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Labor & Employment Law Update

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March 4, 2009

A Permanent Classified Employee Who Enters a Plea of Nolo Contendere to a Misdemeanor Controlled Substance Offense May Not Be Automatically Terminated

On February 23, 2009, the California Second District Court of Appeal held that unless and until the California legislature amends Education Code section 45123(b), a permanent classified employee who enters a plea of nolo contendere to a misdemeanor controlled substance offense may not be automatically terminated. A nolo contendere plea is commonly referred to as a "no contest" plea and means the defendant did not admit committing the crime.

In *Cahoon v. Ventura Unified School District* (Feb. 23. 2009) 2009 DJDAR 2588, school custodian Edward Cahoon was terminated after he entered a plea of nolo contendere to a misdemeanor charge of forging, altering and/or issuing a prescription for a controlled substance in violation of Health and Safety Code section 11368. After his termination, Cahoon filed a petition for writ of mandate in the Superior Court, which granted the writ and ordered the District to reinstate Cahoon to employment. The District filed an appeal.

On appeal, the appellate court affirmed the reinstatement order and held that Cahoon's "nolo contendere" plea did not qualify as a conviction under any of the applicable Education Code provisions providing for automatic dismissal. In reaching its decision, the appellate court noted that under California statutory and decisional law, a conviction by plea of nolo contendere cannot be used to impose discipline in any administrative proceeding absent legislative authorization. After examining applicable Education Code provisions, and their legislative history, the appellate court found no such legislative authority for controlled substance offenses as defined in the Education Code.

Instead, the appellate court noted, both Education Code sections 45123 and 44836 include a "nolo contendere" plea in the definition of a conviction for a sex offense requiring automatic dismissal, but neither statute contains language including a "nolo contendere" plea in the definition of a conviction of a controlled substance offense requiring automatic dismissal. The District argued that Cahoon's offense equated to a controlled substance offense requiring automatic dismissal under Education Code section 44009, but the appellate court rejected that contention, holding that the legislative history of Section 44009 indicates that its "nolo contendere" provisions were intended to apply to employees convicted of any sex offense. Finally, the appellate court noted that Education Code section 44836 permits the employment of

a certificated person convicted of a drug offense if that person holds an appropriate credential. In regard to those provisions, the court said, "It would be far fetched to assume that the Legislature believed that credentialed teachers convicted of controlled substance offenses are less of a risk to school children than permanent classified district employees such as janitors or bus drivers."

It is thus clear from the *Cahoon* decision that automatic dismissal does not apply when a classified employee has entered a "nolo contendere" plea to a misdemeanor controlled substance offense as defined in Education Code section 44011. Nevertheless, districts should continue to consult with counsel concerning those cases because, in some situations, the District may have evidence supporting a "for cause" dismissal, such as when the employee was observed committing the offense at work.

In addition, the Education Code provisions concerning the criminal convictions of school employees are complex and confusing, and most of them remain untouched by the *Cahoon* case. For example, the *Cahoon* decision will have no effect on misdemeanor or felony drug offense cases involving a guilty plea, and districts still have duties or options based on the unique facts of each of those cases. Moreover, the *Cahoon* decision also will have no effect on cases involving a plea of "nolo contendere" in a misdemeanor or felony sex offense case, which the *Cahoon* court itself recognized would still require automatic dismissal of classified or certificated employees based on the express provisions of the Education Code.

In summary, districts should continue to consult with counsel when any employee has suffered any criminal conviction, regardless of whether the employee is classified or certificated, regardless of whether the offense is a misdemeanor or felony, regardless of whether the offense appears to be prohibited by the Education Code, and regardless of whether an employee entered a plea of guilty or "nolo contendere."

We recommend that clients contact us with any questions.

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

— *Patricia T. Castle*