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A California appellate court recently ruled that teachers with provisional credentials must be afforded a right to a layoff hearing and, unless they meet the statutory definition for a permanent, temporary, or substitute employee, must be classified as probationary.

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Court Grants Teachers with Provisional Credentials Right to Layoff Hearing, Ruling that Classification of Teachers Based Solely on Type of Credential Is Improper

By Adam J. Fiss

This ASAP reports on an important decision issued by the California Court of Appeal regarding teachers serving under provisional credentials. The December 19, 2006, decision issued by California's Fifth District Court of Appeal, in *Bakersfield Elementary Teachers Association v. Bakersfield City School District*, has wide-ranging implications regarding employment of certificated employees in school districts and county offices of education throughout California. The decision affects not only how certificated employees are classified as temporary, probationary, or permanent, but also addresses the rights that must be extended to such employees.

Case Overview

In February 2003, the Bakersfield City School District was facing significant state budget uncertainties. To address the budget shortfalls, the District decided to reduce staffing, which was to include the release of over 100 temporary contract teachers and the layoff of a number of probationary or permanent teachers. To that end, in late February or early March 2003, the District notified the temporary employees of their release for the succeeding 2003-2004 school year. Among the temporary teachers who were given such notice were those who had been serving under so-called "emergency permits," "intern credentials," or "pre-intern certificates," because they had not yet taken the course work or passed the certifications to obtain a regular teaching credential. In March 2003, the District gave notice of possible layoff to all affected probationary and permanent teachers ("March 15th notice").

At the layoff hearing, the teachers' union argued that a large number of teachers who

had been classified as temporary teachers were in fact misclassified as such and were really probationary teachers. The union claimed that because the teachers were not provided March 15th notices and were not included in the layoff proceeding, the seniority list might be affected and therefore the entire layoff proceeding had to be invalidated. Ultimately, the Administrative Law Judge rejected the union's arguments, concluded that there was a proper basis for layoff (i.e., the imminent budget shortfall), and authorized the layoff – a decision that the District's Board of Trustees upheld.

In August 2003, Bakersfield Elementary Teachers Association ("BETA") filed a lawsuit alleging, among other things, that the temporary teachers had been misclassified, and, in fact, were probationary teachers who could not be laid off because they had not been given March 15th notices or included in the layoff hearing. BETA also appealed the layoff decision on the grounds that the failure to include the temporary teachers in the layoff hearing "infected" the layoff proceedings. Disagreeing, the District argued that the temporary teachers had been properly classified, and that by waiting until after the March 15th deadline before raising the issue, the employees foreclosed the District from including in the layoff process whichever teachers felt they had been misclassified. The trial court agreed with BETA, concluding that the temporary teachers were misclassified and that both the release of temporary contract teachers and the layoff proceedings had to be invalidated. Accordingly, the trial court ordered the teachers reinstated with back pay, benefits,

and full seniority for the period of their temporary employment. The District appealed the trial court's decision.

On appeal, the court first addressed the District's argument that because the employees waited until after March 15 to raise issues regarding their classification, the employees should be barred from making such a claim. Specifically, the District claimed that since the employees were aware of that classification and had not previously raised an objection they had acquiesced to that status and should be precluded from now challenging their classification. The court, however, rejected this claim noting that the District's argument "overlooks the fact the District led these employees to believe they had no choice but to acquiesce" in their designation. The court explained that even though the District used a contract for each of the classifications designating their employment status, "any contractual provision purporting to waive the protections accorded certificated school employees by the Education Code, including the provisions governing their classification and termination, is 'null and void.'" The court accordingly explained that the District could not argue that the temporary employees "had waited too long to assert a right the District misled them into believing they already had given up."

The court then turned to what it recognized as the principal issue on appeal: whether the District had properly classified the employees as temporary. Initially, the court remarked that "[a]s a general rule ... classification and certification operate independently of one another." In its analysis, the court rejected the District's position that under Education Code section 35160, the District had the discretion to classify employees as temporary based on the status of their certification to teach. The court explained that given the limited protection afforded to substitute and temporary employees, and that since these classifications "are narrowly defined by the Legislature, [they] should be strictly interpreted."

