

City of Firetown  
**SKELLY PROTOCOL**

## **I. LEGAL REQUIREMENTS**

In *Skelly v. State Personnel Board* (1975) 15 Cal. 3d 194, the California Supreme Court ruled that, as part of constitutionally guaranteed due process, public employees are entitled to certain procedural safeguards before discipline which is sufficiently severe to constitute a deprivation of a liberty or property right is imposed on them.<sup>1</sup> A dismissal or a termination of a career employee, a suspension without pay for a period of more than five days, or an unpaid leave of ten days or more are property losses to which Skelly protections attach. The constitutionally protected liberty interests requiring Skelly protections arise whenever the allegations against an employee are sufficiently onerous to seriously impact the employee's ability to find future work in his/her chosen career.

Since Skelly is a constitutionally required due process mandate, employees entitled to Skelly protections must be given proper notice of an intended disciplinary action and a fair chance to respond to the charges against them PRIOR to the implementation of the disciplinary action.

Proper Skelly notice consists of the following elements:

- 1) **TIMING: NOTICE OF THE INTENTION TO TAKE A SERIOUS DISCIPLINARY ACTION MUST BE GIVEN PRIOR TO THE ACTION ACTUALLY BEING TAKEN.**  
The requirement that notice of the intended disciplinary action must be given prior to implementation of the action means that a faulty notice in content or timing renders a subsequent action based on the faulty notice of no force or effect. The infirmity cannot be cured by providing a proper notice after the disciplinary action has been taken, unless the employee is first made whole. To cure a defective Skelly notice, we must bring the employee to the status quo prior to the action, provide a proper Skelly notice and give the employee a fair chance to be heard. This means that the employee will need to be placed back on the payroll, with benefits, until an effective Skelly process is completed. It will also mean that the Skelly meeting must be redone. It may be appropriate to appoint a new Skelly Reviewer to insure that the employee receives a fair chance to make his/her case before the imposition of the disciplinary action.

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<sup>1</sup> *Skelly* involved an employment termination of a permanent civil service employee. *Skelly* rights were extended to permanent, career University employees in the *Mendoza* decision. *Mendoza v. Regents of University of California* (1978) 78 Cal. App. 3<sup>rd</sup> 168.

- 2) **CONTENT: THE NOTICE OF THE INTENTION TO TAKE A SERIOUS DISCIPLINARY ACTION MUST SET OUT THE REASONS FOR THE PROPOSED ACTION IN ENOUGH DETAIL TO ALLOW THE EMPLOYEE TO KNOW AND RESPOND TO THE CHARGES.** Due process requires that a public employer can act only on the basis of the reasons given in the notice of the intended disciplinary action. An employee cannot have a meaningful opportunity to respond to a proposed action (and thus due process principles are violated) if: a) the University does not set out the reasons for the proposed action; or b) the University subsequently presents reasons for the action which are inconsistent with or different from those set out in the notice of the proposed action.
- 3) **SUPPORTING DOCUMENTATION: THE NOTICE OF THE INTENTION TO TAKE A SERIOUS DISCIPLINARY ACTION MUST INCLUDE OR MAKE AVAILABLE THE EVIDENCE ON WHICH THE DISCIPLINARY AUTHORITY RELIED IN COMING TO THE DECISION TO TAKE THE ACTION.** This safeguard is designed to allow the employee the chance to challenge the reliability or relevancy of the evidence motivating the proposed decision. The provision of the required documentation is ordinarily achieved by attaching copies of all relevant documents to the Letter of Intent. The policies or departmental rules allegedly violated (unless the violations are of the type commonly known to be prohibited) must also be attached to the Letter of Intent.
- 4) **STATEMENT OF SKELLY RIGHTS: THE NOTICE OF THE INTENTION TO TAKE SERIOUS DISCIPLINARY ACTION MUST ADVISE THE RECIPIENT THAT HE/SHE HAS A RIGHT TO RESPOND, EITHER ORALLY OR IN WRITING, TO A DESIGNATED UNIVERSITY OFFICIAL BEFORE THE DISCIPLINE CAN BE IMPOSED.** This safeguard has been clarified in subsequent court decisions. An employee facing the loss of a property right or a liberty interest because of an employment decision must be given notice of his/her right to respond to someone who has the authority to insure that an erroneous decision is corrected.

