

by Rod Proffitt

Just Cause?

The state of Colorado has open process for referendums, and the November 2008 election reinforced this when Initiative "O" on the ballot failed. Voters had a chance to weigh in on a number of issues in one of the longest state ballots ever in the November election. Of 14 ballot issues before the voters, only four passed. Pro-employer interests promoted a slate of initiatives to curtail labor's right to organize (Initiatives 47, 49, and 54).

In response, pro-labor interests sought a slate of initiatives to curb employer powers and change the employer-employee relationship (Initiatives 53, 55, 56, and 57). One of the pro-labor initiatives caught my attention: it required an employer to show "just cause" before taking disciplinary action, including termination, against an employee.

Originally entitled Initiative 76, Colorado Initiative 55, known as the "Just Cause Initiative," would have required an employer, including government employers with more than 20 full-time employees to establish and document "just cause" to discharge or suspend a full-time employee. Just cause in this case means specified types of employee misconduct and substandard job performance.

Colorado is an "at will" state, which means employment is conditioned on the willingness of an employee and employer to continue in an employment relationship after hire. Discipline and discharge can occur for good cause, bad cause, or no cause at all, although written person-

nel policies and collective bargaining agreements notwithstanding.

Constitutional limitations against discrimination apply as an exception to this premise. The concept of "at-will" employment was first put forth in a treatise by Horace Gray Wood in 1877 and was quickly adopted by every state. It was not until 1959 that the first judicial exceptions began to appear.

Before the election, employer groups sought to stem the conflicts being created by these competing initiatives by offering money for labor to fight the anti-labor initiatives. An agreement was reached whereby the four pro-labor initiatives were withdrawn in exchange for \$5 million to fight the anti-labor initiatives.

Only Initiative 54 survived the election. It prohibits campaign contributions from winning government contracts of \$100,000 or more and offered with fewer than three bids. The measure is viewed as limiting the ability of unions and other groups to contribute toward campaigns, and several sources have already indicated they will institute legal challenges to this new law.

AT-WILL DOCTRINE TESTED

Because I have been on both sides of the hiring and firing process; written, enforced, and been subject to personnel policies; and worked with collective bargaining agreements, I had a good idea of what to expect, but it is amazing to me how written policies and procedures can be circumvented by those who respect neither the pro-

cess nor the employees subject to that process.

In fact, in one instance, I was notified in writing of the right to a hearing, but I had four hours to make that request. I made the request, only to be denied a hearing five minutes after I made the request. Given the circumstances, it appears there was never any intention to hear a defense or respect my right to a hearing.

The "at-will" doctrine has been tested, and a body of law has grown up to give some protections and standards for employers and employees alike. Montana is the only state, however, that has chosen to modify the "at-will" doctrine. In 1987, the Montana legislature passed the Wrongful Discharge from Employment Act (WDEA) that preserves the doctrine, but expressly enumerates the legal basis for a wrongful discharge action.

Among the grounds provided for such an action is retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; that the discharge was not for good cause after completion of the probationary period; or that the employer violated the express provisions of its own written personnel policy. To learn more about the Montana law, see "Just Cause in Montana: Did the Big Sky Fall?" by Barry D. Roseman, published in September 2008 by the American Constitution Society for Law and Policy, at www.acslaw.org/files/Roseman%20Issue%20Brief_0.pdf.

Express contract exception. ICMA

recommends a model employment contract for members, which mitigates the downside of an at-will employment relationship, and that is the premise of this exception—a contract for standards and processes. A collective bargaining agreement would also override the ability of an employer to otherwise act in an arbitrary manner.

Employees may rely on personnel policies or a handbook, or both, to suggest that once the probationary period has passed and the employee proves value and competence there would be some protections on employment, but that is not necessarily the case.

If you, as a member of ICMA, have not taken advantage of the model agreement, I strongly urge you to reconsider. Every state recognizes the right to contract for employment. It seems problematic, however, to expect a governmental body to negotiate separate contracts for each employee, so this exception has built-in limitations.

