Labor & Employment Law Update

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MIDYEAR DISMISSALS OF PROBATIONARY CERTIFICATED STAFF NOW IMPRACTICAL, IF NOT IMPOSSIBLE

SUPREME COURT DENIES REVIEW IN THE *ACHENE/PIERCE* CASE

The State Supreme Court last week denied review of the *Achene v. Pierce Lt. Unified School District* case (__ Cal.App.4th __, 3rd Dist. Ct. of Appeal). This ends the matter[1] and makes a midyear "for cause" dismissal of a probationary teacher essentially time and cost prohibitive.

Factual Background.

The case arose out of a midyear attempt by a public school employer to dismiss a probationary teacher for unsatisfactory performance. Education Code section 44948.3 covers that process, on its face simply requiring a 30-day notice of intent to dismiss with a statement of charges. If the cause involves a bad evaluation, that document must be attached. If the employee then requests an evidentiary hearing, a state administrative law judge conducts that hearing on behalf of the school board. The proposed decision may be accepted, rejected or modified by the school board.

Here, the teacher raised two objections. First, the teacher challenged the propriety of the underlying evaluation process, claiming that the Stull Bill (at Education Code section 44664) requires recommendations ". . . if necessary . . ." as to needed areas of improvement. In addition, the teacher pointed to Education Code section 44938, a 90-day warning hurdle previously thought to apply solely to the discipline of permanent certificated staff.

[1] The matter is completely resolved as to these parties. This decision by the Third District Court of Appeal is binding on trial courts statewide because no other appellate court has ruled on these precise issues. The decision is not binding on other Courts of Appeal, but is generally treated as persuasive authority should a similar case arise there. As of today, we are unaware of any such cases pending anywhere in California. [footnote revised 12/11/09]

Both the trial court and the appellate court agreed that the District's failure to offer recommendations for improvement and the 90-day warning letter voided the dismissal. Back pay and reinstatement were ordered as remedies.

What This Case Means For Public School Employers.

1. This case applies solely to district employers with 250 ADA or more.

2. The result underscores the desirability of the alternate no-fault nonreelection procedure under section 44929.21. Nonreelections are comparatively cheap to process and require far less documentation.

3. The result may remind employers to take seriously the task of certificated applicant background checks before extending a job offer. Midyear dismissals won't be of help to cut your payroll losses. Did you contact all prior employers and listed references? Why is this applicant available? Dollars spent investigating an applicant are cheaper than a year's salary paid to an unsuitable employee.

4. Even if nonreelected, bad probationary employees still get a free ride on the payroll for the rest of the school year. [Exception: when the employee goes to unpaid status when facing listed sex offense or controlled substance offense charges.]

5. The case does not address the unrelated procedure for year-end dismissals for cause in districts under 250 ADA (section 44948.5). In that statute, there is no mention of any evaluation document. However, in such cases counsel should still be involved in planning and document development.

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If you need further information on this topic, do not hesitate to contact our office.

— *Peter C. Carton*