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LEGAL UPDATE

May 17, 2010

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

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

Subject: Court Upholds Sanctions Against Teacher's Credential for Driving Under the Influence Convictions
Memo No. 15-2010

On May 6, 2010, the California Court of Appeal, Third District, published its decision in *Shirley Marie Broney v. California Commission on Teacher Credentialing* (2010) ___ Cal.App.4th ___, case no. C060831 ruling in favor of the Commission on Teacher Credentialing (CTC). The court upheld the decision of the superior court in Sacramento County which, in turn, upheld the decision of the CTC to take action against Ms. Broney's credential following her third conviction of driving under the influence. Even though this is a credentialing case, the decision means that, in appropriate circumstances, a certificated staff member can be disciplined even for activities occurring off-campus on the employee's own time.

FACTS:

Shirley Marie Broney is an elementary school teacher. She was convicted three times of driving under the influence of alcohol—once in 1987, once in 1997, and once in 2002. Her blood-alcohol level was .25% at the time of her third arrest. She was sentenced to 30 days in jail, which she was allowed to fulfill at home and at work in the classroom by wearing an ankle bracelet. The court also placed Broney on probation for three years and ordered her to complete an 18-month multiple offender alcohol education program.

Broney had held a credential since 1997, at which time she had acknowledged her (then) two DUI convictions. Her credential was granted and due for renewal in early 2002. Shortly after it was renewed, however, she pleaded guilty to her third offense. In 2004, the CTC notified her that it was investigating her fitness to teach and ultimately decided to suspend her credential for 60 days. She asked for a hearing, which (for reasons not explained in the court decision) did not take place until 2007.

The matter was heard by an administrative law judge (ALJ) in June, 2007. The CTC's evidence of unprofessional conduct and unfitness to teach consisted solely of police and government reports confirming her three prior convictions. Broney offered her own testimony, that of her school principal, and that of a licensed substance abuse counselor. The testimony included evidence that Broney had some probability of "acting out," and that while she does not drink during the week, she continues to consume alcohol on the weekend, usually with dinner, sometimes having as many as 3-4 drinks in a 24-hour period of time.

The ALJ determined the CTC had failed to prove unprofessional conduct, and recommended the accusation be dismissed. The CTC, however, rejected the ALJ's proposed decision and instead adopted its own decision and order, concluding that Broney had committed unprofessional conduct indicating she was unfit to teach and imposing the 60-day suspension and 3-year probationary period.

Broney challenged the decision in the superior court. That court ruled against her, finding that her three convictions demonstrated "per se" unfitness to teach under the rule of *Watson v. State Bd. of Education*.¹ Thus, it found it unnecessary to address Broney's argument that no evidence supported the CTC's findings under the seven factors discussed by the Supreme Court in *Morrison v. State Board of Education*² (*Morrison* factors).

Nevertheless, the trial court stated that the *Morrison* factors were relevant for reviewing the propriety of the discipline imposed by the CTC. It reviewed the CTC's findings under those factors and determined that its findings were supported by the weight of the evidence. The trial court entered judgment against Broney, who then filed an appeal.

THE COURT OF APPEAL'S DECISION:

The court of appeal first concluded that the superior court had erred in finding Broney "per se" unfit to teach under the *Watson* decision. In *Watson*, the court had upheld denial of a credential to an applicant who had had six alcohol convictions over a 10-year period, and a seventh while his application was pending. The court of appeal concluded that that standard was inapplicable to Broney, however, because a teacher who already has a credential is per se unfit to teach only if the teacher is convicted of a crime the Legislature has declared requires automatic sanctions against that teacher's credentials. Driving under the influence is not such an offense.³

Nevertheless, the court upheld the CTC's decision on the basis of the superior court's detailed discussion of the *Morrison* factors. Like the superior court, the court of appeal reviewed six of the seven factors and found that all of them supported the action the CTC took. For example, the first factor is the likelihood that Broney's conduct may have adversely affected students or teachers. Although her convictions happened away from school, and although she never exhibited evidence of alcoholism at school, she was required to wear an ankle bracelet at school to fulfill her sentence, which students might have observed. Because the *Morrison*

¹ *Watson v. State Bd. of Education* (1971) 22 Cal.App.3d 559, 563.

² *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 224-225.

³ For a comparison, see, e.g., Ed. Code § 44424, subd. (a) (listing serious felonies that require automatic credential revocation) or § 44425, subd. (a) (conviction of certain sex or controlled substance offenses requiring automatic suspension).

criteria focuses on whether Broney's conduct "may" adversely affect students, the court agreed that wearing an ankle bracelet to school for a month may have adversely affected others, and particularly might have affected the students' respect for their teacher.

The same was true for each of the other factors. Factor 2 is the proximity or remoteness in time of the conduct, with the court noting that Broney's convictions had happened at five-to-ten year intervals. This factor was therefore relevant even though it took CTC two years to initiate its proceedings. Factor 3 is the type of teaching credential involved. In Broney's case, she held a credential to teach elementary school, and the court observed that, given the impressionable nature of children at that age, multiple alcohol convictions were a serious concern.

Factor 4 is extenuating or aggravating circumstances surrounding the conduct. The court noted that despite her extremely high blood alcohol level (.25%, which is more than three times the legal limit), she attempted to drive and endangered others. Factor 5 is the praiseworthiness or blameworthiness of the motives resulting in the conduct, with the court stating that the lack of praiseworthiness in Broney's conduct "speaks for itself." The final factor discussed was the likelihood of the recurrence. Despite Broney's evident remorse, the court concluded that the number of prior convictions and her choice to continue drinking at all rather than to abstain from alcohol raised sufficient questions whether she might again violate the law.

IMPLICATIONS FOR DISTRICTS:

The decision can be cited for the time being. It becomes final 60 days after it was issued (approximately on July 5), after which Ms. Broney will have 10 days to ask the Supreme Court to review the decision. Assuming that this decision is neither reviewed nor "depublished" by the Supreme Court, the *Broney* case's reliance on and discussion of the *Morrison* factors confirms that, in an appropriate case, out-of-school, off-campus conduct can be a basis for discipline of a certificated employee, even though *Broney* itself is a credentialing case and not a disciplinary case.

We will notify you of any subsequent developments in the case. In the meantime if you have any questions, please contact one of the attorneys in our offices.