Public policy exception. Some 42 states and the District of Columbia have public policy exceptions to the at-will doctrine. The eight states that do not recognize this exception are Alabama, Florida, Georgia, Louisiana, Maine, Nebraska, New York, and Rhode Island. Essentially, if the firing or discipline contradicts or violates state or federal public policy, the courts will not validate that action.

Implied contract exception. Some 37 states and the District of Columbia recognize this exception. The burden is always on the employee to show an implied contract. Generally, the employer's personnel policies or handbook are relied on to make this showing. The 13 states that do not recognize this exception are Delaware, Florida, Georgia, Indiana, Louisiana, Massachusetts, Missouri, Montana, North Carolina, Pennsylvania, Rhode Island, Texas, and Virginia.

Covenant of "good faith" and "fair dealing" exceptions. These exceptions are sometimes referred to as the

"implied-in-law" contract exception. There are only 11 states that recognize a breach of implied covenant of good faith and fair dealing; they are Alabama, Alaska, Arizona, California, Delaware, Idaho, Massachusetts, Montana, Nevada, Utah, and Wyoming.

Basically, this exception builds on the narrowly drawn public policy exception and provides a means to avoid bad faith, malice, and arbitrary acts that recognize the inequities in the bargaining power between and employer and employee. Some years ago, courts began recognizing a tort of "bad faith" with regard to policyholders seeking relief for acts of their insurance companies that refused to settle claims. This exception draws on that same equity concept. Courts will not allow a wrong to go without the opportunity for redress.

COMMUNITY VALUES ARE KEY

The aforementioned exceptions allow an organization to formulate policies and procedures to conform to state and federal law, but are exceptions all there is to it? As local government managers and organizational leaders, we need to devise policies and procedures that reflect community values, appreciation for employee contributions, and consistent standards that rise above the people in the organization to assure decisions are credible, enforceable, and just. In other words, "just cause" extends the concept that this is a country of laws and not of people.

Time magazine published "Mandela: His 8 Lessons of Leadership" by Richard Stengel (July 9, 2008). Lesson 7 is "Nothing is Black or White." The lesson is a universal one and not specific to employment issues. According to Mandela, it comes down to "Life is never either/or. Decisions are complex, and there are always competing factors. To look for simple explanations is the bias of the human brain, but it doesn't correspond to reality. Nothing is ever as straightforward as it appears."

In applying this lesson to employment, it seems obvious an executive

needs to refrain from taking disciplinary action, which does not subject the decision to an objective process. A reasoned process eliminates any blind spots, provides necessary perspective on the incident, and assures the means justify the end.

In his July 31, 2008, article entitled "Can We Call a Truce? 10 Tips for Negotiating Workplace Conflicts" (<http://blogs.techrepublic.com.com/10things/?p=393>), Jeffrey Krivis offered this in tip three: Check the reliability of your information. Krivis suggests breaking down information into component parts to gain perspective.

The three parts to look for are reports, inference, and judgments. These are ordered in accordance with their reliability, with the first being the most reliable and the last the least reliable. The idea is take inference and judgments back to a factual report that has some reliable basis in fact.

DIGNITY SHOULD PREVAIL

Wil Schroter recently wrote an article entitled "Firing with Dignity Sets Good Example, Lays Groundwork for Goodwill," for *bizjournals*; an online newsletter. Schroter pointed out the reasons why, when people are fired, it needs to be done with dignity. His reasoning is compelling, and I offer it here to indicate the ramifications such decisions have on an entire organization.

Aside from the fundamental respect of any person for another human being, you're also setting an example for how you will treat the rest of the organization. If your employees watch a person humiliated in front of them, what you've instilled in everyone is the fear they will be treated the same way. That kind of fear is unhealthy in any organization.

