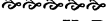


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LEGAL UPDATE

April 8, 2011

To: Superintendents/Presidents, Member Community College Districts

From:  Marko Fong, Assistant General Counsel

**Employment Status of Laid Off Classified Employees Rehired in a Lower
Classification
Memo No. 01-2011(CC)**

Since the 2008 case of Tucker v. Grossmont¹, laid off employees must be offered vacant lower level positions for which they may be qualified. Although the case was specific to Education Code sections 45298 and 45308 which apply to K-12 districts, Education Code sections 88117 and 88127 which apply to community colleges contain identical language.

The State Court of Appeals recently upheld a Superior Court ruling that a laid off, permanent, classified, K-12 employee who is later rehired in a lower classification, does not carry over permanence in that lower classification and must complete a new probation period.² We believe that both cases would be persuasive with respect to laid off classified employees in community colleges.

In the *East Side* case, a School Community Liaison with nearly twenty years of experience and permanent status was laid off in June 2008 and placed on the 39-month reemployment list in a non-merit system school district. In August 2008, the District posted an opening for a Campus Monitor position. This was a lower level position with considerably different duties that had

¹ *Tucker v. Grossmont* 168 Cal. App. 4th 640 (2008) (see Legal Update 31-2008). A copy of this Update can be found on our web site at www.sclscal.org

² *CSEA v. Governing Board of East Side Union High School District* (Mar. 15, 2011, HO034866) ___ Cal.App. 4th ___ [2011 WL 880391] *CSEA v. Governing Board of East Side Union High School District* limits *Tucker* by saying it addressed the right to the lower level position, but did not address probationary status in any way.

accordance with her rights under Tucker v. Grossmont. The District hired her in the new position and informed her that she would be on probationary status for the first six months. Five months later, the District released her from her probationary position as a Campus Monitor. The Court found that permanent status in the former position did not carry over to reemployment in the lower classification.³

When hiring a person who is already on a layoff reemployment list, colleges should be certain of the following before making the employee probationary in the new position:

- 1) The duties for the new position are different in a significant way from prior positions for which the employee has already served a probationary period;
- 2) The re-hired employee is given a written notice of the probationary nature of the new position prior to employment; and
- 3) The employee has not previously established permanence in the new classification.

Please note that the decision in this case is only binding upon the area served by the Appellate Court of the 6th District (San Jose area); however, the decision provides persuasive legal authority for all of California. It is not clear at this time if the State Supreme Court will hear the matter. Our office will keep you informed of any developments.

A question that may arise from this case is whether the original reemployment rights are affected when a person fails to pass probation in the new position. Does that employee remain on the reemployment list? We believe that the individual, although released from the new position, does remain on the reemployment list from the original position, unless otherwise provided in the applicable Board policy or Collective Bargaining Agreement.

Please contact any of our attorneys if you have questions about this legal update or any other legal issues.

³ The court placed emphasis on the lack of statutory authority for the employee to assert permanence in the new position.