

**BERKELEY UNIFIED SCHOOL DISTRICT
PERSONNEL COMMISSION OF THE MERIT SYSTEM**

AGENDA

Thursday, March 5, 2009

Personnel Commission of the Merit System

Meeting 4:00 pm

1835 Allston Way– Open Session

Berkeley, CA 94703

(Annex Conf. Room)

Personnel Commission Members

Margaret Rowland, Chairwoman

Dan Lee, Commissioner

Shirley Van Bourg, Commissioner

Open Session: 4:00 pm

Page No.

Call to Order and Roll Call

1. Secretary's Report

2. Approval/Ratification of Eligibility Lists

Action.. 1

- a. Clerical Specialist – (Open/Combined)
- b. Administrative Coordinator (To be provided at Commission's Meeting)
- c. Instructional Assistant - ECE (To be provided at Commission's Meeting)
- d. Instructional Media Technician (To be provided at Commission's Meeting)

3. Approval Minutes

Action.. 2-4

- a. February 5, 2009

4. Public Comments

5. Vacancy Transfer Notification Format

**Discussion/
Action**

6. Limited Term Appointment

Action.. 5

7. Terminating Provisional Appointments

**Discussion/
Action.. 6-7**

**BERKELEY UNIFIED SCHOOL DISTRICT
PERSONNEL COMMISSION OF THE MERIT SYSTEM**

- | | |
|---|---------------|
| 8. Charles Joseph Tucker, Jr., vs Grossmont Union
High School District | Action.. 8-14 |
| 9. Salary Market Survey and Classification Study Update | Information |

ADJOURNMENT

BERKELEY UNIFIED SCHOOL DISTRICT

MERIT SYSTEM

Eligibility List for: **CLERICAL SPECIALIST – Open (Combined)**

Written Examination: **April 9, 2008 & February 4, 2009**

Performance Evaluation: **n/a**

Technical/General Fitness Oral: **April 28, 2008 & February 18, 2009**

Lists established by Personnel Commission: **May 1, 2008 to expire May 1, 2009 & March 5, 2009 to expire March 5, 2010**

	Date Certified To Position	Effective Date of Appointment
1. Angela Leddell*	_____	_____
2. Yolanda M. Sturgis* & Kathleen Lopes	_____	_____
3. Sharon Stokes-Couto*	_____	_____
4. Tonya Marshall*	_____	_____

* expires May 1, 2009

Personnel Commission Minutes
Regular Session
Thursday, February 5, 2009
4:00 PM
Berkeley Unified School District
Council Chambers
2134 Martin Luther King Jr. Way
Berkeley, CA 94704

1. Call to Order

The meeting was called to order by Commissioner Rowland, Chairwoman of the Personnel Commission, at 3:59 PM.

Roll Call

Roll call was taken by Francisco Martinez, Director of Classified Personnel and Secretary of the Personnel Commission.

Present: Commissioners Dan Lee, Margaret Rowland, and Shirley Van Bourg

2. Public Comments

The mother of a student at Longfellow, requested Permanent status for her daughter's Instructional Assistant – Special Education, Linette Robinson. There was a question of whether she had been hired and whether Ms. Robinson owes the District money. Chairwoman Rowland asked whether this isn't a grievance.

Herrieze Jones asked why she has to take a typing test to include the results in a job application if she has taken a typing test before.

Pat Robertson, BCCE, mentioned a court case pertaining to the layoff of permanent employees.

The BCCE requested clarification of the responsibilities of the Director, Personnel Services and the Director, Classified Personnel.

The BCCE asked for clarification of the use of Substitutes and Contractors.

The BCCE stated that sick leave incentives were not paid in accordance with past practice.

The BCCE requested an orientation for new hires.

3. Secretary's Report

There will be a Classification Study Advisory Committee meeting on February 6, 2009.

Food Service Assistant job announcements will be posted soon.

Sick-leave incentive is a contractual issue, not under the purview of the Personnel Commission.

Ms. Robinson has been hired as an Instructional Assistant – Special Education at Longfellow.

