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LEGAL UPDATE

July 20, 2010

To: Superintendents/Presidents, Member Community College Districts

From: Frank Zotter Jr., Sr. Associate General Counsel *FZ*

Subject: Public Safety Officer Not Entitled to Hearing Upon Denial of Promotion
After Probation
Memo No. 11-2010 (CC)

On May 17, 2010, the California Court of Appeal, Fourth District, Division Two published its decision in *Guinn v. County of San Bernardino* (2010) 184 Cal.App.4th 941, ruling in favor of the County in a case involving whether a peace officer who fails to obtain a promotion after a period of probation is entitled to an administrative hearing under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code § 3300 et seq., or “Act”). The court concluded that the officer’s failure to pass probation and resulting denial of promotion was not “punitive action” against the officer under Government Code § 3304, subdivision (b). For those districts that employ peace officers, this ruling means that an employee who fails to garner a promotion on merit simply reverts to his or her previous position without the need for an administrative hearing.

FACTS:

Guinn was employed by San Bernardino County as a probation corrections officer, a permanent position for which he had successfully passed a period of probation. Guinn applied for a position as a supervisor in May 2005, subject to a nine-month period of probation (according to the County’s personnel rules). His performance reviews were unsatisfactory, and his probationary period as a supervisor was extended by three months. In May 2006, his probation was terminated and he was returned to his previous position because of his unsatisfactory performance in the new position.

Guinn was never offered any formal hearing as a result of the County’s action. Both he and his union therefore challenged the decision in superior court. The superior court denied his request for a court order directing the County to hold such a hearing. Guinn then appealed.

THE COURT'S DECISION:

The court focused on the language of Government Code § 3304, subdivision (b), which provides:

No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer *who has successfully completed the probationary period that may be required by his or her employing agency* without providing the public safety officer with an opportunity for administrative appeal.”¹

Guinn argued that, as used in § 3304, subdivision (b), the phrase “probationary period” refers solely to the probationary period imposed at the time of hiring, and does not refer to any probationary period imposed when a public safety officer seeks a promotion, even though such promotions almost universally require some period of probation before the new position becomes permanent. He therefore contended that because he had successfully passed his initial probationary period (when he was hired) and had become a permanent employee, he was entitled to an administrative hearing as a result of his “demotion.”

The court of appeal disagreed. Relying on the decision *Swift v. County of Placer*,² the court of appeal noted that rejection during probation is not considered “punitive action” under the Act that triggers the right to a hearing. Moreover, Guinn was not “demoted.” He was denied a promotion because his performance during his probationary period was unsatisfactory, and he simply reverted to his original, non-supervisory position. Consequently, he was not entitled to an administrative hearing regarding his “demotion.” The court also rejected Guinn’s argument that the term “probationary period” in § 3304, subdivision (b) was limited to the probationary period when a public safety employee is initially hired, finding nothing in the statute’s language to support this interpretation.

IMPLICATIONS FOR DISTRICTS:

The court of appeal’s decision means that, if a public safety employee seeks a promotion, the failure to pass the promotion will not entitle the employee to a hearing. Rather, the employee ordinarily will just return to the original position that the employee vacated upon being offered the new position that brought with it a new probationary period before the employee became permanent in that position.

Guinn has asked the California Supreme Court to review this case, so it will not be final unless the court rejects his request. This case can be relied on in the interim, however, should this issue arise in your district. As always, of course, districts should consult their own collective bargaining agreements or personnel policies, which may offer protections not afforded by state law as a result of this decision.

If you have any questions, please contact one of the attorneys in our offices.

¹ Government Code § 3304, subdivision (b), emphasis added.

² *Swift v. County of Placer* (1984) 153 Cal.App.3d 209.