## II. THE PURPOSE OF THE SKELLY REVIEW PROCESS

The Skelly review is the opportunity for an employee facing dismissal or another serious disciplinary action to establish that the proposed action is unreasonable or likely to be in error. The function of the Skelly Reviewer is to insure that the employee has the opportunity to respond to the charges against him or her and then, in consideration of the employee's response, to evaluate: 1) whether there is a reasonable basis to believe the employee engaged in the misconduct charged, and 2) whether the proposed disciplinary action is unreasonable. The Skelly Reviewer should not determine whether he/she would take the same action if he/she was in the shoes of the disciplining authority. Rather, the question for the Skelly Reviewer is whether the proposed discipline is unreasonable in the circumstances. In *Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 545-546, the United States Supreme Court explained:

[The Skelly Meeting]...” need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.”

The Skelly Reviewer is not expected to finally decide or resolve all evidentiary disputes. Nor should the Skelly Reviewer conduct a hearing. See Part V below for information on the conduct of the Skelly meeting.

### III. THE QUALIFICATIONS OF A SKELLY REVIEWER

There are two attributes that all Skelly Reviewers must have. They must have the requisite authority to act, and they must be “reasonably” impartial.

The Skelly Reviewer must have the experience and authority to evaluate the appropriateness of the proposed discipline and to strongly recommend upholding, modifying, or revoking the proposed discipline. This level of authority is necessary because of the requirement that the employee be provided a fair and meaningful opportunity to respond to the charges. The Skelly Reviewer’s authority may be inherent or conveyed. Inherent authority reposes in the employee’s chain of command. Thus, any person above the employee in the chain of command has the inherent authority to act as a Skelly Reviewer.

The Skelly Review may also be transferred outside the employee’s chain of command, if it is conveyed by the authority proposing the discipline or anyone else above that person in the employee’s chain of command. In general, the delegation or conveyance of this responsibility should be in writing and should be sent not only to the Skelly Reviewer but to the employee as well. The Employee and Labor Relations Office will assist in drafting the delegation letter.

**Reasonable Impartiality:** The courts have held that, to be meaningful, the right to respond must afford the employee the opportunity to present his/her side of the controversy to a reasonably impartial and noninvolved reviewer. This does not mean that the supervisor or manager proposing the discipline cannot serve as a Skelly Reviewer. Indeed, the Courts have explicitly approved the use of the supervisor/manager proposing the discipline as a Skelly Reviewer. Certainly, where there is credible evidence of bias, the person who is proposing the action will not be in a position to fairly hear and evaluate the employee’s comments. In these circumstances, a person other than the disciplinary authority must be designated to act as the Skelly Reviewer.

- **Examples of Potential Disqualification of the Supervisor from serving as the Skelly Reviewer**

There are a variety of circumstances that may preclude or make it inadvisable for the disciplinary authority (the supervisor or manager initiating the proposed disciplinary action) to also assume the role of the Skelly Reviewer. For example, some organizational units may require that someone other than the disciplinary authority serve as the Skelly Reviewer. There may also be circumstances in which allowing the disciplinary authority to serve as the Skelly Reviewer would give the appearance of bias or impropriety.<sup>2</sup> One example of the latter is when the disciplinary authority is a primary witness to the events charged in the letter initiating the disciplinary action. In this circumstance an individual other than the disciplinary authority must be appointed to act as Skelly Reviewer. It would also be preferable to use someone other than the supervisor as the Skelly Reviewer where there is a history of animus or conflict between the employee and the supervisor.

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<sup>2</sup> Bias should not be inferred merely because the supervisor has proposed taking a disciplinary action.

The selection of an alternative Skelly Reviewer is usually made by someone in the chain-of-command of the person proposing the discipline, with the assistance of the Employee and Labor Relations office.

In the City of Firetown, the Skelly Reviewer will be designated by the Director of Employee and Labor Relations/FTS Labor Relations Manager.

