Labor & Employment Law Update

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March 11, 2011

Let's Play Ball, But Only Temporarily

Court of Appeal holds that "walk-on athletic coach" was a temporary employee under Education Code section 44919(b)[1], even without prior written notice of temporary status.

In *Neily v. Manhattan Beach Unified School District*[2] ("*Neily*"), the Court of Appeal recently held that a high school varsity baseball coach was properly classified by the Manhattan Beach Unified School District ("District") as a temporary employee rather than a probationary certificated employee. This distinction is obviously important due to the greater employment protections afforded to probationary employees *vis a vis* temporary employees under the Education Code.

Facts and Procedural History

Mr. Michael Neily, a certificated teacher, was hired by the District in January of 2002 as a high school varsity baseball coach. A year later, in January of 2003, in addition to his duties as a coach, Mr. Neily was employed as a full-time teacher. In June of 2004, Mr. Neily was relieved of his duties as a teacher, but continued his employment as the varsity baseball coach for the next five school years. Mr. Neily was informed in writing in June 2009 that his services as a "walk-on coach" would not be needed for the 2009-2010 school year. Following this notification, Mr. Neily filed a petition for writ of mandate with the Superior Court in an effort to be reinstated.

The Superior Court denied Mr. Neily's petition and ruled that an athletic coach is properly classified as a temporary employee under section 44919(b) which expressly addresses classification of temporary athletic coaches. As a result of his classification as a temporary employee, the Superior Court found that notification of Mr. Neily's termination could be given "at any time before the end of the school year" and was timely in this case.

[1]All further statutory references are to the Education Code, unless otherwise noted.
[2] *Neily v. Manhattan Beach Unified School District* (2011) 192 Cal. App. 4th 187.

Court of Appeal Opinion

The Court of Appeal affirmed the Superior Court's ruling and held that at least in the narrow circumstances of walk-on athletic coaches, there are two paths to becoming accurately classified as a temporary employee. Section 44916 mandates that if a district employs a certificated person as a temporary employee, the district must provide a written statement indicating the temporary nature of the employment and the length of the employment. If the statement does not indicate the temporary status of the employee, the certificated employee is deemed to be a probationary employee by default. The Supreme Court confirmed this statutory rule in its holding in *Kavanaugh v. West Sonoma County Union High School Dist.*[3] ("*Kavanaugh*"). In *Kavanaugh*, the Court held that if a certificated employee is not given a written statement identifying his or her classification prior to the start of the school year, he or she must be deemed classified as a probationary employee. Mr. Neily argued that section 44916 and *Kavanaugh* applied to his circumstances as he was a certificated teacher. According to Mr. Neily, because the District failed to notify him in writing of his status as a temporary varsity baseball coach, he was entitled to be deemed a probationary certificated employee.

Disagreeing with Mr. Neily's arguments, the Court of Appeal found that section 44916 and *Kavanaugh* were inapplicable to the facts at hand and that the more specific section 44919(b) applied. In particular, the Court noted that section 44919(b) "expressly and unambiguously provides that a school district 'shall classify as temporary employees persons…*who are employed to serve in a limited assignment supervising athletic activities of pupils*.'" Because from June 2004 to June 2009 Mr. Neily's role in the District was a "temporary athletic team coach," and not a teacher in a position requiring certification, classification as a temporary employee under section 44919(b) was appropriate.

Although Mr. Neily argued that the District could not classify him as a temporary employee because it failed to provide him with written notification of his temporary status under section 44916 and *Kavanaugh*, the Court of Appeal held that this written notice was not required in the coaching context. The Court held unequivocally that a certificated person who accepts a position expressly defined under the law as a temporary one "is not afforded the same job protections as a probationary employee simply by virtue of his or her certification."

Addressing Mr. Neily's secondary argument, the Court of Appeal affirmed the Superior Court's ruling as to the timeliness of the District's notice of Mr. Neily's termination from his position as the varsity baseball coach. The Court found that while the last instructional day of the school year was June 18, 2009 and the District did not notify Mr. Neily of its decision to terminate his services until June 22, 2009, the notice was timely. The District only had to provide notification of termination under section 44954(b) before the end of the school year–June 30, 2009.

[3] *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911.

Discussion

The *Neily* opinion will most likely have limited impact on your District due to its application in the circumstances of temporary athletic coaches only. Despite the holding in *Neily*, we suggest that you continue to provide temporary employees, especially those serving in temporary certificated positions, with our recommended temporary employment contracts prior to the first date of paid service in that position. To avoid any misunderstandings, we also recommend that you continue to annually send a farewell letter to each temporary certificated employee before the end of the school year on June 30th. While temporary athletic coaches not serving in certificated positions may be exempt from these notice requirements under *Neily*, we believe the most conservative approach in these circumstances is best.

If you wish to discuss this case and its impact on your District, or other related issues, please do not hesitate to contact our office.

–Melissa H. Brown