relations as designated by the City Manager). The Office of Employee Relations reviews the ~~Department's~~ ORS' documentation and coordinates any changes/modifications with the ~~Department Director~~ ORS' CEO or designee.
3. **Notice of Intended Discipline (NOID).** If the recommendation for formal disciplinary action is approved, the employee is given a Notice of *Intended* Discipline (NOID). This is a required notice advising the employee that formal disciplinary action is being recommended. It is ***not*** a final decision to impose discipline. The NOID specifies the causes for discipline, potential effective date of discipline and the recommended disciplinary action and is provided along with a copy of the materials upon which the action is based.
4. **Skelly Conference.** The NOID also advises the employee that he/she can respond either personally or in writing at an informal conference/meeting ("*Skelly* Conference") with the ~~department director or other designated official~~ ORS CEO or designee. The employee must request a *Skelly* conference within the timeline specified in the NOID, which in most cases is five (5) days from receipt of the NOID. However, the employee may request time extensions in writing to the ~~Department Director or designee~~ ORS CEO. If an employee requests a *Skelly* Conference within the specified timeframe, the proposed discipline will ***not*** be imposed on the date contained in the NOID. Any decision on the proposed discipline will not occur until after the *Skelly* Conference.

The purpose of the *Skelly* conference is to allow the employee an opportunity to present any information they want the City ORS CEO to consider before the City ORS CEO makes a final decision on the proposed discipline. This is not a full evidentiary hearing and the employee does not present witnesses. The responsibility of the City ORS CEO during the *Skelly* Conference is to listen to the employee and to ask questions if necessary to ensure

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understanding of the employee's statements. The employee has the right to have a representative at the *Skelly* conference. Also present at the *Skelly* conference is a representative from the Office of Employee Relations, and in certain cases, ORS' legal counsel ~~a representative from the City Attorney's Office~~.

After the *Skelly* conference, the ~~City (the City Manager through the Office of Employee Relations, in consultation with the Department)~~ ORS CEO may do one of the following: impose the proposed disciplinary action, impose a lesser disciplinary action, enter into a settlement agreement with the employee, the City and ORS, or not impose any discipline at all.

5. **Notice of Discipline (NOD)**. If the City ORS CEO decides to proceed with formal discipline after the *Skelly* Conference or if the employee does not request a *Skelly* conference, the employee is served with a Notice of Discipline (NOD) outlining the causes for discipline, the final effective date of the discipline and the type of disciplinary action being taken. In most cases, if the employee does not request a *Skelly* conference, the disciplinary action being taken does not change from the discipline specified in the NOD.

Civil Service Commission Appeal. Once an NOD is served, an employee who has been suspended, demoted, reduced in salary step or dismissed has the right to appeal to the Civil Service Commission (CSC), within twenty (20) days of the date the NOD is served to the employee. **Please note that even when an employee appeals to the CSC, the discipline becomes effective on the date specified in the NOD.**

The Commission is composed of five members who are appointed by the City Council pursuant to the City Charter. The Commission must schedule a disciplinary appeal hearing within 45 days, or authorize extension of the time limit. Employees represented by the POA or IAFF may, alternatively, appeal to arbitration. Time limits for appeals to arbitration are set forth in the appropriate MOA.

- a. **Conduct of hearings**. Disciplinary appeal hearings are evidentiary hearings. The City ORS CEO is usually represented by ~~the City Attorney's Office~~ ORS' legal counsel and the employee has a right to representation. Both sides may submit evidence, examine and cross-examine witnesses and present their case similar to a case in court.
- b. **Results of Appeal**. For appeals to the Civil Service Commission, the Commission hears the case as an appellate body and decides the appeal by majority vote of the members present. In appeals to arbitration, a single arbitrator selected mutually by the City ORS CEO and the employee organization hears and decides the appeal. The Commission (or arbitrator) can affirm, reject or reduce the level of discipline imposed. Based on the findings of the appeal, the Commission/arbitrator may:
 - i. Sustain/uphold the discipline (deny the appeal)
 - ii. Modify the discipline by reducing it to a lower level or lesser suspension. For example, a dismissal may be reduced to a suspension. The level of discipline cannot be increased as a result of an appeal.
 - iii. Overturn the discipline (revoke the action entirely).

Office of Retirement Services Discipline Policy 2.1.3**RIGHT TO REPRESENTATION/WEINGARTEN RIGHTS**

When an employee represented by a bargaining unit (a union) is being interviewed and the employee reasonably believes that the investigation is likely to result in disciplinary action, the employee has the right to request to have a union representative present during the investigative interview.