Date of Hearing: June 27, 2023

ASSEMBLY COMMITTEE ON HIGHER EDUCATION
Mike Fong, Chair
SB 433 (Cortese) – As Amended May 18, 2023

SENATE VOTE: 28-11

SUBJECT: Classified school and community college employees: disciplinary hearings: appeals: impartial third-party hearing officers

SUMMARY: Establishes an appeal process for classified staff employed by either a K-12 or community college district who have received notice of a disciplinary action from their employer, the governing board of the K-12 or community college district. Specifically, **this bill**:

K-12 section of the measure.

1) Establishes an appeal process for classified employees (who are employed by non-merit districts) in the event a K-12 school district determines the conduct of an employee is subject to a disciplinary action. The appeal process will be conducted by an impartial third-party officer paid by the school district and selected by the district and the employee or the employee organization and the district. Requires a classified employee who wishes to exercise this appeal authority to notify the governing board of the K-12 district within thirty days of receiving the initial disciplinary decision.

    a) Permits the governing board of a K-12 district and the classified employee union to include in their collective bargaining agreement an alternative method for appealing a disciplinary action for classified staff.

    b) Exempts for purposes of the appeal process, classified employees who are peace officers as defined.

2) Authorizes the determination made by the third-party hearing officer reviewing the appeal, as to whether the disciplinary action is warranted or not, to be subject to judicial review pursuant to Section 1286.2 (a) of the Civil Procedure Code.

3) Stipulates (1) of this analysis applies to classified employees who are employed by an entity, including a regional occupational center or program, created or established by one or more school districts that exercise any joint power as defined.

4) Clarifies that disciplinary action does not include verbal or written reprimands or verbal or written warnings.

5) Requires a governing board of a school district or an impartial third party officer to delegate its authority to a judge to determine whether sufficient cause exists for a disciplinary action against a classified employee involving allegations of egregious misconduct and conduct involving a minor. The judge's ruling will be binding by all parties.

6) Deletes outdated language regarding when the provision of the code section will apply to K-12 districts' collective bargaining agreements with classified staff.

7) Authorizes those who are employed by a county superintendent of schools in a position not requiring a certification qualification and whose salary is paid from the county school service fund to be eligible for an appeal of a disciplinary action.

8) Makes conforming and technical changes.

9) Authorizes that if the Commission on State Mandates determines this act contains a cost mandated by the state, the state is required to reimburse local agencies and districts for those identified costs in accordance with Part 7 of Division 4 of Title 3 of the Government Code.

Community college section of the measure.

1) Establishes an appeal process for classified employees (who are employed by non-merit districts) in the event the governing board of the community college district determines the conduct of the classified employee is subject to a disciplinary action. The appeal process will be conducted by an impartial third-party officer paid by the community college district and selected by the community college district and the employee, or the employee organization and the community college district. Requires a classified employee who wishes to exercise this appeal authority to notify the governing board of the community college within thirty days of receiving the initial disciplinary decision.

    a) Permits the governing board of the community college district and the classified employee union to include in their collective bargaining agreement an alternative method for appealing disciplinary action for classified staff.

    b) Exempts for purposes of the appeal process, classified employees who are peace officers as defined.

    c) Clarifies that (1) of this analysis also applies to classified employees who are employed by an entity created or established by one or more community college districts that exercise joint power, as defined.

2) Permits a community college district to stop paying the permanent classified employee before a decision is rendered if 30 days have passed since the employee requested an appeal hearing.

3) Authorizes the determination made by the third-party hearing officer reviewing the appeal, as to whether the disciplinary action is warranted or not, to be subject to judicial review pursuant to Section 1286.2 (a) of the Civil Procedure Code.

4) Clarifies that disciplinary action does not include verbal or written reprimands or verbal or written warnings.

5) Makes clarifying and conforming changes.

6) Authorizes that if the Commission on State Mandates determines this act contains a cost mandated by the state, the state is required to reimburse local agencies and districts for those identified costs in accordance with Part 7 of Division 4 of Title 3 of the Government Code.

