



LEAD: Legal, Effective & Accurate Documentation Employee Discipline

Presented by:
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West Valley-Mission Community College District
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Overview

Sarah Levitan Kaatz is a Partner in Lozano Smith's Monterey office. She specializes in labor and employment law and student issues for school districts. Ms. Kaatz spent two years with the U.S. Department of Labor in its Office of Administrative Hearings before joining Lozano Smith.

Since joining Lozano Smith in 1999, Ms. Kaatz has advised K-12 school districts and community college districts with regard to classified and certificated employment issues, labor relations and student related concerns.

Experience

Ms. Kaatz has represented clients in numerous administrative proceedings, discipline hearings and appeals, and grievance arbitrations. She negotiates collective bargaining agreements on behalf of school district clients using both traditional and interest based bargaining approaches. She regularly advises clients regarding discrimination complaints, personnel investigations, labor law compliance and related personnel issues.

Presenter Experience

Ms. Kaatz is a frequent presenter to school audiences, including the Association of California School Administrators (ACSA) and the California School Boards Association (CSBA), on issues such as sexual harassment prevention, employment discrimination, employee and student discipline, and cyber-bullying. She is also a regular presenter of student and employment topics at Lozano Smith's Central Coast Education Law Consortium.

For four years, Ms. Kaatz was the attorney coach for Seaside High School's Mock Trial Team and took the team to State for two of those years.

Articles

Ms. Kaatz's published work includes "*Avoiding Settlement Conference Traps*," published in the San Francisco Daily Journal, and "*Settling the Score*" published in the ABA Journal.

Education

Ms. Kaatz earned her J.D. from Hastings College of the Law in San Francisco, and was a member of the Moot Court Board. She established roots on the Central Coast while an undergraduate student at the University of California at Santa Cruz, where she earned her B.A. *with honors*.

Practices

Labor & Employment
Student
Investigative Services

Education

J.D., Hastings College of Law
B.A., University of California, Santa Cruz
(with honors)

Admissions

California

WHO WE ARE & WHAT WE DO

Lozano Smith is a full-service education and public agency law firm serving hundreds of California's K-12 and community college districts, and numerous cities, counties, and special districts. Established in 1988, the firm prides itself on fostering longstanding relationships with our clients, while advising and counseling on complex and ever-changing laws. Ultimately, this allows clients to stay focused on what matters most – the success of their district, students and communities they serve. Lozano Smith has offices in eight California locations: Sacramento, Walnut Creek, Fresno, Monterey, Bakersfield, San Luis Obispo, Los Angeles, and San Diego.

AREAS OF EXPERTISE

- Administrative Hearings
- Charter School
- Community College
- Facilities & Business
- Governance
- Investigations
- Labor & Employment
- Litigation
- Municipal
- Public Finance
- Public Safety
- Special Education
- Student
- Technology & Innovation
- Title IX

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DIVERSITY IS KEY and we consciously practice it in all that we do. It is one of our core beliefs that there is a measurable level of strength and sensitivity fostered by bringing together individuals from a wide variety of different backgrounds, cultures and life experiences. Both the firm and the clients benefit from this practice, with a higher level of creative thinking, deeper understanding of issues, more compassion, and the powerful solutions that emerge as a result.

What's Ahead

Effective Documentation

Employee Status

Employee Discipline

Personnel Files

LS

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Effective Documentation

Goals for Effective Documentation

- Create accurate documents that support personnel decisions, instead of ambiguous documents that undermine decisions.
- Use disciplinary tools consistently and fairly.
- Think about tone.
- Check provisions of the Collective Bargaining Agreement and Board Policies and Regulations for procedures.
- Involve Human Resources.

LS

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Discipline versus Evaluation

- Parallel paths that occasionally intersect
- They should support one another
- Don't use an evaluation to discipline; use the discipline process

Disciplinary Documents

Know Your Audience



What Are the Challenges with Documenting Employees?

Roadblocks



I have known this person for years...

I don't have time...

It wasn't THAT bad...



Why is it Important to Document Misconduct?



Make your documentation solid by following the Yellow BRICS Road.



