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UPDATE: Will the Teacher Layoff Process be Reformed?

In May, 2010, the Los Angeles County Superior Court sent shock waves through the school and legal community when it issued a preliminary injunction ordering the Los Angeles USD to reinstate permanent, probationary, and long-term substitute teachers at three middle schools. (*Reed v. State of California, etc., Los Angeles Unified School District*, May 13, 2010).

The court's order was based on its conclusion that the disparate impact of the 2009 and proposed 2010 layoffs of teachers from those three particular schools violated the constitutional Equal Protection rights of the students due to significant teacher turn over. The court found that because the schools were high poverty, hard-to-staff schools, they had higher numbers of junior teachers and long-term substitutes. As a result, when the district implemented a large layoff in 2009, and proposed to do the same in 2010, the last-hired, first-fired laws and contract provisions governing teacher layoffs resulted in up to a sixty percent loss of the existing teaching staff at the schools. By comparison, the other middle schools in the district suffered losses of closer to fifteen percent or less. The court found that the disparity in the numbers of teachers laid off from one school to another matters, because evidence was presented that teacher turn-over adversely affects quality of instruction. In addition, as a result of the 2009 reductions in force (RIFs), there were a disproportionate number of teachers teaching outside their credential authorization and disproportionate numbers of substitute teachers. Evidence showed that those factors likewise adversely impacted the quality of instruction by depriving students of the opportunity to learn basic, core academic skills.

The district argued in *Reed* that there was a compelling state interest in laying teachers off in seniority order, as dictated by state law and the collective bargaining agreement. The court found, however, that teachers' economic

NOTE:

For our previous discussions on SB 955 and the *Reed* case, please see our Legal Alerts entitled, "Superior Court Enjoins Los Angeles Unified School District From Implementing Layoffs For Teachers At Three Middle Schools", June 2, 2010; and "Senate Bill 955 Seeks To Change Policies On Teacher Dismissal And The Layoff Process", May 6, 2010.

interest in retaining their jobs through a seniority-based layoff, bumping and transfer system is subordinate to students' fundamental right to receive an education. "Bumping" occurs when more senior teachers at one school or in one assignment retain their jobs by displacing junior teachers at another school or different assignment, who are then given a layoff notice. If a particular school has a significant number of the most junior teachers in the district, or significant numbers of temporary teachers who have no right to retain their jobs, a district-wide layoff can create a "funnel" effect whereby the more senior teachers from a variety of schools or assignments displace a higher percentage of the staff at the low-seniority school. This is what happened at these three schools.

The court rejected the district's arguments, finding that the current law (Education Code section 44955(d)(2)) specifically permits districts to deviate from laying teachers off in seniority order if needed to maintain or achieve compliance with constitutional requirements related to equal protection. In this case, the court ruled, the district should have used this provision to protect the staffs at these three schools from the disparate impact of the layoff and bumping process with the resultant excessive turn-over. The court held that contractual and statutory seniority rights cannot result in students being denied their right of equal protection to an education.

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Proposed Legislative Response

Even prior to the court's ruling in *Reed*, Senator Huff (Rep., Diamond Bar, with principal co-authors Emmerson and Romero) introduced legislation that would make significant changes to the procedures for teacher tenure, evaluation, dismissal and layoffs, giving local school districts more authority over the decision-making and processes. SB 955 was passed from the Senate Education Committee on April 21, 2010 and was then referred to the Senate Rules Committee, amended, and re-referred to Senate Rules. It is supported by a variety of business groups, school districts, minority chambers of commerce, and education organizations or foundations. Not surprisingly, it is opposed by various employee unions, including the California Teachers Association and California Federation of Teachers. SB 955 is an urgency measure, which means it needs a two-thirds vote for passage and would take effect immediately.

Meanwhile, Senator Steinberg (Dem., Sacramento and Chair of the Senate Rules Committee) introduced his own version of layoff reform in SB 1285. This bill is less of an overhaul of the teacher evaluation and dismissal procedures, and more of direct response to the *Reed* case, focusing not on teacher performance and local discretion as the Huff bill does, but rather on percentages of teachers affected. SB 1285 is supported by the ACLU (which represented the plaintiffs in the *Reed* case), and various public advocacy groups. It is also opposed by the California Teachers Association and California Federation of Teachers. SB 1285 is not an urgency measure, so if passed, would take effect on the next January 1 following passage.

Analysis

While the two bills approach the layoff issues differently, each has provisions that recommend it, and each has provisions that potentially could create more confusion, litigation and cost. Following is a look at the layoff provisions of SB 955, and SB 1285.