4. Eligibility Lists

The following eligibility list was presented in a format having columns for certification and effective dates:

PROGRAM ASSISTANT – Open

The following eligibility lists were approved:

MAINTENANCE TECHNICIAN – Promotional
MAINTENANCE TECHNICIAN – Open (Combined)
SCHOOL SAFETY OFFICER – Promotional
SCHOOL SAFETY OFFICER – Open

5. Approval of Minutes – January 15, 2009

The Minutes of the January 15, 2009 meeting were approved, subject to the following additions and changes:

Under **Public Comments** paragraph one, change “Mr. Martrell” to “Mr. Dinkins”; paragraph five, change “area” to “are”; paragraph ten, change “wouldn’t” to “would”; paragraph thirteen, strike the last sentence; and paragraph 20, strike “to” before “clarification”.

Under **Approval of Minutes**, paragraph six, Pat Robertson will supply the name of the person listed as “Mina Barthelmy”; change last name of Gloria “Bethany” to “Dudley”.

Under **Salary Market Survey**, paragraph two, change “Francisco” to “Director Martinez and “frustrating” to “frustrated”; paragraph three, add “Advisory” before “Committee”; and paragraph four, change “both she” to “both her”.

6. Vacancy Transfer Notification Format

The Commission discussed the inclusion of references to eligibility lists on the Vacancy and Transfer form.

7. “Employee in Good Standing”

Paula Phillips, President of the BCCE, requested clarification of the definition of “employee in good standing” and who makes the determination, whether the District or the Merit Commission. The Commissioners discussed whether they should define what it means to be an “employee in good standing”.

8. Substitute Employees

Francisco Martinez, Director of Classified Personnel, presented a Memorandum explaining Substitute Employee pay rates in various classifications.

9. New Business

Scheduled for February 11, 2009, a special Commission meeting to edit the Merit Rules’ Education Code citations.

Scheduled for March 13, 2009, the evaluation of the Director of Classified Personnel.

Scheduled for April 14, 2009, a reception to honor BUSD employees.

10. Motions Passed at this Meeting

Minutes:	1 set approved
Eligibility Lists:	1 reformatted
	4 approved

11. Next Meeting – Thursday, March 5, 2009 at 4:00 PM

12. Adjournment – 5:55 P.M.

Berkeley Unified School District

2134 Martin Luther King Jr. Way, Berkeley, California 94704-1180
Phone: (510) 644-6150 Fax: (510) 644-6151 www.berkeley.k12.ca.us



William Huyett
Superintendent

To: Personnel Commission of the Merit System
From: Francisco Martínez
Director of Classified Personnel
Date: March 5, 2009
Subject: Limited Term Appointment

Berkeley Unified School District, like every other school district in the state, is confronted with unprecedented budget shortfalls due to the reductions in state funding during the 2008-09 and 2009-10 fiscal years. In order for BUSD to maintain its financial obligations, the District will have to reduce its workforce. To assist in this endeavor, the Human Resources Department is requesting a limited-term appointment position to assist the Department in preparing the necessary documents to complete this process. The Department would like to hire Brenda Johnson for up to six (6) months as a Confidential Administrative Coordinator to assist in the layoff process. Ms. Johnson is a retired and experienced human resources professional. She has worked in the Berkeley Unified School District Human Resources Department. She will not require any training as she has assisted the Human Resources Department in various substitute capacities. Merit Rule 60.300.1 allows the appointment authority to establish limited term positions. Rule 60.300.1 states:

60.300.1 Types of Limited-term Appointments

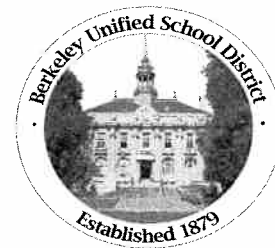
B. The appointing authority may establish positions the duration of which is six months or less; such positions shall be designed "limited-term." Such positions are subject to classification by the Personnel Commission, except that the Personnel Director may classify them subject to later ratification if the good of the service demands expeditious action.

Recommendation:

Approve the limited term appointment of a Confidential Administrative Coordinator to assist the Human Resources Department.

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William Huyett
Superintendent

To: Personnel Commission of the Merit System
From: Francisco Martínez
Director of Classified Personnel
Date: March 5, 2009
Subject: Terminating Provisional Appointments

Paula Phillips, BCCE's President, has asked that the Personnel Commission discuss the Terminating Provisional Appointments Rule. The termination of provisional appointments is covered by merit rule 50.300.2 and rule 50.300.IE

50.300.2 Terminating Provisional Appointments

A. The services of a provisional appointee shall be terminated within 15 working days after the date on which an eligibility list has been established, provided that this 15-day period does not extend beyond the 90-working-day provisional assignment or the additional 36 working days if authorized by Rule 50.300. IE.