Investigate

Before you get on the BRICS Road:

- Contact Human Resources
- Gather the Facts (Investigate)
- Remember to include the employee!
- Tell the employee the reason for the meeting (general)
- Be aware of Weingarten Rights

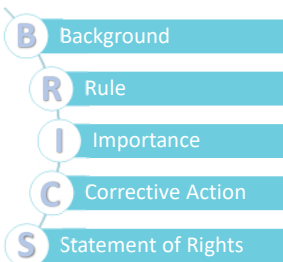


Timeline

- Typically based on incident. Those that require formal investigation will take longer. But see:
 - Negative Documentation: All negative documentation other than performance evaluations to be used in disciplinary action regarding work performance must be initiated within twenty (20) working days of incident and subsequently included in the personnel file. Disciplinary action resulting from unit member violation of District policy or state and federal laws is not subject to the twenty (20) working days. (Article 23, Supervisor's Association CBA; Article 21, Classified Association CBA)
 - Adverse material must be signed by "complainant" and submitted within twenty (20) working days of the incident or occurrence. (Article 12, Classified Association CBA)
 - Supervisor must provide a copy of the complaint two working days before the investigation by the supervisor. (Article 12, Classified Association CBA)



5 Steps for Effective Documentation: BRICS



The Tardy Custodian



The Tardy Custodian

Bob has been a custodian with the District for ten years. He used to work in a position in which the manager had flexibility on start times because of the specific buildings that were being cleaned. Two years ago, his assignment was changed and he now works in a position where it is critical to get doors unlocked and certain tasks done on time. He has not transitioned well. Last year was a nightmare of complaints from faculty members and students.

You are determined to get this employee back on track. But in the first month he has already been late five times.

What are your next steps?



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The Tardy Custodian: Background

Okay

You were tardy multiple times at the start of the current semester.

Better

You reported to work between five and thirty minutes late on August 17, 18, 24, 25 and 30.

Best

You reported to work between five and ten minutes late on August 17, 18, 24, 25 and 30. You failed to provide notice to your supervisor. The alarms in Building G were set off by a faculty member because you had not disarmed them on time. In addition, students were not able to enter the restrooms because they were locked.



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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.
- Talk to the employee before writing the document.



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The Tardy Custodian: Rule

Okay

Reporting to work late without providing notice violates District policy.

Better

Reporting to work late without notice violates BP 444 and Article 5 of the collective bargaining agreement with the Association. It also violate prior directives issued to you by your supervisor.

Best

Reporting to work late without notice violates BP 444 and Article 5 of the District's collective bargaining agreement with the Association, which requires you to be on site and punched in at or before the scheduled start time and/or to promptly report to the administration if you are unable to do so. You exhibited a similar pattern of tardiness during the 2017-2018 school year and were orally directed by your supervisor to report to work at your scheduled start time. Your conduct outlined above directly violates these past directives.



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



The Tardy Custodian: Importance

Okay

It is important to the operation of the College that you report to work on time.

Better

It is important to the operation of the College that you report to work on time. Both students and other staff members are impacted when you do not report on time and complete your opening duties.

Best

It is important to the operation of the College that you report to work on time. Both students and other staff members are impacted when you do not report on time and complete your opening duties because an on-call employee was called. Moreover, your conduct placed a burden on other staff who were asked to interrupt their duties in order to open the facilities.



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

Consider:

- What's the Big Deal?
- Why is it important to:
 - Students
 - Student learning and progress
 - Co-workers, supervisors
 - District resources (eg: Time, Money, Facilities, Equipment, and Technology)
 - The College's image in the eyes of the public



The Tardy Custodian: Corrective Action

Okay

Arrive to work on time.

Better

Effective immediately, be at work and ready to work at your designated start time or let us know if you will be late.

Best

Effective immediately, you are directed to arrive to work and be ready to start your duties at 6:00 a.m. In the event you are running late, you must call your Supervisor on her cell phone to advise her of your estimated arrival time. You are directed to call at least 30 minutes before your start time.



Step #4 – C
Corrective Action Required/Recommendations

Options:

- State specific corrections
- Reiterate the expected standard
- Directives
- Remediation Plan
- Recommendations



The Tardy Custodian: Statement of Rights

Okay

This letter will go in your file.

Better

This letter will go in your file and you may respond to it.

Best

This letter, and the enclosures, will be placed in your personnel file. If you wish to respond to this letter in writing you may do so within ten (10) days. Any response will be attached to this letter and also placed in your personnel file. Failure to comply with these directives may result in further discipline up to and including dismissal.



