

2015 Annual Conference

Personnel Section Meeting
October 6, 2015

Progressive Discipline in the Public Sector

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Progressive Discipline in the Public Sector:

Ball and Chain
Or
Key to Success

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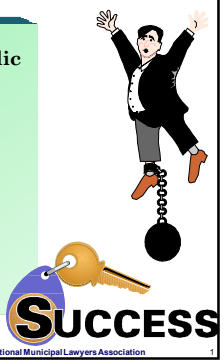

This Section Meeting is a follow-up to IMLA June Webinar on Progressive Discipline

This presentation focuses on
- **Considerations in drafting a progressive discipline policy; and**
- **Disclaimers and at-will employment.**

Derived from 2015 Idaho Supreme Court decision, *Nix. V. Elmore County*

Nix v. Elmore County

- **County had personnel policy with "usual" disclaimers.**
- **Nix had attained regular full-time employment status – making progressive discipline policy applicable.**
- **She was disciplined "back" to probationary status, then was fired without pre-termination hearing.**

Among issues addressed in court's opinion

- **Was there an employment contract?**
  - **Was it breached by County?**
  - **What about implied covenant of good faith and fair dealing?**
- **Did contract, if it existed, include progressive discipline?**
- **Did disciplinary reclassification as probationary employee affect entitlement to progressive discipline and requirement for pre-termination hearing?**
  - **Did supervisor alter employment terms and conditions?**

What does the case say about progressive discipline policies, disclaimers, & employment actions?

- **Understand why employer adopts:**
  - **Personnel Policies (whom & what do they bind?)**
  - **Progressive Discipline Policy?**
- **Language, indeed, is important**
  - **But so is effective and proper administration of policy language.**
- **Beware of language modifying at-will status – intentional or not!**
  - **Can you say, "Do as I say, not as I do" or "You are bound by policies, I am not"?**

"Wise" Words from the Concurring Opinion??

- **Meaning of "At-Will" Employment**
- **Nature of Employment Agreement**
  - **There always is one!**
- **Effect of a Disclaimer**
  - **You are at-will, no matter what we say in our policies.**
  - **When is a promise something more than a promise? When does it arise to a contract term?**
- **Are you better off saying nothing about term of employment in policy or saying it is terminable at will?**

Practice Pointers

- **Handbooks, policies, and manuals may or may not create elements of a contractual relationship – language is important and so is context.**
- **Supervisors continue to play an important, perhaps decisive, role in employment relations.**
- **Documentation remains one of an employer's significant defenses to employment practices liability – if the documentation supports the employer action.**
- **Reliance on "boiler-plate" language is risky.**

Any Questions?

Thank you!

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