The argument is sometimes offered that setting standards and processes to assure employee protection from unnecessary, arbitrary, and abusive disciplinary actions increases costs and subjects management to undue restrictions. The Roseman article reached a different conclusion.

Roseman found that the Montana

law, WDEA, had no negative impact on business, hiring practices, and unemployment rates. In fact, there was anecdotal evidence from business recruiters that the law actually helped attract employees. Montana suffered through the labor wars of the early part of the twentieth century, but it has found a way to provide employees with stability in the employment relationship without the need to resort to unions.

Government organizations often cannot compete for the best employees because they cannot offer salaries found in the private sector. By providing better protections for employees from political interference in employer and employee relations and mitigating the possibility an employee will have to suffer unnecessary, arbitrary, or abusive disciplinary actions, government may have a recruiting tool to offset lower salaries.

Government has become increasingly more complicated and demand-

ing since World War II. The recognition by many local governments that elected officials can no longer carry out operational aspects of government testifies to this continuing trend. The need to incorporate professional staffing in support of elected officials is now universally recognized as a prerequisite to good government.

Now, in the information age, with the cost of training new employees so high and competition so fierce for good employees, providing incentives for employee retention, staffing stability, and disciplinary policies and practices in order to withstand judicial scrutiny is important for an effective and efficient organization. Incorporating standards and processes for just cause is good for the employee, the employer, and for the taxpaying public.

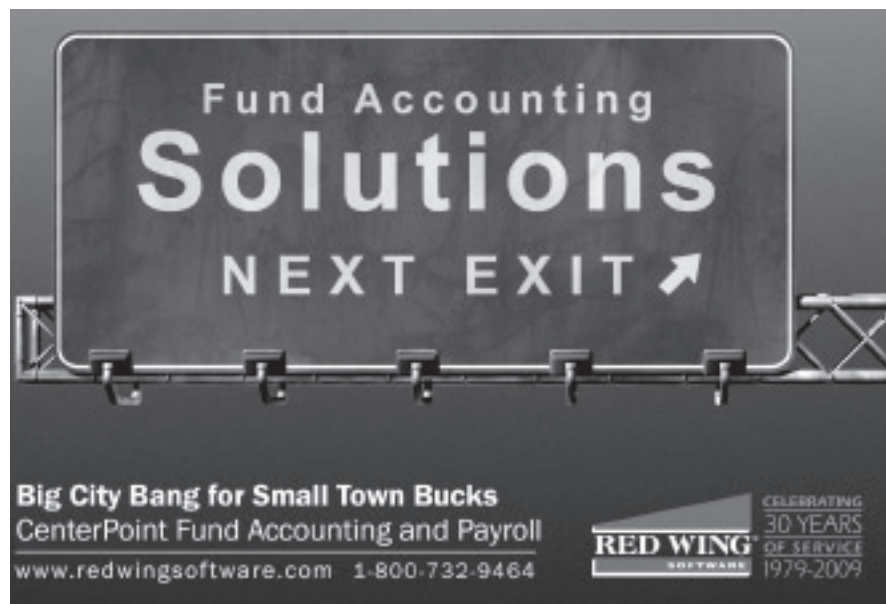
“JUST CAUSE” CHECKLIST*

Ask yourself these seven questions (they can be found at Labor and

Employment Law, www.laborandemploymentlawblog.com):

1. Did the employer put the employee on notice of any applicable rules and possible consequences of violating the rule(s)?
2. Was the employer's rule or work order reasonable as to what the employer might properly expect of the employee?
3. Did the employer make an effort to investigate (both sides of the issue) as to whether the employee violated any rule(s)?
4. Was any investigation fair and objective?
5. Was there any proof of misconduct?
6. Has the employer given equal treatment for similarly situated employees?
7. Was the level of discipline an appropriate penalty? **PM**

Rod Proffitt is a management consultant, Pagosa Springs, Colorado (planatlaw@yahoo.com).



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