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HOW SCHOOLS WIN DISMISSAL CASES-- A STUDENT-CENTERED STRATEGY FROM BEGINNING TO END

ACSA 2014 Personnel Institute October 9, 2014

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CALIFORNIA'S THOUGHT LEADERS
IN EDUCATION LAW



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How Schools Win Dismissal Cases- A Student-Centered Strategy from Beginning to End

ACSA Personnel Institute
October 9, 2014

Presented by:

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Overview: Employee Rights

Employment classification of employee
determines the rights and benefits he or
she may enjoy



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2



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Students



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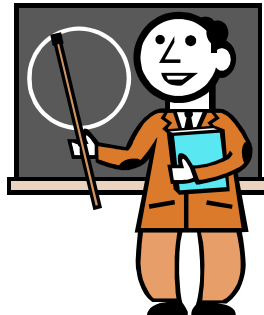
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PROGRESSIVE DISCIPLINE AND DOCUMENTATION



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Progressive Discipline

What is progressive discipline?

Progressive discipline is the process of identifying, communicating and attempting to correct employee performance and/or behavior which does not meet expected standards



Progressive Discipline

What is its purpose?

- Help employee understand his/her performance deficiencies by identifying and communicating those deficiencies to him/her
- Help employee correct performance deficiencies, and
- If employee does not improve, allow district to fairly, and with substantial documentation, take further disciplinary action up to and including dismissal

Progressive Discipline

Typical steps:

- Counseling
- Verbal Warning
- Written Warning
- Written Reprimand
- Suspension
- Dismissal



Documentation

What is documentation?

Documentation is the vehicle through which we record, recollect and communicate observations of employee behavior and/or performance





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Documentation

For whom do we document?

- Employee
- Ourselves
- Third Parties – Neutrals and Advocates

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Documentation

Why is documentation important?

- Demonstrates district's efforts to help employee remediate performance deficiencies
- Contradict allegations of unfair and/or unlawful discipline

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Documentation

Grounds for allegations of unfair and/or unlawful discipline may include but are not limited to the following:

- Discrimination
- Harassment
- Retaliation
- Protected union activities

Documentation

Content should include:

- Purpose
- Facts
- Rule or Standard
- Impact
- Directives
- Advisory



Documentation

Purpose:

- If verbal, specify whether counseling or warning
- If written, identify document (e.g., conference summary, warning, reprimand, etc.)
- Better practice: follow up verbal warning with written conference summary

Tip: consider issuing counseling memorandum

Documentation

Facts of incident leading to discipline:

- Rule of Thumb: describe behavior at issue including the who, what, when and where of performance or incident(s)

Tip: write document so that an outside third party may understand incident at issue

Documentation

Identify rule or standard violated by employee:

- Board and/or school site policies
- Education Code and Title 5
- State and federal laws
- Evaluation standards
- Collective Bargaining Agreements

Best practice: attach copy of applicable written policy to documentation and direct employee to review and comply with policy

Documentation

Impact of conduct at issue:

- Explain why misconduct is problematic
- E.g., “violates law so creates liability,” “interferes with orderly operation of school,” or “creates or contributes to hostile learning or work environment”



Documentation

Directives:

- Specify expectations of employee
- Provide guidance on how employee can improve behavior/meet standard
- Clearly define parameters for employee performance and behavior
- Provide employee with assistance in meeting standards

Tip: make yourself available for assistance

Documentation

Advise employee:

- Documentation will be placed in personnel file
- Right to respond
- Right to have written response attached to derogatory information and placed along with it in personnel file



Documentation

Example:

"A copy of this letter will be placed in your personnel file ten (10) days from the above-listed date. Within that period, you may submit a written response which will be attached hereto and placed along with it in your personnel file."

Documentation

Personal delivery

- Obtain signature of employee acknowledging receipt of document
- "I hereby acknowledge receipt of this document. My signature does not necessarily mean I agree with its content."

Best practice: present two copies of same document; ask employee to sign both and give one to him/her to take and the other for the personnel file

Documentation

If employee refuses to sign:

- "On September __, 2014, I delivered the attached notice to [employee name]. He/she refused to sign acknowledging receipt. I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct."
- Be sure to sign and date



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Documentation

Delivery by mail

- Via Certified & U.S. Mail
- Return Receipt Requested

Best practice: personally deliver documentation and counsel employee regarding why disciplinary action is being taken, and follow up with conference summary memorandum

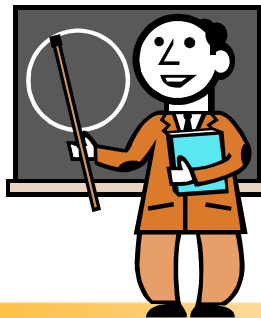
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Hypothetical

1. Was the Principal justified in placing Suzie on paid administrative leave?
2. What should be the next steps?
3. If discipline is appropriate, what level?
4. If discipline appropriate, what should be included in the document?

