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LEGAL UPDATE

December 16, 2008

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

From: Robert S. Latchaw, *RS* Employer-Employee Relations Coordinator
Janna L. Lambert, Sr. Associate General Counsel *JLL*

Subject: Laid-Off Classified Employees Have a Preferential Right Over New Applicants To Any Vacant Classified Position For Which They Are Qualified
Memo No. 31-2008

On November 20, 2008, the California Court of Appeal, Fourth District, published its decision in *Tucker v. Grossmont Union High School District*, (2008) 168 Cal.App.4th 640, holding that laid-off classified employees have a preferential right over new applicants to be reemployed in any vacant classified position for which they are qualified. The decision represents a significant departure from the commonly accepted interpretation of laid-off classified employee reemployment rights because it does not limit such rights to vacancies in the employee's former classification or to the laid-off employee's previous full-time equivalency.

The school district's arguments that Education Code sections 45298 and 45308 must be read together and that any preferential rehire rights would apply only to the class in which the individual had formerly been employed, were expressly rejected by the Appellate Court:

This argument is not persuasive. Section 45298 describes the rights of a laid-off employee in relation to new applicants and specifies the laid-off employee has a right to reemployment in preference to a new applicant. Section 45308 explains the order in which members within a class must be laid off and rehired. The language of Section 45308 is relevant to the rights of the individual members of a class vis-à-vis each other. It is not relevant to the rights of laid-off employees versus new applicants. To take the language of

Section 45308 regarding the rights of class members in relation to each other and interject it into the language of Section 45298 that describes the reemployment rights of laid-off employees versus new applicants would change the plain meaning of Section 45298.

The Court further rejected the school district's argument that laid-off employees "will have inappropriate priority over other employees."

Nothing in the statutory provisions gives the laid-off employee the right to a position currently held by another employee.

With respect to the relative rights of laid off employees and better qualified new applicants, the Court concluded as follows:

[The] District's worries that a laid-off employee would have an unjustifiable preference *over a much better qualified new applicant* are also unwarranted. Section 45298 does not provide a guarantee of reemployment. A district has the ability to set its own hiring criteria for any given position to ensure that it may hire a well-qualified individual to fill the position. (Emphasis added.)

A narrow reading of the *Tucker* decision, specifically the italicized portion above, suggests that a district may be authorized to hire a "better qualified new applicant" instead of a laid off employee. However, when this section is construed in the context of the entire decision, it leads to the conclusion that a school district may only safely decline to reemploy a laid off employee if the laid off employee is not qualified for the vacant position. *Tucker* also distinguished *Gately v. Cloverdale Unified School Dist.* (2007) 156 Cal.App.4th 487, although this was based on what the *Tucker* court believed were factual differences between the two cases and not a disagreement with the legal principle set forth in *Gately*.

It is our understanding that the Grossmont Union School District is considering seeking Supreme Court review. However, until the Supreme Court grants review and rules otherwise, school districts must comply with the *Tucker* decision. To that end we make the following recommendations:

1. Review applicable collective bargaining agreements to determine whether they define the right to reemployment in narrower terms than the *Tucker* decision (e.g., reemployment only in former classification and only to the extent of former F.T.E.). If so, comply with agreement as written.
2. The Court did not hold that laid off employees are entitled to "special notice" when a position becomes vacant. Therefore:
 - a. Review applicable collective bargaining agreements to determine whether they provide for specific notice of vacancies to laid-off employees. If so, follow the agreed-upon notice procedure.

b. If your district has not agreed by contract or adopted a board policy providing for notice of vacancies to laid-off employees, implement a procedure that advises laid-off employees that vacancies will be posted and if they believe they are qualified for a vacancy in any classification in which they have not previously served, they must apply for the position within the time limit specified in the posting.

4. If more than one laid-off classified employee applies for a position in a classification in which they have not previously served and more than one such employee meets minimum qualifications for the position, offer the position to the laid-off employee with the earliest hire date.

5. Review classified job descriptions to determine whether they clearly specify current, relevant minimum qualifications. To the fullest extent possible describe minimum qualifications using objective criteria (e.g., minimum education requirements, minimum typing/ keyboarding speed, required licenses or certificates). Update job descriptions if appropriate.

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