#### **IV. ARRANGING THE SKELLY MEETING**

The Letter of Intent to Discipline will identify the Skelly Reviewer. It will advise the employee that he/she has the right to respond directly to the Skelly Reviewer, either orally or in writing, and will set out the time limit within which the response must be submitted. The Letter of Intent to Discipline will also advise the employee how he/she can contact the Skelly Reviewer to arrange a meeting.

The employee and/or the employee's representative are responsible for contacting the Skelly Reviewer and arranging the meeting, if the employee indeed wishes to meet. The Skelly Reviewer has no responsibility to initiate a contact with the employee or his/her representative. An employee may choose to submit a response in writing. Or, some employees prefer to submit both a written response and an oral response. All of these techniques are valid –so long as the response in whatever form it takes is timely (i.e., within the stated deadline). A Skelly Reviewer need not consider an untimely response. Questions about requests to accept an untimely response, or to request an extension of the review period, should be addressed to the Employee and Labor Relations Office.

The Skelly meeting, once requested, will proceed like any other meeting, with the Skelly Reviewer serving as chair. The employee will meet with the Skelly Reviewer, provide such evidence or information as he/she wishes and tell his/her side of the story. Subsequent to the meeting, the Skelly Reviewer will make a recommendation as to whether the proposed disciplinary action should be upheld, modified, or revoked. Matters related to the Skelly Reviewer's recommendation are addressed in Part V, below.

From time to time, employees may request that a scheduled Skelly meeting date be extended, or that the standard Skelly response period be increased. Although the Skelly Reviewer has the discretion to grant or deny these requests, it is recommended that the Skelly Reviewer consult with Employee and Labor Relations prior to issuing a decision on the issue. Since employees may be on leave with pay during the Skelly period, it is important to consider the stated need for the extension, along with the financial implications of the request, before issuing a decision.

#### **V. CONDUCTING THE SKELLY MEETING**

##### **1. PRIOR TO THE MEETING THE SKELLY REVIEWER SHOULD REVIEW:**

- a. The notice of the intended action
- b. All supporting documents
- c. The Skelly Protocol
- d. The applicable University policy and/or labor agreement provisions
- e. Any written response submitted by the employee in advance of the Skelly Meeting, as well as any documents the employee has submitted in support of that response.

## **2. THE SKELLY MEETING**

- a. The Skelly Reviewer first introduces all persons present.<sup>3</sup> The Skelly Reviewer begins by explaining the purpose of the meeting (*to minimize the likelihood of an erroneous decision*). The Skelly Reviewer should also explain that, upon completing the meeting, he/she will consider the information provided and then make a recommendation to uphold, modify, or revoke the proposed disciplinary action. The issues for the Skelly Reviewer to determine are: 1) whether there is a reasonable basis to believe the employee engaged in the misconduct charged, and 2) whether the proposed disciplinary action appears to be within the range of reasonable penalties.
- b. Next, the Skelly Reviewer should ask the employee or the employee's representative to respond to the charges and advise that the response may be submitted in writing, if the employee or the employee's representative desires.
- c. The Skelly Reviewer should allow the employee (or the employee's representative) to present all relevant non-cumulative information, including documents. While the employee's representative may be permitted to speak, the Skelly Reviewer is entitled to hear directly from the employee if the Skelly Reviewer wishes.

### **THE SKELLY REVIEWER SHOULD NOT:**

- Allow the discussion to wander into generalities unrelated to the charges.
  - Argue or try to settle any disputes about the proposed action.
  - Respond to questions about the action or express an opinion about the quality of the action. (The Skelly Reviewer may, however, respond to procedural type questions if the answer is known).
  - Indicate during the meeting what his/her recommendation is likely to be.
- d. Remember, the Skelly meeting is not a formal hearing requiring examination of witnesses. However, if the employee feels that witnesses other than the employee are required in order to demonstrate the likelihood that an error will be made if the proposed action is implemented, witnesses may be called into the meeting. The witnesses should be heard from one at a time so long as, in the discretion of the Skelly Reviewer, they are giving relevant non-cumulative information. Witnesses are not sworn.
  - e. The employee is entitled to have a representative present when he/she meets with the Skelly Reviewer.
  - f. The Skelly Reviewer should ask the appropriate questions and then give the employee or his/her representative the opportunity to make a few, brief follow-up statements. Questions should be directed to the Skelly Reviewer, not to the supervisor or witnesses.
  - g. Occasionally, a Skelly Reviewer will desire to obtain corroboration of information provided during a Skelly meeting. The Skelly Reviewer should contact the Employee and Labor Relations Department for advice and assistance in obtaining the desired information.