CERTIFICATED DISMISSAL PROCESS AND AB 215 CHANGES, EFFECTIVE JANUARY 1, 2015



Grounds for Dismissal Under Education Code

- No permanent employee shall be dismissed except for one or more of the causes listed in Education Code sections 44932 and 44933



AB 215 Change

AB 215 amends sections 44932 and 44939 to omit "knowing membership by the employee in the Communist Party" as basis for dismissal/suspension



AB 215 Change

Egregious Misconduct

- Creates new procedure (44934.1, 44944.1) for dismissal based *solely* on charges of egregious misconduct
- Egregious misconduct is defined exclusively as immoral conduct that is the basis for an offense described in Ed. Code sections 44010 [sex offenses] or 44011 [controlled substances], or in Penal Code sections 11165.2 to 11165.6 [child abuse], inclusive

Morrison v. State Board of Education **(1969) 1 Cal.3d 214**

- Section 44932 terms are broad and could "embrace an unlimited area of conduct." So, courts consistently relate them to "unfitness to teach"
- "An individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher"

Morrison Factors

1. Likelihood that the conduct may adversely affect students or fellow teachers
2. Degree of such adversity anticipated
3. Proximity or remoteness in time of the conduct



"Which reminds me, Fishlock
- I want to see you."



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Morrison Factors

4. Type of teaching certificate held by the party
5. Aggravating or extenuating circumstances
6. Praiseworthiness or blameworthiness of the motive for the conduct
7. Likelihood of recurrence



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Morrison Factors

8. Extent to which disciplinary action might have an adverse impact or chilling effect on the constitutional rights of the teacher involved or other teachers

Morrison Factors

A district does not need to prove all the Morrison factors, only those that are pertinent





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Immediate Suspension (without pay)

Under Education Code section 44939, the District may suspend upon the filing of written charges, any employee who has been charged with immoral conduct, conviction of a felony or of any crime involving moral turpitude, with incompetency due to mental disability, or with willful refusal to perform regular assignments without reasonable cause.



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AB 215 Changes

Immediate Suspension (without pay)

- Except for charges based solely on egregious conduct, employee may appeal to OAH and file a motion for immediate reversal of suspension
- Review limited to a determination as to whether the facts as alleged in the statement of charges, if true, are sufficient to constitute a basis for immediate suspension
- Appeal to OAH is exclusive means of obtaining interlocutory review of suspension pending dismissal
- The grant or denial of the motion shall not be subject to interlocutory judicial review



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AB 215 Changes

- For charges of egregious misconduct, as defined in section 44932, no right of appeal (See 44939, 44939.1)

Statement of Charges

- Sets forth conduct which supports grounds for dismissal under Education Code sections 44932 or 44933
- Charges are to be signed and verified typically by the superintendent or assistant superintendent and then filed with the Governing Board for consideration



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Statement of Charges

Statement of Charges of unprofessional conduct or unsatisfactory performance must specify instances of behavior and acts or omissions, including all relevant facts and statutes and rules violated sufficient to enable the employee to correct faults and overcome the grounds for the charged conduct

(Ed. Code § 44938(a), (b); *Perez v. Comm'n on Professional Conduct* (1983) 149 Cal.App.3d 1167; *California Teachers Assn. v. Governing Board* (1983) 144 Cal.App.3d 27.)



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Notice of Intention to Dismiss

- Charges of dismissal are filed with the Governing Board
- If by majority vote the Governing Board moves to proceed with dismissal, notice must be given to the permanent employee of its intention to dismiss him or her at the expiration of thirty (30) days from the date of service of the notice unless the teacher demands a hearing (Ed. Code, § 44934.)



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Notice of Intention to Dismiss

- The notice must be personally served on the employee or sent by registered mail to his or her last known address along with the statement of charges and a copy of Education Code sections 44930-44988 and Government Code sections 11507.5, 11507.6 and 11507.7



AB 215 Changes

- Prior to January 1, 2015, no notice of intention to dismiss could be served on a permanent employee between May 15 and September 15 (Ed. Code, § 44936.)
- Effective January 1, 2015, notice may be given at any time of year, EXCEPT
 - Charges of unsatisfactory performance only, shall only be given during the instructional year of the school site where the employee is physically employed



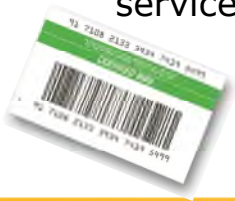


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AB 215 Changes

Method of service (44936)

- During the instructional year– personal service or by United States registered mail sent to last known address
- Outside the instructional year-- personal service required (Really?)