B. A provisional appointment may be terminated at any time, at the discretion of the appointing power.

Rule 50.300. IE

E. Notwithstanding Rules A and B above, the Commission may extend the 90-working-day provisional appointment for a period not to exceed 36 additional working days provided:
(EC 45288)

A. An examination for the class was completed during the initial 90 work days of the employee's provisional assignment.

B. Satisfactory evidence is presented indicating:

a. Adequate recruitment effort has been and is being made.

b. Extension of this provisional assignment is necessary to carry on vital functions of the District.

c. The position cannot be satisfactorily filled by use of the eligibility list or other employment lists or procedures such as reinstatement, transfer, or other appropriate eligibility lists.

F. Provisional employees are entitled to all fringe benefits accorded other classified employees.

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**William Huyett
Superintendent**

To: Personnel Commission of the Merit System
From: Francisco Martínez
Director of Classified Personnel
Date: March 5, 2009
Subject: Charles Joseph Tucker, Jr., V. Grossmont Union High School District

Paula Phillips, BCCE's President, has asked that the Charles Joseph Tucker, Jr., v. Grossmont Union High School District court decision be placed on the Commission's Agenda as an action item. The Tucker decision is attached below.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT DIVISION ONE STATE OF CALIFORNIA

October 28, 2008

**CHARLES JOSEPH TUCKER, JR., PLAINTIFF AND RESPONDENT,
v.
GROSSMONT UNION HIGH SCHOOL DISTRICT, DEFENDANT AND
APPELLANT.**

APPEAL from a judgment of the Superior Court of San Diego County, Jan I. Goldsmith, Judge. Affirmed. (Super. Ct. No. GIE029350).

Stutz Artiano Shinoff & Holtz, Daniel R. Shinoff, Paul V. Carelli IV for Defendant and Appellant.

Patrick F. O'Connor; and Boudreau Williams, Jon R. Williams for Plaintiff and Respondent.

The opinion of the court was delivered by: O'rourke, J.

CERTIFIED FOR PUBLICATION

Opinion ordered published November 20, 2008

Grossmont Union High School District (District) appeals an order granting an extraordinary writ to require District to reemploy Charles Joseph Tucker, Jr., in preference to new applicants for any available position with District for which Tucker applies and for which he is qualified. District contends under the plain meaning of relevant statutes Tucker does not have reemployment rights to positions outside of the class from which he was laid off. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Tucker began working for District in 1982 as a general maintenance worker and after one and one half years was promoted to maintenance supervisor. He left District's employ from 1988 until 1996 during which time he worked for another school district and earned an MBA. In 1996 Tucker returned to work for District and held the position of director of maintenance and operations. He later assumed additional responsibilities in connection with the building of a new high school and compliance with the Americans with Disabilities Act (Pub.L. No. 101-336 (July 26, 1990) 104 Stat. 327), and some of his former responsibilities were delegated to others. His job title became director of operations, safety and special projects.

District's former assistant superintendent stated that in 2004 District asked a state agency, the Fiscal Crisis and Management Team (FCMAT), to review its classified management structure. FCMAT recommended eliminating Tucker's position and combining his duties with those of other positions to reduce expenditures. On January 13, 2005, District's Board of Trustees voted to eliminate Tucker's position because of lack of work and/or lack of funds. He was laid off effective April 2005.

In April 2005 Tucker applied for the position of maintenance manager with District. According to District's human resources director, this position was of a lower class and had different job responsibilities than Tucker's previous position. Although Tucker was qualified for the position, District hired someone else, an individual who had never before worked for District.

Tucker petitioned for a writ of mandate. He alleged District illegally laid him off; it did not comply with his "bumping rights," which he claimed gave him the right to move into a job held by a current employee; and it violated his right to reemployment under Education Code section 45298,^{*fn1} which gives employees laid off for lack of work or lack of funds reemployment preference over new applicants. He also petitioned for

declaratory relief.

The superior court granted Tucker's petition in part and denied it in part. The court found District had legitimately laid off Tucker for lack of work and/or lack of funds and Tucker had no "bumping rights." The court also found Tucker had and continues to have the right to be reemployed in preference to new applicants under section 45298, and this right was violated when he was not reemployed in April 2005 as maintenance manager. The court found section 45298 does not limit reemployment to a job only within a particular classification. It stated in order to exercise his right to reemployment, Tucker must apply for an available position and satisfy the qualifications promulgated by District for the position sought. The court declined to award damages without prejudice to Tucker seeking damages in a separate action.

