LIEBERT CASSIDY WHITMORE

SPECIAL BULLETIN

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Court Clarifies When a Legislative Body May Act on Discipline In Closed Session Without Giving 24 Hour Written Notice to Employee.

A recent Court of Appeal decision from the Second District Court of Appeal has provided public agencies operating under the Brown Act, or Open Meetings Act, with important new clarification on when the governing body of the agency can take action in closed session to discipline or terminate an employee *without* first giving the employee 24 hours notice and an opportunity to request a public hearing.

On May 2, 2006, the Governing Board of the Los Angeles Unified School District (LAUSD) met in closed session and initiated the process to dismiss permanent teacher Colleen Kolter. The District did not provide Ms. Kolter any pre-meeting notice of the session or the charges against her. After the meeting, the District notified Ms. Kolter by mail of its intent to dismiss her.

Ms. Kolter appealed the decision, and exercised her statutory right under Education Code 44934 to a hearing before a Commission on Professional Competence ("Commission"). At the outset of the hearing, Ms. Kolter's counsel moved to dismiss the action on the ground that the board's closed session decision violated her rights under the Brown Act. The Commission denied the motion, and convened the hearing. At the conclusion of the hearing, the Commission unanimously agreed that Ms. Kolter should be dismissed.

Ms. Kolter appealed the Commission's decision to the Superior Court. She argued that the District violated the Brown Act in considering the decision to initiate dismissal proceedings without first giving her 24 hours written notice, and that the violation rendered the dismissal void. The trial court ruled against her, and she appealed.

In its opinion, the Court of Appeals discussed Government Code section 54957, which describes what is commonly referred to as the "personnel exception" to the Brown Act. Section 54957 allows agencies subject to the Brown Act to convene a closed session "to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee *or to hear complaints or charges brought against the employee unless the employee requests a public session*." [emphasis added] The section further provides that, as a condition to convening "a closed session with regard to specific complaints or charges brought against an employee by another person or employee" the agency must give the employee at least 24 hours written notice that the employee has the "right to have the charges heard in open session." Ms. Kolter argued that the Board's consideration of the charges against her triggered the requirement of 24 hours notice of the right to have the matter heard in open session. The Court disagreed.

The Court concluded that Section 54957 does not entitle an employee to 24 hour written notice when the closed session "is for the sole purpose of considering, or deliberating, whether complaints or charges brought against the employee justify dismissal or disciplinary action." The Court focused on the nature of the meeting, not the nature of the charges.

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Because the Board did not conduct an evidentiary *hearing* on the charges in closed session but, instead, *considered* whether the charges justified the initiation of dismissal proceedings, it was not required to provide the employee 24 hour written notice of the right to an open session. The subsequent public evidentiary hearing by the Commission was sufficient to provide Ms. Kolter's statutory rights.

In reaching its holding, the Court relied on an earlier Court of Appeals case, *Bollinger v. San Diego Civil Service Commission*. The *Bollinger* Court first noted that in Section 54957, the legislature used the term "hear" in conjunction with the phrase "complaints or charges," but used the verb "consider" in conjunction with the phrase "dismissal of public employee." The Court distinguished between "hearing" and "considering." To hear means "to listen to in an official… capacity" while "consider" means "to deliberate upon." Section 54957 states only that the 24 hour notice requirement is a condition to a board "hearing complaints and charges" in closed session, not to "consideration" of dismissal.

Second, the *Bollinger* Court noted that the original drafts of the Assembly and Senate Bills for section 54957 contained the following language: "As a condition to holding a closed session on the complaints or charges to consider disciplinary action or to consider dismissal, the employee shall be given written notice of his or her right to have a public hearing rather than a closed session…" That language specifically provided the right to notice when an agency either heard complaints or charges *or* considered disciplinary action. That language was removed from the statute. The Legislature specifically declined to tie the notice requirement to the "consideration" of personnel actions, including dismissal, and only tied it to the "hearing of complaints or charges."

The California Teachers Association ("CTA") filed an amicus brief, in which it made several arguments. CTA first argued that *Skelly v. State Personnel Board* requires that an employee have the right to address the governing board prior to the board's decision. The Court held that the argument "misstate[d] the holding in *Skelly*," which did not require a full evidentiary hearing. The Court also noted that the Legislature enacted Education Code section 44934 the year after *Skelly* in order to provide the safeguards required by *Skelly*. As a result, no additional *Skelly* hearing is required for certificated employees of a school district.

CTA also argued that, because under the Education Code, the Commission is not authorized to impose a sanction short of dismissal, the employee should have had the right to address the school board. The Court found that argument unpersuasive because the Commission has the right to refuse to dismiss even if it finds that cause for discipline exists. Finally CTA contended that Ms. Kolter was entitled to a "liberty interest" hearing to "clear her name." The Court found that such a requirement would add a second evidentiary hearing to the process, a result which is "neither desired nor required by law."

Public agencies should be careful in following this decision. In a footnote, the Court specifically distinguished cases in which the action taken in closed session actually effectuated discipline or was the only forum where the disciplinary action would be heard. Here, the action in question was the Board's consideration whether the charges justified the initiation of dismissal proceedings. In other words, it was *pre-disciplinary* in nature, and there was a later, public hearing on the dismissal. In a case where a governing body acts to impose a final discipline, or when an action is post-disciplinary in nature, the 24 hour notice would likely apply.

Kolter v. Commission on Professional Competence of Los Angeles Unified School Dist.
(2009) --- Cal.Rptr.3d ----, 2009 WL 43633.

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If you have questions about this issue, please contact our
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