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



Disciplinary Documents

Now what?

- Meet with the employee
- Allow a union representative
- Confirm understanding of directive
- Answer questions
- Ideally, have a witness or note taker



Small Group Work - Hypothetical

1. What facts are not clear to you?
2. What additional facts do you need?
3. How can you improve the document?



Employee Status

Employee Status

Faculty Status

Classified Status

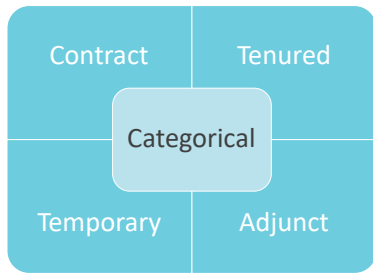


Status: Why it Matters

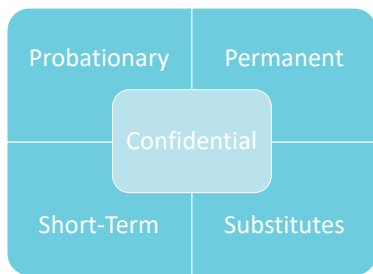
- Employee status drives what options are available
- Those with a greater property right are entitled to higher levels of due process
- Permanent/Tenured employees have the greatest due process rights
- Temporary/Substitutes can typically be released “at the pleasure of the Board”
 - Any non-discriminatory reason
 - It still helps to have documentation



Faculty Status



Classified Status



Employee Discipline

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



Progress


Your

Discipline

LS

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Typical Progressive Discipline Steps



Dismissal

Suspension

Written Reprimand

Letter of Concern

Verbal Warning

LS

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Progressive Discipline – Classified Association

- Verbal Warning
- Written Warning
- Suspension
- Demotion or Dismissal
- May skip where “problem is particularly serious to include violation . . . that endangers health and well being”

(Article 21, Section 21.2.1, Classified CBA)



Progressive Discipline – Faculty Association

- Recognizes Progressive Discipline
- But an academic administrator, in consultation with the Associate Vice Chancellor of Human Resources, “has the discretion to determine the appropriate level of warning based on the seriousness of the issue.”

(Article 46, Faculty CBA)



Verbal Warning

A conversation with the employee to put them on notice and provide guidance on expectations. May be, but isn't always, confirmed in writing such as by email.



Oral Warning – Faculty Contract

- Private and confidential
- Right to a representative
- How to improve
- Disciplinary consequences
- Written summary to the personnel file
- Removed in 12 months, on request
- (Article 46, Faculty CBA)



Letter of Concern

This is not a formal reprimand, rather it expresses concern about the employee’s behavior and directs the employee to change the behavior.



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.



Written Warning – Faculty Association

- Summary of previous oral warnings
- Rule
- Examples
- Corrective/improvement measures
- Consequences
- Formal meeting



(Article 46, Faculty CBA)





Tenured Faculty Dismissal

Grounds for Dismissal (Ed. Code § 87732)

- Immoral or unprofessional conduct
- Dishonesty
- Unsatisfactory Performance
- Evident Unfitness for Service
- Physical or mental condition unfitting him or her to instruct or associate with students
- Persistent violation or refusal to follow District rules or state law
- Conviction of a felony or crime of moral turpitude
- Conduct specified in Section 1028 of Government code



Dismissal/Release of Permanent Faculty



Termination only
for cause with right
to hearing.

Education Code sections 87667 and 87732.

90-Day Notices (Ed. Code § 87734)

- Give to employee prior to filing charges of dismissal for unsatisfactory performance or unprofessional conduct.
- Specify nature of concerns, list specific instances.
- Purpose: give employee opportunity to correct faults and overcome grounds for charge.
- Notice must include most recent evaluation.