EXISTING LAW: *Pertaining to K-12 School Districts.*

1) Establishes the procedures by which a K-12 school district may provide a disciplinary action for a classified employee. Specifically stipulates, a school district must adopt rules and procedures for disciplinary proceedings that include providing the employee a written notification of the specific charges against the employee, information on the employee's right to a hearing, and how the employee can request a hearing including a requirement that the district must be notified at least five days after the service of notice to the employee. The burden of proof will remain with the governing board of the school district. Authorizes the governing board of the school district or a third-party impartial hearing officer to determine whether there is sufficient cause for the disciplinary action. If the school district elects to use an impartial hearing officer, the governing board of the school district will retain the ability to review the determination, as defined. Prohibits the suspension, demotion, or dismissal of an employee, who has requested a hearing, unless the governing board of the K-12 district or the third-party impartial hearing officer have determined the employee engaged in either criminal misconduct, misconduct that presents a risk of harm to pupils, staff, or property, or committed habitual violations of the district's policies or regulations. For specific disciplinary actions involving allegations of egregious misconduct and conduct involving a minor, the governing board of a district will delegate its authority to a judge and the judge's rule in the disciplinary matter will be binding for all parties. Clarifies the above appeal procedures only apply to non-merit K-12 districts (Education Code (EDC) Section 45113).

2) Establishes the procedures and disciplinary proceedings for classified staff in non-merit community college districts. Specifies, the governing board of a community college district will adopt procedures for disciplinary proceedings that contain a provision for informing the employee by written notice of the specific charges, the employee's right to a hearing, and the timeframe an employee has to request a hearing (must be at a minimum five days after the notice is received by the employee of the disciplinary action). Permits the governing board of a community college district to delegate authority as to whether there is sufficient cause for disciplinary action to an impartial third-party hearing officer (pursuant to the classified employee's collective bargaining agreement), but the governing board will retain authority to review the determination under specific circumstances, as defined. Prohibits the suspension, demotion, or dismissal of an employee, who has requested a hearing, unless the governing board of the community college district or the third-party impartial hearing officer have determined the employee engaged in either criminal misconduct, misconduct that presents a risk of harm to pupils, staff, or property, or committed habitual violations of the district's policies or regulations. Stipulates if a hearing is conducted by a third-party hearing officer the district will stop paying the employee after 30 calendar days from the date the hearing is requested. Clarifies the above appeal procedures only apply to non-merit community college districts (EDC Section 88013).

3) Establishes the California Community Colleges (CCC) under the administration of the Board of Governors of the CCC, as one of the segments of public postsecondary education in this state. The CCC shall be comprised of community college districts (EDC Section 70900).

4) Establishes that CCC districts are under the control of a board of trustees, known as the governing board, who has the authority to establish, maintain, operate, and govern one or more community colleges, within its district as specified (EDC Section 70902).

FISCAL EFFECT: According to the Senate Committee on Appropriations, by requiring a neutral third-party to settle disciplinary appeal hearings for non-merit districts, this bill could

result in unknown, but potentially significant Proposition 98 General Fund costs to school and community college districts. A precise amount would depend on the number and scope of such proceedings each year. The costs associated with a single hearing can potentially exceed $10,000 for a more complicated matter, depending on the duration and the extent of the legal preparation involved. Additionally, the bill provides that the third-party hearing officer shall be paid by the school district.

COMMENTS: *Double referral.* This bill passed out of the Assembly Public Employment and Retirement Committee on June 14, 2023, with a vote count of 5-1. The Committee heard the measure as it pertained to matters that were germane to its jurisdiction.

Author's intent. As explained by the author, "classified employees are the lifeblood of a school — these employees drive our school buses, prepare and serve meals to children, and carry out essential office functions. They deserve the same due process rights as teachers. SB 433 promotes a more fair and equitable discipline system. Establishing impartial, third-party officers to arbitrate over disciplinary actions will protect the rights and liberties of the classified school staff."