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Initiating Hearing

- Once employee files request for hearing within thirty (30) days, an accusation signed and verified by the superintendent or assistant superintendent must be filed with the Office of Administrative Hearings ("OAH")

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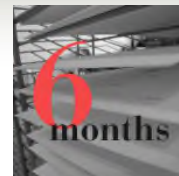
Initiating Hearing

- The accusation should also be served personally or by registered mail at the last known address on file along with a Notice of Defense, a statement that the employee may request a hearing by filing a Notice of Defense within 15 days after service of the accusation and that failure to do so will constitute a waiver of the employee's right to a hearing and copies of Government Code sections 11507.5, 11507.6 and 11507.7

AB 215 Changes

Time to Commence Hearing (44944)

- Hearing shall be commenced within *six months* (not 60 days) from the date of the employee's demand for a hearing
- Charges involving egregious misconduct shall commence within 60 days from the date of the employee's demand for a hearing (44944.1)



Commission on Professional Competence

- Dismissal and suspension hearings are conducted by a three person panel called Commission on Professional Competence ("CPC")
- The chairperson and voting member of the CPC panel is an administrative law judge ("ALJ") employed by OAH

AB 215 Changes

Panel or Single ALJ (44944(c)(1).)

- Parties may stipulate to use a single ALJ rather than the 3-member panel
- Egregious conduct only- ALJ presides





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Commission on Professional Competence

- The employee and the District each selects one panel member, who must not be related to the employee or be an employee of the District bringing the action

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AB 215 Changes

Panel member qualifications (44944)

- *Each member* shall hold a currently valid credential and have at least three years' experience within the past 10 years in the discipline of the employee.
- *(i) For an employee subject to dismissal whose most recent teaching assignment is in kindergarten or any of the grades 1 to 6, inclusive, "discipline" means a teaching assignment in kindergarten or any of the grades 1 to 6, inclusive*

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AB 215 Changes

Panel member qualifications (44944) (cont.)

- *(ii) For an employee subject to dismissal whose most recent assignment requires an education specialist credential or a services credential, "discipline" means an assignment that requires an education specialist credential or a services credential, respectively*
- *(iii) For an employee subject to dismissal whose most recent teaching assignment is in any of the grades 7 to 12, inclusive, "discipline" means a teaching assignment in any of grades 7 to 12, inclusive, in the same area of study, as that term is used in Section 51220, as the most recent teaching assignment of the employee subject to dismissal*

AB 215 Changes

Pay for panel members (44944)

- If employed by another school district in this state, then member receives salary, fringe benefits, accumulated sick leave, and other leaves and benefits from the school district in which the member is employed (but no additional compensation or honorariums for service on the commission)
- If retired, then member receives pay at the daily substitute teacher rate in the party school district (but no credit toward retirement benefits)



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Commission on Professional Competence

- If either the District or the employee fails to select a commission member at least seven (7) calendar days prior to the date of the hearing, the failure shall constitute a waiver of the right to selection
- Under these circumstances, the panel member is selected by the County Board of Education (Ed. Code, § 44944(c).)

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Commission on Professional Competence

- The decision of the CPC must be by a majority vote. After the hearing the CPC issues a written decision containing findings of facts, determinations of issues, and a disposition (Ed. Code, § 44944(d).)
- CPC has no power to dispose of a dismissal by imposing probation or another lesser sanction (Ed. Code, § 44944(d).)

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Commission on Professional Competence

CPC has discretion to reject dismissal even if it makes a finding that cause for discipline exists

(*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208.)



Discovery AB 215 Changes

- The parties are afforded the same discovery rights that civil litigants enjoy in superior court actions (Ed. Code, §44944(a).)
- Typically discovery involves depositions, document production, written interrogatories, and request for admissions
- AB 215 imposes initial disclosure requirements and additional discovery requirements in §44944, §44944.05 and §44944.1

Hearing

Typically, evidence of incidents that occurred more than four (4) years before the Notice of Intent to Dismiss was filed are inadmissible (Ed. Code, § 44944(a).)

**4
Years**

AB 215 Changes

Four-Year Evidence Rule (44944, 44944.1)

- Evidence concerning the employee may be introduced, but no decision relating to the dismissal or suspension of employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years before the filing of the notice, except allegations of an act described in Ed Code section 44010 or Penal Code sections 11165.2 to 11165.6, inclusive



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Commission on Teacher Credentialing

- School districts must notify the Commission on Teacher Credentialing of the dismissal within thirty (30) days after the CPC decision becomes final

(Cal. Code Regs., tit. 5, § 80303 (a)(5).)