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<sup>3</sup> The Skelly Reviewer may request the attendance and assistance of a member of the Employee and Labor Relations staff at the Skelly meeting.

- h. Notes: The Skelly Reviewer may choose to take notes at the Skelly meeting. It is not required. If the Skelly Reviewer does choose to take notes, the notes should be attached to his/her Skelly recommendation.
- i. It is often helpful to invite the disciplinary authority to sit in on a Skelly meeting for the purpose of providing clarification. However, the attendance of any person is at the sole discretion of the Skelly Reviewer. The Skelly Reviewer may ask questions of the disciplinary authority or allow the employee accused of misconduct to ask questions of the disciplinary authority. Such questioning, however, should be permitted only so long as the Skelly Reviewer finds it of value, given the limited charge of the Skelly Reviewer.

### **3. AFTER THE SKELLY MEETING**

- a. The Skelly Reviewer evaluates all of the information after the meeting. If the Skelly Reviewer concludes that additional information is needed, the Skelly Reviewer should contact the Employee and Labor Relations Department for advice and assistance in obtaining the information.
- b. After reviewing all the documentation and information provided by the employee, the Skelly Reviewer evaluates whether there is a reasonable basis to believe the employee engaged in the conduct charged and whether the proposed disciplinary action is within the range of penalties. The Skelly Reviewer may confer with the disciplinary authority during this evaluation if any factual issues need to be clarified. If this evaluation involves policy or contract issues, the Employee and Labor Relations Department should be consulted. Depending on the results of his/her evaluation, the Skelly Reviewer then makes a recommendation to uphold, modify, or revoke the proposed disciplinary action.

- c. The Skelly Reviewer first prepares his/her written recommendation in draft form. A typical draft recommendation will look substantially as follows:

[DRAFT]

To: Employee and Labor Relations

Re: Intent to Impose (identify proposed disciplinary action)

I write in consequence of the Skelly meeting of \_\_\_\_\_ (date) with respect to the letter of intent to (identify proposed discipline) of (date of letter of intent) with regard to (name of employee). Those present at the Skelly meeting were: \_\_\_\_\_ . After reviewing the relevant documents made available to me, and after hearing from (employee and/or the employee's representative) at the Skelly meeting, I am making the following recommendation:

Because there appear to be (reasonable/insufficient) grounds to believe (the employee) engaged in the misconduct charged, I recommend that the proposed disciplinary action be (upheld or modified (and explain how) or revoked).

Name

Title

Skelly Reviewer

cc: Disciplinary Authority

Employee

Employee representative (if any)

enc: All documents presented prior to or at the Skelly meeting

Any other documents considered by the Skelly Reviewer

Skelly Reviewer notes (if any)

- d. The Skelly Reviewer's draft recommendation should be sent to the Employee and Labor Relations Department within a reasonable time (generally three working days) after the Skelly meeting. E-mail or FAX may be used to speed the process.
- e. If the Skelly Reviewer's draft recommends that the disciplinary action be upheld, the Employee and Labor Relations Department will ask the Skelly Reviewer to finalize the recommendation (along with the attachments) and will then submit it to the disciplinary authority. The disciplinary authority then issues the final corrective action letter to the employee (and the employee's representative, if applicable), enclosing a copy of the Skelly Reviewer's recommendation (along with the attachments).
- f. Alternatively, if the Skelly Reviewer's draft recommends that the proposed disciplinary action be modified or revoked, the Employee and Labor Relations Department submits the draft

recommendation to the disciplinary authority and arranges for the Skelly Reviewer and the disciplinary authority to confer about the recommendation. If their discussion results in an agreement regarding the proposed disciplinary action, the Skelly Reviewer finalizes the recommendation to reflect that resolution. The Skelly Reviewer then submits the final recommendation (along with the attachments) to the Employee and Labor Relations Department which, in turn, submits it to the disciplinary authority. The disciplinary authority then issues the final corrective action letter to the employee (and the employee's representative, if applicable), enclosing a copy of the Skelly Reviewer's recommendation (along with the attachments).