Suspension/Dismissal

General Rules

- Charges cannot include conduct that has occurred more than four years earlier. (Ed. Code § 87675)
- Employee must be provided notice of the statement of charges and an opportunity to respond at a Skelly hearing.
- Following the Skelly meeting, if the recommendation is upheld, the employee is provided with a copy of the formal written charges including a request for hearing form.
- The employee has thirty calendar days to object and request a hearing. (Ed. Code § 87673 and 87737)
- Hearing will be before an arbitrator or administrative law judge with OAH.
- There is discovery, including documents, depositions, and written questions. (Ed. Code § 87675)

Options



Classified Employee Discipline

Suspension/Dismissal/Demotion

Examples of Grounds

- Incompetence/inefficiency
- Failure to meet or retain qualifications
- Absence/tardiness
- Insubordination
- Discourteous, offensive, abusive conduct
- Dishonesty
- Under the influence
- Carelessness/negligence
- Willful damage or waste of public property/supplies
- Retaliation



Classified Employee Discipline

Probationary Classified Employees:

- A probationary classified employee may be dismissed at the sole discretion of the District

Permanent Classified Employee:

- A permanent classified employee can only be dismissed for cause (Ed. Code § § 88013, 88016). Procedures are contained in Administrative Procedure 7365 or the applicable CBA.



Classified Employee Discipline

Notice of Disciplinary Action :

- A statement of the specific acts and omissions upon which the disciplinary action is based;
- A statement of the cause for the action taken; and,
- If it is claimed that an employee has violated a rule or regulation of the employer, such rule or regulation shall be set forth in said notice. (Ed. Code § 88016; AP 7365)



Suspension/Dismissal

General Rules under Due Process and AP 7365

- 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 at a Skelly hearing.
- Following the Skelly meeting, 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, a hearing officer or an ALJ.
- Board decision is final.



Available Options Pending Disciplinary Action



Available Options Pending Disciplinary Action

- Paid Administrative Leave
- If arrested for certain sex or drug offenses, the District may be able to place the employee on an unpaid leave of absence (Education Code sections 87736, 87010, 87011)
- T.R.O.
- Law Enforcement
- Unpaid suspension pending dismissal



Paid Administrative Leave – Faculty

Assembly Bill 1651

- Academic employees must be given at least two business days' notice before placement on PAL and notified in writing of general nature of allegations
- Exception where there is "serious risk of physical danger or other necessity arising from the specific allegations"
- Under exception, notice of allegations within five business days



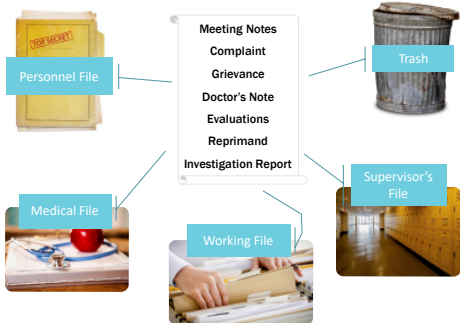
Paid Administrative Leave – Faculty Association

“Within 90 days of being placed on PAL, the employer should complete its investigation of the accused misconduct and initiate disciplinary proceedings against, or reinstate, the employee.”

(Article 46, Faculty CBA)



Documented!
Now where does it go?



Personnel File Rules



- Right to review file
- Right to notice when derogatory information will be entered
- Right to comment on documents with derogatory information (i.e., right to attach a response)

Personnel File Rules

- Faculty Association (Article 11)
 - Member may request correction of inaccurate information
- Supervisors Association (Article 14)
- Classified Association (Article 12)

Questions





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Lozano Smith.**

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- Volunteer projects
- Sponsorships and award programs
- Scholarships

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For more information, questions and comments about the presentation, please feel free to contact:

Sarah Levitan Kaatz
Partner

Tel: 831.646.1501
skaatz@lozanosmith.com

Or any of the attorneys in one of our 8 offices.




Templates

[REPRINT ON DISTRICT LETTERHEAD OR SENT BY EMAIL]

(THIS DOCUMENT IS FOR EXEMPLARY PURPOSES ONLY. IT SHOULD BE DRAFTED TO MEET YOUR SPECIFIC NEEDS.)

Re: Confirmation of Oral Warning

Dear [EMPLOYEE NAME]:

This email confirms our conversation today regarding your tardiness. You have been tardy on three of the last ten workdays. You are required to be at your work station at 8am. If you will be late, you must text me prior to your work time and provide me with your estimated arrival time.

Your failure to comply with these directives will result in further disciplinary action. [FOR FACULTY: This letter will be placed in your personnel file. You have the right to submit a response and to have that response attached to this warning. If no further performance problem is identified in the next 12 months, you may request that this letter be removed from your file.]