Purpose of the measure. As expressed by the co-sponsors of the bill the California School Employees Association and the American Federation of State, County, and Municipal Employees, SB 433 (Cortese) would establish appeal protocols by which a classified employee of a non-merit K-12 or community college district would be able to appeal a disciplinary action to an impartial third-party hearing officer, who would render a decision as to whether a classified employee should receive the disciplinary action.

Under current law, a classified employee of a K-12 or community college district who receives a disciplinary action notification is able to "appeal" the disciplinary action to either the governing board or to an impartial third-party officer. The option for an impartial third-party officer is only available if collectively bargained between the governing board of the district and the classified employee union. Therefore, it is entirely plausible that there are districts (K-12 and community colleges) where classified employees are notified of a pending disciplinary action and can only appeal to the governing board, which has already determined there was sufficient evidence to warrant the disciplinary action against the employee in the first place. To preserve due process and the right to an impartial decision-maker, SB 433 (Cortese) would require districts to either have procedures in place where a classified employee can appeal their disciplinary action to an impartial third-party hearing officer or a procedure that is collectively bargained and agreed to by both the governing board of the district and the classified employee organization.

Skelly v. State Personnel Board (1975) 15 Cal.3d 194. In 1975 the California Supreme Court ruled that part of the due process afforded to public employees must include specified procedures and safeguards prior to a disciplinary action. The ruling determined all public employees, including classified staff at K-12 and community college districts, are entitled to the following:

1) Notice of the proposed disciplinary action;

2) A statement of the reasons for the proposed action;

3) A copy of the charges and materials upon which the proposed action is based; and,

4) The right to respond either orally or in writing to the authority initially imposing the discipline.

This procedure created the function of a "Skelly" officer whose role is to provide an objective review of the proposed discipline and the employee's response. The officer will then make a judgment or recommendation as to whether the disciplinary action should be sustained, modified, or rejected. The Skelly officer can be someone employed by the K-12 or community college district but must be impartial or have no involvement in the discipline of the matter. For example, the Skelly officer would need to be someone from another department with no history of conflict with the employee, and not involved in the discipline or involving the employee.

After the Skelly hearing, a public employee may have the right to appeal. In the case of a K-12 and community college classified employees appeal their disciplinary action either to the governing board of the district or to an impartial third-party officer depending upon the district's classified employee collective bargaining agreement.

Community college classified staff versus faculty appeal procedures. Education Code section 87672 through 87683 provides the procedures by which a community college district must follow to penalize or dismiss full-time faculty. The procedure includes a notification of the disciplinary decision along with the reason for the disciplinary decision and the right for the faculty member to appeal. Unlike classified staff, faculty have the right to have an appeal hearing overseen by an arbitrator. The Education Code further explains since the governing board of the community college district is not the decision maker in the appeal hearing, they, along with the employee, can appeal the decision of the arbitrator to the judicial system for review. The below chart highlights the differences between faculty and classified staff disciplinary procedures.

Classified Staff	Full-time Faculty
Skelly Process and Hearing	Skelly Process and Hearing
Disciplinary Action Notification	Disciplinary Action Notification
A minimum of five days to appeal subject to collective bargaining	Thirty days to appeal, as delineated in the Education Code.
The appeal hearing is either before the Governing Board of the community college district or before a third-party impartial hearing officer. In the event the governing board makes the determination of the appeal hearing, the decision is final no further appeals are granted. In the event the third-party impartial hearing officer makes the determination in the appeal hearing, the governing board has a right to review the determination and vacate the	The appeal hearing is either before an arbitrator or if the employee and the district agree OR After thirty days if the district and the employee cannot agree on an arbitrator, the appeal hearing is held before an administrative law judge.

decision under certain circumstances. In either case, the classified employee has exhausted all rights to appeal the disciplinary action.	
	If either the employee or the governing board disagrees with the outcome of the "appeal hearing" either party can request a second appeal review conducted by the court.