- g. If the conference between the Skelly Reviewer and the disciplinary authority does not result in agreement, the Skelly Reviewer finalizes the recommendation and submits it (along with the attachments) to the Employee and Labor Relations Department which, in turn, submits it to the next level of management above the disciplinary authority. After reviewing the Skelly Reviewer's recommendation, the next level of management determines whether the proposed discipline will be implemented, implemented in modified form, or revoked and communicates that decision to the disciplinary authority and to the Employee and Labor Relations Department. The disciplinary authority then prepares the final corrective action letter and issues it to the employee (and the employee's representative, if applicable), enclosing a copy of the Skelly Reviewer's recommendation (along with the attachments).

#### **4. PAY STATUS**

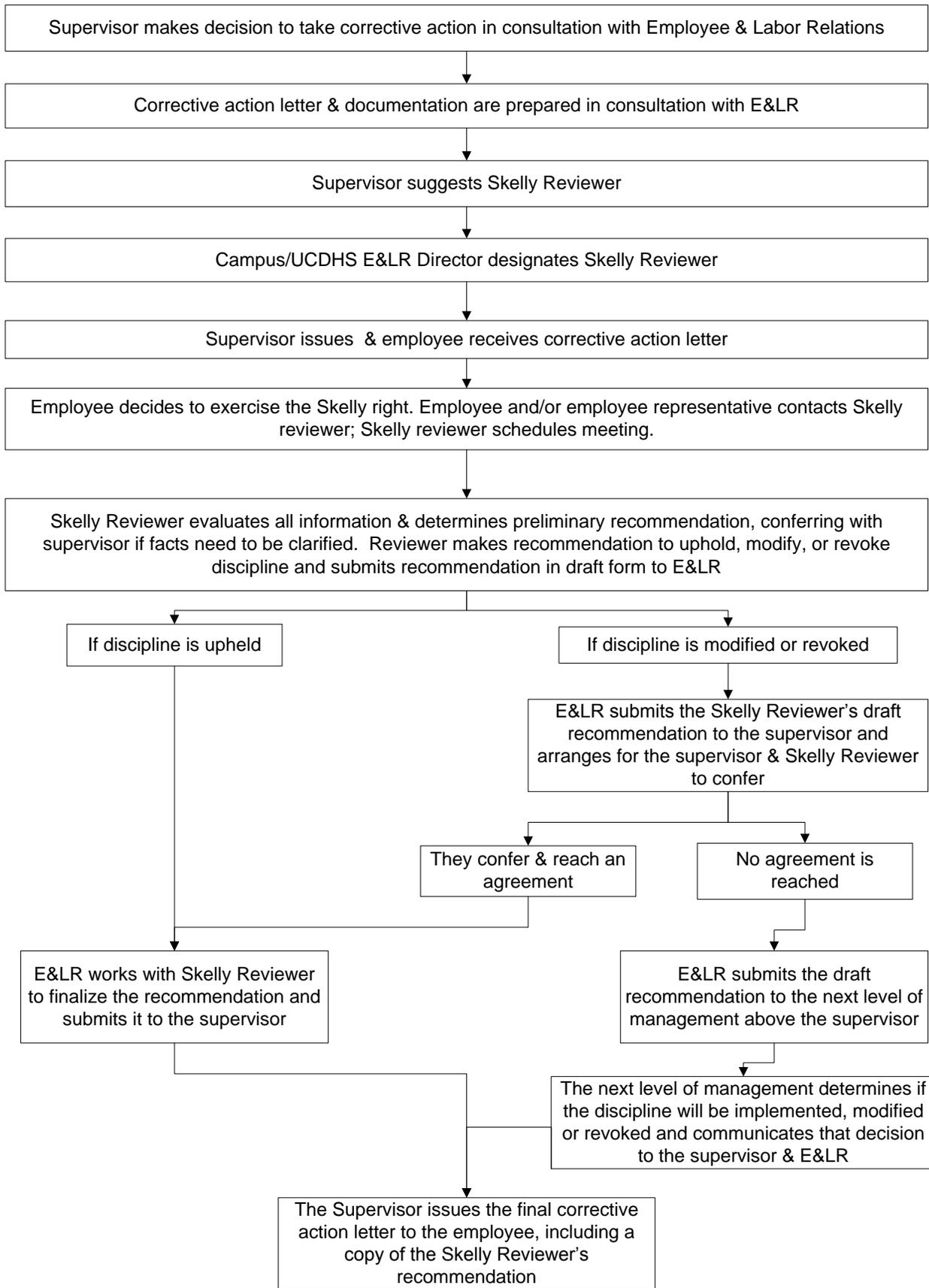
In most cases, the employee will continue to remain on pay status until the Skelly review process is completed and the discipline is implemented, implemented in modified form, or revoked.