Next, the court examined the District's practice of classifying teachers based upon their possession – or lack thereof – of a teaching credential. The court concluded that the District could not base an employee's classification solely on his or her certification, e.g. whether

the employee possessed a preliminary or clear credential. In reaching this conclusion, the court explained that an employee is not a temporary employee simply because he or she is not yet fully accredited, but rather because he or she occupies a position the Education Code defines as temporary. The court relied on the fact that there are only four classifications recognized by the Education Code: permanent, probationary, substitute, and temporary. According to the court, the Education Code recognizes two kinds of temporary employees: those who are employed to serve for less than three or four months or in limited assignments and those who are employed for up to one year to replace a certificated employee on leave or due to illness. The court did note that there are several situations where an employee is treated like a temporary employee. The court found that the District could classify as temporary employees only those who meet the requirements for a temporary employee as set forth in the Education Code and that such designation was not contingent upon the employee's credential.

The court therefore held that all certificated employees who were not properly classified as temporary, permanent, or substitute employees must be classified as probationary employees. After reaching this conclusion, the court analyzed what rights should be afforded to these probationary employees. Relying in large part on its decision in *California Teachers Assn. v. Governing Bd. of Golden Valley Unified School Dist.*, as well as its interpretation of various Education Code statutes, the court held that the employees must be given the rights of a probationary employee, including the right to accrue seniority and the right to notice and a hearing in the event of a layoff. The court did limit its holding by noting that even though employees may have a seniority date, unless provided by statute, the time spent as a probationary employee cannot count toward obtaining tenure.

The court remanded the case back to the trial court to make certain determinations regarding the employees' correct classifications and the amount of back pay and benefits, if any, to which they were entitled. Significantly, in the court's order, it concluded that the employees were only entitled to back pay for the 2003-2004 school year because as probationary employees they had no entitlement to

continued employment beyond that year.

Impact

- If the *Bakersfield* decision stands (a Petition for Review with the California Supreme Court is pending), school districts will need to include provisionally credentialed teachers in their layoff proceedings.
- With respect to damages claims for probationary employees, the *Bakersfield* decision confirms that damages should not exceed the relevant school year because probationary employees have no assured right to ongoing employment.
- If the Supreme Court accepts review of this case or if the case is depublished, the court's ruling that provisionally credentialed teachers accrue seniority may place the various teachers' unions in a position where they may be unable to properly represent both credentialed and non-credentialed/provisionally credentialed teachers in a layoff hearing due to the uncertainty regarding whether non-credentialed employees should have seniority dates.

Recommendations

Until all of these issues have been sorted out, we have several recommendations:

- Conduct a complete review and analysis of the classification of each certificated employee in the district – excluding only those who commenced their employment possessing either a preliminary or clear credential. Given the court's decision, unless an employee meets the statutory definition for designation as temporary, substitute, or permanent, the employee should be classified as probationary.
- Although an employee may be designated as probationary, depending on what certification they possess, e.g. an emergency waiver or intern certificate, the employee may not be accruing credit toward permanent status or may only be able to accrue a limited amount of credit toward tenure. The court's decision will create situations where an employee is deemed probationary for longer than the generally accepted two-year period.
- For those employees classified as

temporary, ensure that the designation is supported by the applicable Education Code sections. Those include Section 44909 (categorical programs), Section 44919 (short term classes), and Section 44920 (leaves of absence). With respect to teachers replacing a teacher on a leave of absence, confirm that there are not more teachers out on a leave of absence than are being designated as temporary under Section 44920.

- Based on the review, implement the necessary changes to employee classifications as well as adjust seniority dates to reflect the employee's first day of paid service as a probationary employee. In other words, using a date-of-hire list separate from a seniority list for "Probationary 0" employees is not feasible under this decision.
- If a district is implementing a certificated layoff, probationary employees—including "Probationary 0" employees – should be afforded the due process steps set forth in Education Code sections 44949 and 44955, including being issued a March 15th notice and having the right to request a hearing.
- Due to potential issues arising of whether university interns are entitled to such due process, it is our recommendation, that, at a minimum, any such employee be provided a "dual March 15th notice." The notice should state that the district is notifying them of their release consistent with Education Code section 44464. The notice should then continue to provide that in the event the employee is challenging that status or contending he or she has a right to the due process under Sections 44949 and 44955, then in accordance with those sections, the employee is being notified that his or services will not be required for the ensuing school year. In those situations, the employee should be allowed to request a hearing.

Given the complexity of this case and the potential affect on employee classifications, school districts may wish to provide their legal counsel with substantial advance notice before undertaking a layoff, in order that strategy (including seniority issues) may be evaluated

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