Source: Education Code Section 87672 through 87683 and Education Code Section 88013.

SB 433 (Cortese) establishes an appeal process by which a neutral third-party hearing officer would be the decision maker, not the governing board of the community college districts, and provides a step towards parity between classified staff and faculty employed by the same district.

Personnel Commissions and the merit system. A personnel commission is an independent board separate from the governing board of a district and the leadership of a college within a district. The purpose of the personnel commission is to maintain a merit system for classified employees of the district and campuses within the district and to oversee the work of the executive director and personnel commission staff. The personnel commission's main directive is to ensure fair and objective treatment of all applicants and employees.

Established in Education Code Section 88060 through 88139, a personnel commission is comprised of three to five citizens who are appointed into staggering terms to oversee the work of the personnel commission staff. In some K-12 and community college districts, the personnel commission staff are the human resources staff of either the district or campus within the district. However, that is not always the case and for many the personnel commission staff are independent positions separate from the district. If the classified staff elects to have a merit system, the personnel commission is established to oversee and enforce the merit system.

A merit system is a set of rules and procedures to ensure the selection, promotion, retention, and discipline of classified staff is conducted in a manner without favoritism or prejudice. As part of its role, the personnel commission is tasked with classifying and reclassifying positions and serves as the appeal hearing officer for disciplinary actions taken against classified staff. As of 2021, of the 73 community college districts, only five community college districts have a merit system and therefore have a personnel commission. SB 433 (Coretese) would provide comparable circumstances between classified staff in merit and non-merit districts by establishing an appeal process before an impartial thirty-party officer for non-merit classified staff akin to their merit counterparts who are able to appeal disciplinary actions to the personnel commission.

Arguments in support. As proponents of the measure, the California Federation of Teachers, illustrates the need for the measure by highlighting that, "Current law provides discipline appeal hearings for classified school employees to be decided by the same group of individuals who initially determined their discipline. This is contrast to nearly all other appeal processes for other public sector employees including teachers where a separate entity would review the disciplinary case. Consequently, the there is no true appeal process given the composition of the appealing body is likely the same as the initial adjudicator. SB 433 would require an impartial third-party

hearing officer to determine on appeal if a permanent classified employee in a non-merit district should be subject to disciplinary action."

Additional, points for consideration are highlighted by the California School Employees Association stating that, "the opposition is incorrectly arguing SB 433 would take away a district's ability to 'render personnel decisions' and that the bill does not define 'disciplinary action'. These contentions ignore the amendments taken in the Senate Appropriations Committee:

1. Clarifying that SB 433 only applies to appeal hearings and not initial disciplinary decisions.

2. Specifying that, for the purpose of this bill, discipline does not include verbal or written reprimands or verbal or written warnings."

Arguments in opposition. The Association of California Community College Administrators raises the following concerns regarding the provision within SB 433 (Cortese), "ACCCA holds steadfast to the principle that local control to fundamental in establishing and operating sound programs for students and creating an infrastructure that supports all community college employees. As currently written, SB 433 would remove the authority of a community college district (CCD) to make the ultimate decision on whether to take significant disciplinary action, such as demotion, suspension, or dismissal, against a classified staff person and the ability of the CCD to reject the decision of the third-party hearing officer. The bill would also prove costly to districts, as they would be financially responsible for paying for the third-party official."

Additional opposition from the California School Boards Association highlights concerns from K-12 districts or local education agencies (LEAs), "currently, LEAs negotiate how disciplinary appeals are handled and funded. However, this measure proposes that the LEA shoulder the entirety of the cost. Additionally, it mandates that the third-party hearing officer be selected jointly by the LEA and employee representative. This will further add to the delay in resolving sensitive personnel matters, as it could lead to many otherwise legitimate hearing officers being excluded because the LEA and employee's representatives are unable to agree on a hearing officer. This would be further exacerbated in small LEAs in rural areas, where there may only be one or two hearing officers available. Deferring the determination of the disciplinary action against an employee contingent upon the accessibility to an 'impartial third-party hearing officer' would also result in delayed decisions due to increased caseloads and delays in a hearing officer's ability to render a decision in a timely matter. Finally, requiring a LEA to schedule, fund, and wait for a hearing before an 'impartial third-party hearing officer' would further delay necessary and time-sensitive disciplinary actions against an employee."