Appendix A – Skelly Protocol Flowchart

Appendix B – Skelly Reviewer Checklist

Appendix C – Skelly Reviewer Appointment Letter

APPENDIX A  
SKELLY PROTOCOL FLOW CHART



APPENDIX B  
SKELLY REVIEWER CHECKLIST

- Skelly Reviewer designated.
- Corrective Action Letter sent to employee; copy with attachments sent to Skelly Reviewer.
- Skelly Reviewer meets with employee and/or employee representative.
- Skelly Reviewer confers with supervisor, if necessary to complete his/her review.
- Skelly Reviewer prepares draft letter of recommendation.
- Skelly Reviewer submits draft recommendation to Employee and Labor Relations for review. \*
- If Skelly Reviewer recommends upholding the disciplinary action, Skelly Reviewer finalizes recommendation and submits it (with attachments) to Employee and Labor Relations.
- Supervisor issues final corrective action and encloses Skelly Reviewer's recommendation (with attachments).

\*If Skelly Reviewer recommends modifying or revoking the disciplinary action proposed by supervisor:

- Skelly Reviewer and supervisor confer to determine whether an agreement can be reached regarding whether the proposed disciplinary action should be implemented, implemented in modified form, or revoked.
  - If Skelly Reviewer and supervisor reach agreement regarding the proposed disciplinary action:
    - Skelly Reviewer finalizes recommendation and submits it (with attachments) to Employee and Labor Relations.
    - Supervisor issues final corrective action and encloses Skelly Reviewer's recommendation (with attachments).
  - If Skelly Reviewer and supervisor do not reach agreement:
    - Skelly Reviewer finalizes recommendation and submits it (with attachments) to Employee and Labor Relations.
    - Employee and Labor Relations refers Skelly Reviewer's recommendation to next level of management for resolution.
    - Next level of management makes decision regarding whether the proposed disciplinary action will be implemented, implemented in modified form, or revoked.
    - Supervisor issues final corrective action and encloses Skelly Reviewer's recommendation (with attachments).

APPENDIX C  
SKELLY REVIEWER APPOINTMENT LETTER

Firetown EMPLOYEE AND LABOR RELATIONS DEPARTMENT  
HUMAN RESOURCES

[INSERT SKELLY OFFICER NAME]  
[TITLE]  
[DEPARTMENT]

Re: Skelly Officer Appointment  
[EMPLOYEE NAME]: Intent to [DISMISS/DEMOTE]

Dear [NAME],

Thank you for accepting this appointment as the Skelly officer in the matter referenced above. Your charge is to determine: 1) whether there is a reasonable basis to believe the employee engaged in the conduct charged, and 2) whether the proposed penalty appears to be within the range of reasonable penalties. In arriving at this decision, you should review the notice of the intended action, all documents accompanying the notice of intended action, and consider any written or oral information presented to you during the Skelly meeting. You should be guided in your decision making by the Skelly protocol which is attached. If you have any questions about your responsibilities as a Skelly officer please call [INSERT CONSULTANT NAME] at [XXX-XXXX] or via e-mail at [XXXX@].

Thank you very much for accepting this important assignment.

SUPERVISOR NAME  
TITLE

Pursuant to and as required by the Firetown Skelly Protocol, I hereby approve this appointment.

Jack Gosinya  
Director  
Employee and Labor Relations

Encl: Letter of Intent to [INSERT] w/ attachments  
Skelly Protocol  
[INSERT APPROPRIATE POLICY/CONTRACT ARTICLE]

cc: [INSERT CONSULTANT NAME]