

SCHOOL AND COLLEGE LEGAL SERVICES of California

General Counsel
Margaret M. Merchat

Attorneys
Janna L. Lambert
Nancy L. Klein
Marko H. Fong
Carl D. Corbin
Patrick C. Wilson
Loren W. Soukup
Frank Zotter, Jr.


Susanne K. Reed
(1947 – 2010)

A Joint Powers Authority serving school and
college districts throughout the state with offices in
Eureka, Hayward, San Rafael, Santa Cruz and Santa Rosa

Reply to:
Santa Rosa Office
5350 Skylane Blvd.
Santa Rosa, CA 95403
(707) 524-2690
Fax: (707) 578-0517
santarosa@sclscal.org

Employer-Employee
Relations Coordinator
Robert S. Latchaw

Of Counsel
Robert J. Henry
Virginia A. Riegel

LEGAL UPDATE

April 4, 2011

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

From: ~~Mr~~ Marko Fong, Assistant General Counsel

**Employment Status of Laid Off Classified Employees Rehired in a Lower
Classification
Memo No. 04-2011**

The State Court of Appeals recently upheld a Superior Court ruling that a laid off, permanent, classified employee who is later rehired in a lower classification, does not retain permanence in that lower classification and must complete a new probation period.¹

In this 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 never been held by the former employee. The former employee applied for the position in accordance with her rights under Tucker v. Grossmont.² 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 re-employment in the lower classification.³

¹ *CSEA v. Governing Board of East Side Union High School District* (Mar. 15, 2011, HO034866) ___ Cal.App. 4th [2011 WL 880391]

² *Tucker v. Grossmont* 168 Cal. App. 4th 640 (2008) held that a laid off employee must be offered lower level positions for which he or she may be qualified (see Legal Update 31-2008). *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.

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

When hiring a person who is already on a layoff reemployment list, districts 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 what happens with the original position when a person fails to pass probation in the new position? Do they 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.