[Statement of rights.] This letter, and the enclosures, will not be placed in your personnel file, but will be attached to any future disciplinary documents related to this matter. You may request a meeting with me if you have any questions regarding this letter. [Faculty Contract requires a formal meeting to present this letter, and written warnings are placed in the personnel file per Article 46. Include the following: If you wish to write a response to this letter, you may do so within ten (10) calendar days, and it will be attached to this letter and also placed in your personnel file.]

Sincerely,

[Name]

[Title]

Enclosures: Exhibits A - _____

cc: Personnel File (if applicable)

[REPRINT ON DISTRICT LETTERHEAD]

BRICS FORMAT

(THIS DOCUMENT IS FOR EXEMPLARY PURPOSES ONLY. SHOULD YOU NEED TO DRAFT A LETTER OF WARNING IT SHOULD BE DRAFTED TO MEET YOUR SPECIFIC NEEDS.)

[DATE]

[NAME]

[ADDRESS]

Re: Letter of Warning

Dear [EMPLOYEE NAME]:

[Background] On April 15, 2020, you did not complete your monthly payroll report in a timely manner. I emailed you and April 1, and reminded you that the report was due by April 15, and that it is important that it be completed on time so that it could be included in our audit. You responded that you had the deadline calendared. On April 16, I followed up and asked for the report, which I did not receive on April 15. You responded that it was almost complete and I would have it within the hour. I did not receive the report from you until April 18. Further, the report was incomplete, as it did not include the sick leave balances. (Emails attached.)

[Rule] Your conduct violated previous directives I have given to you. Specifically, you were reminded in January, February and March of the due dates and importance of the report. (Emails attached.) Your job description includes the completion of payroll reports. (Job Description attached.)

[Importance] These reports are critical. We require them for the auditors. In addition, we review the reports monthly in order to determine if payroll errors are present in order to correct them in a timely manner. When you do not complete reports on time, additional burden is placed on your coworkers to complete the report. Also, we are not able to correct payroll errors prior to checks being processed.

[Corrective Action] Effective immediately, you are directed to complete your monthly payroll report by the 15th of each month. In months when the 15th falls on the weekend, the report is due on the first work day following the weekend.

Your failure to comply with these directives will result in further discipline up to and including dismissal. Please contact me directly if you have any questions regarding this letter.

[Statement of rights.] This letter, and the enclosures, will not be placed in your personnel file, but will be attached to any future disciplinary documents related to this matter. You may request a meeting with me if you have any questions regarding this letter. [Faculty Contract requires a formal meeting to present this letter, and written warnings are placed in the personnel file per Article 46. Include the following: If you wish to write a response to this letter, you may do so within ten (10) calendar days, and it will be attached to this letter and also placed in your personnel file.]

Sincerely,

[Name]

[Title]

Enclosures: Exhibits A - _____

cc: Personnel File (if applicable)

[REPRINT ON DISTRICT LETTERHEAD]

BRICS FORMAT

(THIS DOCUMENT IS FOR EXEMPLARY PURPOSES ONLY. SHOULD YOU NEED TO DRAFT A LETTER OF REPRIMAND IT SHOULD BE DRAFTED TO MEET YOUR SPECIFIC NEEDS.)

[DATE]

[NAME]

[ADDRESS]

Re: Letter of Reprimand

Dear [EMPLOYEE NAME]:

[Background] On April 17, 2020, a number of school administrators were at our school conducting a walk through of the ____ Elementary School site. I emailed all teachers on April 12, 2020 and April 16, 2020 making them aware of this walk through. When the group of observers walked through the building on April 12, 2020 at 9:30 a.m., they could hear loud music being played at high volumes from your classroom. The song being played contained uncensored lyrics that contained profane language and that were otherwise not suitable for elementary school age students.

[Rule] Your conduct violated previous directives I have given to you. Specifically, you played loud music with inappropriate lyrics in your classroom on March 16, 2020. As such, in a memorandum dated March 16, 2020, which is attached, I directed you to refrain from playing loud music, or any music for that matter, in your classroom during instructional time without my prior written permission.

[Importance to the school] Your conduct placed the school in a negative light and reflected poorly on the school during the walk through. Also, playing loud music with inappropriate lyrics during instructional time negatively impacts the learning environment of our students.