SB 955

First, it should be noted that SB 955 has major changes to other topics, such as notice of non-reelection of probationary employees; repeal and reenactment of the evaluation process; and major procedural changes to tenured teacher dismissals (such as allowing the board to designate that the dismissal hearing is before just an ALJ with an advisory decision to the board, leaving the final decision of dismissal up to the governing board). This article looks solely at the layoff reform.

SB 955 repeals Education Code section 44949, which is the section that contains the March 15 notice requirement for layoffs and the hearing procedures. Instead, districts would simply be required to provide the final notice of layoff prior to May 15, as provided in section 44955. This would constitute a significant cost savings to districts, by avoiding the time and expense of a layoff hearing. On the other hand, an assertion that the district violated the provisions of 44955 would then go to court, which could be equally costly and possibly more time consuming than the layoff hearing, and would probably not be resolved by the time school started in the Fall, which could produce back pay liability for districts if found to be out of compliance.

SB 955 also amends Section 44955. Subsection (b) (3) relating to resolving ties in seniority would allow districts to also consider distinctions based upon performance evaluations. While Section 44955 still requires layoffs to be implemented in seniority order, and still contains specified exceptions to that, the number of exceptions is increased in the bill. An additional criterion added to 44955(d) permits the district to deviate from seniority on the basis of performance evaluations, if pursuant to a process whereby those with superior evaluations are retained over those with inferior evaluations. The process would be required to be applied uniformly to the entire class subject to reduction in force. In addition, the bill adds a section that authorizes the governing board to designate schools to be exempt from layoff based on the needs of the educational program.

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Finally, SB 955 does not permit the district to deviate from seniority order if the employee has 18 months or less from his/her date of retirement or is on medical leave. This provision could be problematic, in that an employee who intends to retire eighteen months later typically does not advise the district of that fact that early. Districts would need to put a process in place whereby an employee notifies the district of retirement and is thereby insulated. As for employees on medical leave, the bill does not define what that means. Some employees are on medical leave for a few days, some a few weeks, some for an entire semester or year. At what point in time would it be determined that an employee is "on medical leave" under the provisions of this section? And would it make a difference whether the employee was anticipated to return the following year or not?

While SB 955 contains needed reforms in the area of tenured teacher dismissals, the layoff provision can inadvertently create as many problems as it solves. Districts may applaud the elimination of the March 15 notice and the onerous and costly hearing requirements. But they would want to make certain that their procedure for identifying the seniority order of layoff was target-proof. For while layoff hearings can take inordinate time and expense, and districts complain about having to identify teachers subject to layoff by February or March and in the absence of any meaningful information about the subsequent year's revenues, the plus side is the relative finality of the decision prior to May 15. In relatively rare situations, the attorney for the teachers may file a court action challenging the layoff conclusions; however, having the district's decision-making process vetted through the hearing procedures may in hindsight demonstrate far fewer court appeals.

SB 1285

Senator Steinberg's bill focuses on the distribution of first and second year teachers throughout the district and throughout the school year. It requires districts to balance the teaching force so that one school's percentage of first and second year teachers is not more than 10% greater than the overall district

percentage of first and second year teachers.

What is not clear in the language of this bill is whether the designation of first and second year teachers refers to overall teaching experience, whether in that district or not, or simply first and second year within the district. Districts often hire experienced teachers from outside the district who are nevertheless probationary and low on the seniority list. They may have gained permanency in another school district, but per the Education Code will still have to serve the two years of probation in that district and will have a low seniority number. Although districts have discretion to grant permanency after one year if the teacher was permanent in the prior district, very few if any districts exercise that option. Even if they do, the seniority date does not change.

As for the language in the bill that counts time as a permanent employee to determine first or second year status, this only makes sense if time is counted as a permanent employee in another district, since by law, beginning teachers must serve at least two complete consecutive years to obtain permanency, and districts have no legal authority to deviate from that. Also, a permanent teacher who resigns and is rehired within 39 months retains permanent status but gets a new seniority date. Thus the teacher may be permanent, with many years of experience, but still be subject to layoff due to a low seniority date. It is not clear from this legislation whether the bill aims to balance experience or seniority, because the two are not synonymous. The factor that resulted in the excessive teacher turn-over in the *Reed* case was more a function of seniority.

SB 1285 requires the county superintendent of schools to monitor the distribution of first and second year teachers as part of the monitoring requirements for schools in deciles 1 to 3 laid out in section 1240. Thus, the county superintendent's report will be required to include the extent to which the percentage of teachers in each school who are in their first or second year of teaching exceeds or falls below the percentage in the district of first and second year teachers. This again includes all time served as temporary, probationary and permanent employees.