The Assembly Committee on Education's Committee comments. According to comments provided bythe Assembly Education Committee, this bill creates *near* parity for K-12 classified employees with regard to the dismissal hearing process that currently exists for K-12 certificated employees, however, it does not provide parity in a few situations. First, K-12 certificated employees have the ability to appeal suspension and dismissal decisions, while this bill allows K-12 classified employees to appeal more than suspension and dismissal decisions. This bill would allow K-12 classified employees to request an appeal hearing for reassignment decisions and demotions. *The Committee should consider amending the bill to limit the appeal hearings only to suspension and dismissal decisions*.

Second, the cost of K-12 certificated employee dismissal appeal hearings are shared by the school district and the state when a K-12 certificated employee is dismissed. *The Committee should consider amending the bill to reflect the same cost-sharing that exists in the K-12 certificated employee dismissal hearing process outlined in Education Code 44944 (f).*

Committee comments. As enumerated above, SB 433 (Cortese) provides a step towards parity for classified staff and faculty at community colleges by ensuring classified staff have a neutral third-party officer for their appeal hearings; however, the measure does not provide equality under the law for appeals for disciplinary actions of classified staff and faculty. One could surmise the reason for the secondary appeal to the court system is to provide the governing board of the community college a right to "appeal" the decision of the arbitrator, thereby preserving a measure of local control over the decision for disciplining a faculty member.

SB 433 (Cortese) aims to remove implicit biases from the appeal process and ensure classified staff has access to a fair and impartial appeal process. However, SB 433 (Cortese) still enables local control by permitting alternative pathways for appeal that are collectively bargained between the governing board of the community college district and the employee organization.

Furthermore, SB 433 (Cortese) provides an opportunity for the third-party hearing officers' decision to be subject to judicial review, but it is not clear who can submit the case for a review nor whether the review is considered independent of the arbitrator's decision.

Finally, the measure does not define who can be the impartial third-party hearing office. Without defining who the impartial third-party hearing office is, it is possible community college districts could adopt a definition that aligns with the person who can be a Skelly officer; thereby circumventing the intention of the bill for the third-party hearing officer to be an arbitrator.

To alleviate the above concerns, the Committee has suggested and the author has accepted the following amendments to SB 433 (Cortese):

Amend Section 45113, subdivision (g), subparagraph (4) to read to clarify the definitions of disciplinary action and who the hearing officer is when there is a disciplinary appeal:

(4) ~~For purposes of this subdivision, "disciplinary action"~~ *~~does not include verbal or written reprimands or verbal or written warnings.~~ (4)For purposes of this section, the following definitions apply:*

(A) "Disciplinary action" means dismissals and suspensions of staff and demotions of nonsupervisory staff and does not include reprimands or warnings whether verbal or written.

(B) "Hearing officer" means an arbitrator selected by striking from a list of seven arbitrators to be obtained by parties from the California State Mediation and Conciliation Service, unless the parties agree upon another method of selecting a hearing officer..

Amend Section 88013, subdivision (b) to read as follows to clarify the governing board's decision of the classified employee's disciplinary action is not conclusive:

(b) An employee designated as a permanent employee shall be subject to disciplinary action only for cause as prescribed by rule or regulation of the governing board, ~~*but the governing*~~

~~*board's determination of the sufficiency of the cause for disciplinary action shall be conclusive, except as set forth elsewhere in this section.*~~

Amend Section 88013, subdivision (c) to clarify the employee has 30 days from the date of the notification of the disciplinary action to appeal.

