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LEGAL UPDATE

October 21, 2009

To: Superintendents, Member School Districts (K-12)

From: Carl D. Corbin, Assistant General Counsel CDC

Subject: Reemployment Rights for School Employees
Memo No. 26-2009

This Legal Update is being provided to address some of the common issues regarding re-employment rights for laid off school employees.

Certificated

There are different categories of certificated employees with each category having varying rights to reemployment.

Permanent Teacher

A permanent teacher has a preferred right to reemployment for a period of 39 months.¹ Reemployment should be made based upon seniority with the most senior laid off teacher, who is credentialed and competent for the position, being offered the vacant position first. The district determines the competence needed for the position. The district also has the discretion to adopt tie-breaking criteria for teachers with the same date of hire based upon the needs of the district. If the district wants to establish new tie-breaking criteria for reemployment purposes, then a new resolution must be adopted by the school board.

¹ Education Code section 44956. Unless otherwise noted, all references will be to the Education Code.

Preferred Right to Substitute

Laid off permanent teachers shall be offered, by order of seniority, the first opportunity to substitute for a teacher on leave or temporarily absent from duty. The laid off teacher may be paid at the regular school board adopted substitute rate and not the teacher's per-diem rate. However, if a laid off permanent teacher substitutes for more that 20 days within a 60 day school-day period, then the teacher is entitled to the teacher's per-diem rate of pay retroactive to the first day of substitute service. The per-diem rate of pay shall not be less than the amount the employee would receive if reemployed.

Probationary Teacher

A probationary teacher also has a preferred right to reemployment for a period of 24 months.² Reemployment should be made based upon seniority with the most senior laid off teacher, who is credentialed and competent for the position, being offered the vacant position. The district determines competence needed for the position. The district also has the discretion to adopt tie-breaking criteria for teachers with the same date of hire based upon the needs of the district. If the district wants to establish new tie-breaking criteria, then a new school board resolution must be adopted.

Preferred Right to Substitute

Laid off probationary teachers must also be offered, by order of seniority, the first opportunity to substitute for a teacher on leave or temporarily absent from duty. However, unlike laid off permanent teachers, there is no requirement that the probationary teacher ever get paid at a per-diem rate regardless of the number of substitute days worked. Therefore, a probationary teacher providing substitute service should be paid at the regular school board adopted substitute rate. In addition, any period of substitute time worked by the probationary teacher shall not count towards obtaining permanent status.³

Categorically Funded and Employed Teacher

Categorically funded and employed teachers have no reemployment rights and no preferred rights to substitute service pursuant to Education Code sections 44909 and 44918.

Temporary Teacher

Temporary teachers, properly identified as such upon hiring,⁴ who have been employed less than 75% of the school year do not have any reemployment rights.

Temporary teachers who were released from service pursuant to Education Code section 44954 do not have any reemployment rights.

² Section 44957.

³ Section 44957(c).

⁴ Section 44916.

A temporary teacher employed at least 75% of the school year, who was not released pursuant to Education Code section 44954, has a right to be reemployed the following school year in the same grade level at which the teacher served if the district has a vacant position and the teacher is credentialed and competent to fill the position.⁵ However, laid off permanent and probationary teachers must first be offered any vacant positions for which the teacher is credentialed and competent prior to these positions being offered to a temporary teacher who had previously worked at least 75% of the school year.

Substitute Teacher

Substitute teachers, properly identified as such under Education Code section 44917, do not have any right to reemployment. Districts are advised to carefully review the employment of substitute teachers to ensure the teacher is properly identified as a substitute and not a temporary (or even probationary) teacher. Remember, the school district must identify the position that the teacher is employed in prior to the teacher rendering paid service otherwise the teacher will be deemed to be a probationary employee.⁶

Classified

Classified employees shall be subject to layoff for lack of work or lack of funds.⁷ The order of layoff within the class shall be determined by length of service with the employee who has been employed the shortest time in the class, plus higher classes shall be laid off first. Length of service is all hours in paid status (except overtime) from the time the employee became probationary. Length of service can be negotiated to mean "hire date."

Reemployment

The right to reemployment is in reverse order of layoff as to other laid off employees.⁸ There is a 39-month period of eligibility for reemployment in which the laid off employee shall be reemployed in preference to new applicants. In addition, classified employees who take a voluntary demotion or voluntary reduction in work hours are entitled to an extra 24 months (for a total of 63 months) of reemployment rights. Laid off employees also have the right to participate in promotional examinations during their period of reemployment eligibility.

Laid Off Employees Have Preferential Rights Over New Applicants

As between laid off classified employees and new applicants, the recent California Court of Appeal decision in *Tucker v. Grossmont Union High School District*⁹ holds that laid off employees who are qualified for a vacant position in a classification in which they have not previously served have a preferential right to the position over new applicants.

⁵ Section 44918.

⁶ Section 44916.

⁷ Section 45308.

⁸ Section 45298.

⁹ (2008) 168 Cal.App.4th 640.

We recommend that Districts follow the process below prior to reemploying laid off employees.

1. Review the applicable collective bargaining agreement to determine whether it defines the right to reemployment in narrower terms than the *Tucker* decision (e.g., reemployment only in former classification and only to the extent of former F.T.E.). If so, comply with the agreement as written.
2. The *Tucker* decision does not require that laid off employees be given “special notice” when a position becomes vacant. Therefore:
 - a. Review the applicable collective bargaining agreement to determine whether it provides for specific notice of vacancies to laid-off employees. If so, follow the agreed-upon notice procedure.
 - b. If your district has not agreed by contract or adopted a board policy to provide notice of vacancies to laid-off employees, implement a procedure to advise laid-off employees that vacancies will be posted and that they may apply, within the specified time limit, for positions in any classification including classifications in which they have not previously served.
3. If more than one laid-off classified employee applies for a position in a classification in which he/she has not previously served and more than one such employee meets qualifications for the same position, offer the position to the employee with greater seniority.
4. Review classified job descriptions to determine whether they clearly specify current, relevant minimum qualifications. To the fullest extent possible describe minimum qualifications using objective criteria (e.g., actual education requirements, typing/ keyboarding speed, physical agility requirements, required licenses or certificates). Update job descriptions if appropriate. Such updating is negotiable if the updates involve a substantial change.

No Right to Substitute Service

Unlike certificated employees, classified employees do not have a statutory preferential right to substitute service over new applicants. However, please check the district collective bargaining agreement to see if this issue has been addressed. If so, then follow the terms of the agreement.

Please contact any of our attorneys or Bob Latchaw, our Employer-Employee Relations Coordinator if you have questions regarding these issues.