[Corrective Action] Effective immediately, you are directed to refrain from playing music in your classroom during instructional time. If you wish to play music in your classroom as it relates to a lesson, you are directed to obtain prior approval from me.

Your failure to comply with these directives will result in further discipline up to and including dismissal. Please contact me directly if you have any questions regarding this letter.

[Statement of rights.] This letter, and the enclosures, will be placed in your personnel file. If you wish to write a response to this letter, you may do so within ten (10) calendar days, and it will be attached to this letter and also placed in your personnel file.

Sincerely,

[Name]

[Title]

Enclosures: Exhibits A - _____

cc: Personnel File

**[DO NOT ISSUE A 90 DAY NOTICE WITHOUT CONFERRING
WITH HUMAN RESOURCES]**

November __, 201_

By Personal Delivery

NAME

[Street Address]

[City, CA Zip Code]

Re: Ninety (90) Day Notice of Unprofessional Conduct and Unsatisfactory Performance

Dear NAME:

Pursuant to Education Code sections 87734 (Exhibit A) and 87732 (Exhibit B), this letter constitutes a notice of and need to correct your unprofessional conduct and unsatisfactory performance. The Community College District (“College”) is required to provide you with notice at least ninety (90) days prior to initiating formal disciplinary proceedings for dismissal or suspension on the grounds of unprofessional conduct or unsatisfactory performance. Please be advised that sections 87734 and 87732 do not preclude the initiation of formal disciplinary proceedings for causes other than unprofessional conduct and/or unsatisfactory performance.

Your unprofessional conduct and unsatisfactory performance is based on, but not limited to, the evaluation standards (Article 6.3) for tenured faculty as contained in the contract between College Faculty Association (“CFA”) and Community College District (“CCD”) (Exhibit C), Appendix X: Tenure Standards B.1-2, 5 (Exhibit D), and failure to meet the work load requirements in Articles 7.1.1 and 7.1.4 (Exhibit E), California Code of Regulations, title 5, sections 55002(a)(3) and (a)(4) (Exhibit F), College Board Policy 4080 (Exhibit G), and College Administrative Procedures 4020, 4023, and 5350 (Exhibit H).

This formal notice is designed to provide you with sufficient information to understand the nature of your unprofessional conduct and unsatisfactory performance, and to illustrate specific instances of that behavior with enough particularity to provide you with an opportunity to correct these faults and overcome the grounds for charges based on unprofessional conduct and unsatisfactory performance. Please be advised that, while this notice is being issued pursuant to Education Code section 87734, your conduct may also constitute violations of, or refusal to obey school laws and rules, constitute evident unfitness for duty, and/or constitute other violations of Education Code section 87732.

Your unprofessional conduct and unsatisfactory performance is based more specifically on the following:

1) LIST EACH INSTANCE OR SHORTCOMING SEPARATELY. ATTACH RELEVANT DOCUMENTS, REPRIMANDS, PRIOR 90 DAY NOTICES, AND EVALUATIONS.

You must immediately implement the following directives:

2) LIST ALL DIRECTIVES

The District is willing to assist you in overcoming these deficiencies. However, please be advised that you must correct these deficiencies immediately. Your failure to do so may result in your dismissal in accordance with the provisions of the Education Code.

A copy of your most recent evaluation (Exhibit __) is attached pursuant to Education Code section 87734. This letter and the attached materials will be placed in your personnel file. If you wish to write a response to this letter, you may do so within ten (10) days, and it will be attached to this letter and placed in your personnel file.

Sincerely,

Attachments:

- Exhibit A - Education Code section 87734
- Exhibit B - Education Code section 87732
- Exhibit C - CFA Contract,
- Exhibit D - California Code of Regulations, title 5, sections 55002(a)(3) and (a)(4)
- Exhibit E - College Board Policy 4080
- Exhibit F - College Administrative Procedures 4020, 4023, and 5350
- Exhibit G - Faculty Evaluation

Disclaimer:

These materials and all discussions of these materials are for instructional purposes only and do not constitute legal advice. If you need legal advice, you should contact your local counsel or an attorney at Lozano Smith. If you are interested in having other in-service programs presented, please contact clientservices@lozanosmith.com or call (559) 431-5600.

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