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Commission on Teacher Credentialing

- If a teacher is dismissed for immoral conduct or conviction of a felony or crime involving moral turpitude, the District must transmit to the Commission on Teacher Credentialing and to the County Board of Education that issued the teacher's credential, a copy of the reporter's transcript from the CPC dismissal hearing and a request for revocation of the credential issued by the County Board of Education if the employee is not reinstated on appeal (Ed. Code, § 44947.)

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AB 215 Changes



Heightened CTC Obligations for egregious misconduct (44939.5)

- Prohibits districts, county offices, and charter schools from entering agreement that would prevent a mandatory report of egregious misconduct to CTC or any other state or federal agency
- Also prohibits agreements to expunge credible complaints of, substantiated investigations into, or discipline for, egregious misconduct, from employee's personnel file
- A school district, county office of education, or charter school that has made a report of employee's egregious misconduct to CTC shall disclose this fact to a school district, county office of education, or charter school considering employee's application, upon inquiry



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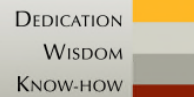
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As California's *thought leaders* in education law, we are at the forefront on legal issues our clients face. Most importantly, we know how to work with our clients to resolve these issues. We build long-standing partnerships with our clients by acting as more than just lawyers—we are strategic advisors that are dedicated to helping future generations enjoy the right to public education.

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We were one of the first law firms in California to dedicate its practice exclusively to education law. We advise boards and district leadership with passionate conviction and insight. We find our work enormously rewarding. For more than 35 years, we have stood shoulder-to-shoulder with our clients—working together for the betterment of California's educational system.

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- Board Ethics, Transparency and Accountability (BETA)
- Business, Property and Finance
- Construction
- Charter Schools
- Special Education and Student Issues
- Litigation
- Community Colleges/Higher Education

Our team approach to client service means that while specific attorneys represent a client, several others will remain informed of the client's issues so that they may assist if needed. We pride ourselves on the in-depth experience within the firm and on the promptness with which we respond to a client's inquiry. We regard ourselves as members of our client's team. Our objective is to work with our clients to help them carry out their goals and mission!



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Jonathan A. Pearl counsels and represents public school and community college district clients in employment matters related to best practices for hiring, remediation, progressive discipline, harassment/discrimination prevention, accommodation issues, technology-in-the-workplace concerns and board policy/procedure development. He is a well-known trainer on sexual harassment prevention, documentation, employee remediation and discipline. Jon also serves education clients in all aspects of labor relations including certificated and classified labor contract negotiations and contract administration. He represents clients in arbitrations and PERB proceedings and has trained governing boards, district bargaining teams and union bargaining teams on negotiations techniques including Interest Based Bargaining. Jon is also a member of the firm's Students and Special Education Group, and represents school districts in student matters involving discipline, constitutional issues, pupil records, residency and technology issues. He is a frequent presenter at Dannis Woliver Kelley workshops and state and regional CSBA, CASBO and ACSA conferences on topics including "Principled Ethical Negotiations," "Collective Bargaining 101," "New Negotiations for the New Decade," "Bargaining Benefits," "HR Adventures in Cyberspace," "Students' Constitutional Rights in Cyberspace," and "Student Discipline Hearings, How Much Due Process is Due." Having worked closely with governing boards, superintendents and administrators, Jon believes that ongoing and interactive training greatly enhances educators' abilities to effectively address the dynamic legal issues that impact schools each day. Before joining Dannis Woliver Kelley in 2001, Jon practiced education, labor and employment law for public and private sector clients in Chicago.

Education

- » University of Wisconsin, Madison (B.A.)
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Practice Areas

- » Labor, Employment and Personnel
- » Special Education and Students
- » Governing Boards
- » Community Colleges/Higher Education
- » Independent Schools and Nonprofit Corporations
- » Board Ethics, Transparency and Accountability (BETA)

Admissions

- » State Bar of California
- » Illinois State Bar

Media/Publications



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Ellen C. Wu is Special Counsel in the Long Beach office and is a member of the Labor, Employment and Personnel Practice Group. She represents school districts in all aspects of labor and employment law, including but not limited to, grievance handling, administrative hearings, labor relations, disciplinary investigations, and contract administration. Prior to joining Dannis Woliver Kelley, Ellen was a Regional Attorney for the Public Employment Relations Board, where she investigated and processed unfair practice charges, mediated unfair practice complaints and contract disputes, investigated and issued determinations in representation matters, and litigated in trial and appellate courts in defense of Board decisions. Ellen has also represented public and private sector employers in defense of wrongful termination and discrimination litigation, as well as in Department of Fair Employment and Housing and Equal Employment Opportunity Commission investigations.

Education

- » University of California, Los Angeles (B.A.)
- » University of Oregon School of Law (J.D.)

Practice Areas

- » Labor, Employment and Personnel
- » Community Colleges/Higher Education

Admissions

- » State Bar of California
- » U.S. District Court, Eastern District of California