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A second change proposed by SB 1285 is in the section that defines the district superintendent's powers and duties (EC 35035). Current law authorizes the superintendent to assign all certificated employees in the district to the position in which they are to serve, and gives superintendents the power to transfer those employees when the superintendent concludes that the transfer is in the best interest of the district. If there is a board policy on the subject, the power to transfer must conform to the policy. Since transfers are also a mandatory subject of bargaining in Government Code section 3543.2, PERB has held that the power to transfer must also be consistent with the negotiated agreement. That is why in many districts, transfers of employees are required to be done by seniority pursuant to the terms of the collective bargaining agreement.

SB 1285 modifies section 35035 by specifying that the initial teacher assignments shall occur in a manner that the percentage of teachers in each school who are in their first or second year of teaching shall not exceed the percentage of teachers in the district who are in their first or second year of teaching by more than 10 percentage points. The bill does not provide specific authority for the superintendent to ignore the provisions of a collective bargaining agreement in order to achieve this, i.e., by making involuntary transfers of more senior teachers to balance out the distribution, but one could certainly argue that the terms of a collective bargaining agreement cannot supersede the Education Code. Thus, to the extent the contract precludes the superintendent's ability to comply with this provision, one could assert that it is invalid.

In the layoff context, the bill modifies section 44955(d). Currently section 44955 (d) (1) allows districts to deviate from seniority when the district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services under a pupil personnel services or nurse credential, and that the employee has special training and experience necessary to teach that course or course of study or provide the other services.

Section 44955 (d) (2) allows the district to deviate from seniority for purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

SB 1285 retains both subsections, but adds two new subsections as (1) and (2). The new subsection (1) states that for the purposes of maintaining stability of instructors in schools in deciles 1 to 3 and in the schools identified as persistently lowest-achieving, during a layoff the proportion of certificated employees providing classroom instruction shall be no greater than the proportion of classroom teachers laid off in the district as a whole. For this section to apply at the persistently lowest-achieving schools, the school must have put in place certificated employees who provide instruction in a classroom as part of the school reform plan approved by the governing board.

SB 1285 also amends subsection (2) to provide that the ability of the district to deviate from seniority for purposes of equal protection, applies to certificated employees as well as for pupils. It is unclear how this would play out in the teacher context. Originally, it is assumed that this section was put into law to allow districts to implement affirmative action programs and save lower seniority minority teachers. However, that purpose was invalidated with the passage of Proposition 209 in 1996, which barred public agencies from considering race in any decisions about employment.

SB 1285 also seeks to amend Section 44955 by providing penalties for its violation. It states that the Superintendent [of Public Instruction or the county?] shall require boards that do not comply with these amendments to reinstate the employees terminated in violation of the limit. They must be returned to the school from which they are laid off, and the district board is barred from making further reductions in force at those schools "for the school year in which the terminations in violation of the limit would have been in effect." The board is also barred from making reductions at other school sites in the district in order to compensate for the reinstatements.

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This last provision is the most troublesome change in SB 1285. First, it is entirely unclear how an allegation of violation of this provision would end up with the Superintendent of Public Instruction (SPI). Currently he/she has no role whatsoever in this area. Second, due to the statutory layoff timelines for initial notice of teachers of possible layoff by no later than March 15, the district could not legally implement further layoffs for that coming school year as the result of a ruling by the SPI. Third, to impose such penalties on school districts further exacerbates the very reasons districts usually resort to layoffs, which is to reduce expenses by reducing staff. Anyone who has been through the layoff process knows there are already countless pitfalls that can result in restoration of certificated staff contrary to the district's expectations. For it to also have to factor in these hard and fast percentages of staffing renders it an even more complex process.

To accurately calculate a percentage, one has to have absolute clarity concerning the parameters of the group on which the percentage is based. For example, the bill uses the phrase, "certificated employees who provide instruction in the classroom." If a decile 1 to 3 school has hired teachers to serve as instructional coaches to the teaching staff, and who go into classrooms to do demonstration lessons, are they considered "certificated employees who provide instruction in the classroom" and therefore included in the calculations? If a teacher is assigned to serve at more than one site, are they counted in both places? Is a P.E. specialist excluded, since they typically provide instruction outdoors? Is an administrator who works part-time in the classroom included? What about an administrator who may occasionally substitute for a teacher when a substitute is not available? These are all very real situations and every one of them, plus others not anticipated, will be the subject of argument and legal maneuverings during the layoff hearing, as the attorneys for the teachers work to undermine the numbers of staff subject to layoffs. This will serve to further add to the costs of the layoff process.

While the intent of SB 1285 is laudable, the devil is always in the details. Too many times

school attorneys have stood before judges on issues involving statutory interpretations, and heard the judge say that the result does not make sense or sound public policy, but they are bound to follow the law as written by the Legislature. Hopefully, this bill will not be another one of those instances.

Questions

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

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