(c) The governing board shall adopt rules of procedure for disciplinary proceedings that shall contain a provision for informing the employee by written notice of the specific charges against the employee, a statement of the employee's right to a hearing on those charges, and *a notification of the thirty days* ~~*the time*~~ within which the hearing may be requested ~~*which shall be not less than five days*~~ after service of the notice to the employee, and a card or paper, the signing and filing of which shall constitute a demand for hearing, and a denial of all charges. The burden of proof shall remain with the governing board, and any rule or regulation to the contrary shall be void.

Deletes Section 88013, subdivision (e) and adds the following language to: (1) clarify that the "appeal hearing" requested by the classified employee is to be conducted by an impartial third-party hearing officer as determined by the collective bargaining agreement between the community college district and the classified employee organization, (2) clarifies the change in the disciplinary proceedings is to be adopted into future collective bargaining agreements between the classified employee organization and the CCC district, and provides a definition of what constitutes a disciplinary action and the hearing officer.

(e) (1) If an employee, excluding a peace officer as defined in Section 830.32 of the Penal Code, requests a hearing pursuant to subdivision (c), an impartial third-party hearing officer paid by the community college district and jointly selected by the district and the employee or their employee organization, as defined in subdivision (d) of Section 3540.1 of the Government Code, shall preside over the hearing and provide a determination as to the outcome of the disciplinary action.

(2) The impartial third-party hearing officer's determination shall be subject to judicial review, on petition of either the governing board or the employee, pursuant to the standards of subdivision (a) of Section 1286.2 of the Code of Civil Procedure and in the same manner as a decision made by an administrative law judge under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on review, shall exercise its independent judgment on the evidence. The proceeding shall be set for hearing at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence is given by law.

(3) This subdivision shall also apply to those classified employees that are employed by any entity created or established by one or more community college districts pursuant to statute, exercising any joint power pursuant to Article 1 (commencing with Section 6500) of Chapter 5 of Division 7 of Title 1 of the Government Code, or as otherwise conferred by law upon community college districts.

(4) To the extent that this subdivision conflicts with a provision of a collective bargaining agreement entered into by a public school employer and an exclusive bargaining representative before January 1, 2024, pursuant to Chapter 10.7 (commencing with Section

3540) of Division 4 of Title 1 of the Government Code, this subdivision shall not apply to the community college district until the expiration or renewal of that collective bargaining agreement.

(5) For purposes of this section, the following definitions apply:

(A) "Disciplinary action" does not include verbal or written reprimands or verbal or written warnings.

(B) "Hearing officer" means an arbitrator selected by striking from a list of seven arbitrators to be obtained by the parties from the California State Mediation and Conciliation Service, unless the parties agree upon another method of selecting a hearing officer.

Deletes from Section 88013, subdivision (f), subparagraph (1) references for the third-party hearing officer to make the decision after the Skelly review process whether there was conclusive evidence to suspend or dismiss the employee based on the preponderance of evidence of an egregious offense.

(f) (1) Except as specified in paragraph (2), a permanent employee who timely requests a hearing on charges against the employee shall not be suspended without pay, suspended with a reduction in pay, demoted with a reduction in pay, or dismissed before a decision is rendered after the hearing unless the governing board, ~~*or an impartial third-party hearing officer provided pursuant to the terms of an agreement with an employee organization under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code,*~~ finds that at the time discipline was imposed at the conclusion of the review process specified in Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194, the employer demonstrated by a preponderance of the evidence that the employee engaged in criminal misconduct, misconduct that presents a risk of harm to students, staff, or property, or committed habitual violations of the district's policies or regulations.

Deletes Section 88013, subdivision (g) as the language has been added to subdivision (e).

REGISTERED SUPPORT / OPPOSITION:

Support

AFSCME
California Federation of Teachers
California Labor Federation, AFL-CIO
California School Employees Association
California Teachers Association

Oppose

Association of California Community College Administrators
California School Boards Association
Kern County Superintendent of Schools Office
Peace Officers Research Association of California (PORAC)

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