DISCUSSION

District contends the court erred by finding section 45298 provides Tucker with the right to be reemployed by District in preference to new applicants for any position for which he applies and for which he is qualified. It argues section 45298 must be read together with section 45308, and analyzing the two statutes together leads to the conclusion that Tucker has preference to reemployment only for a position within the class from which he was laid off.

Because the resolution of this issue involves a question of law where the facts are not in dispute, we are not bound by the trial court's decision, but may make our own determination. (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 502.) In deciding the proper interpretation of statutes, the primary goal is to determine the intent of the Legislature when the law was enacted. The goal of statutory construction is to ascertain the legislature's intent to effectuate the purpose of the law. (*Torres v. Automobile Club of Southern California* (1997) 15 Cal.4th 771, 777.) " '[E]very statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.' " (*Landrum v. Superior Court* (1981) 30 Cal.3d 1, 14.)

The reviewing court seeks to give the statute a reasonable construction and to promote rather than defeat the policy underlying the legislation. (*County of Alameda v. Johnson* (1994) 28 Cal.App.4th 259, 263.) We first look at the language of the statute, attributing to the words their plain, usual, ordinary and commonsense meaning. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476; *Torres v. Automobile Club of So. California*, *supra*, 15 Cal.4th at p. 777.) When the statutory language is clear and unambiguous, judicial construction is neither necessary nor proper. (*Cortez v. Percolator Air Filtration Products* (2000) 23 Cal.4th 163, 179.)

The governing board of a school district prescribes written rules and regulations

governing the personnel management of the classified service. (§ 45113, subd. (a).) However, "the governing board may lay off and reemploy classified employees only in accordance with procedures provided by Sections 45298 and 45308" (§ 45114.)

We thus examine the pertinent language of these statutes. Section 45298 provides:

"Persons laid off because of lack of work or lack of funds are eligible to reemployment for a period of 39 months and shall be reemployed in preference to new applicants."

Section 45308 provides in part:

"Classified employees shall be subject to layoff for lack of work or lack of funds. Whenever a classified employee is laid off, the order of layoffs within the class shall be determined by length of service.

The employee who has been employed the shortest time in the class, plus higher classes, shall be laid off first. Reemployment shall be in the reverse order of layoff."

District asserts because sections 45298 and 45308 must be read together and section 45308 refers to classes of classified employees and designates the orders for laying off and reemploying members of a class, an employee's rights to preference for reemployment are for reemployment only within the class in which he or she was formerly employed. District argues the rights do not include any preference for reemployment in a lower or different class even if the laid-off employee is qualified for the position.

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-a-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.

If the Legislature had intended to limit a laid-off employee's right to reemployment, it easily could have stated the former employee "shall be reemployed within the same class from which the employee was laid off in preference to new applicants." It did not do so, and the language of the statute has remained essentially the same since it was first enacted in 1935 as section 5.798 of the School Code. (Stats. 1935, ch. 618, § 1.) In

other sections of the code the Legislature has included language relating to classes of employees. Section 45195, which applies to classified employees in elementary and secondary schools, states an employee who returns to work after a leave "shall be restored to a position within the class . . . and, if at all possible, to his or her position . . ." (Italics added.) Section 88127 and 88195, which apply to classified employees in community colleges, refer respectively to the order of lay off of classified employees within a class and of returning to work to a position within a class after a leave of absence. In enacting section 45298, however, the Legislature did not specify that the laid-off employee's preference to reemployment over a new employee was restricted to reemployment only in the same class from which he was laid off. Because the Legislature did not include this language, we conclude it did not intend to so restrict a laid-off employee's preference to reemployment versus a new applicant.

District's suggestion that language in the second paragraph of section 45298 supports its interpretation is not convincing. The second paragraph of section 45298 states: "Employees who take voluntary demotions . . . shall be granted the same rights as persons laid off . . . provided, that the same tests for fitness under which they qualified for appointment to a class shall still apply." These words simply mean that employees who took voluntary demotions and laid-off persons have the same rights vis-a-vis each other to reemployment as long as they are still qualified for the class of employment. The language does not suggest that a laid-off employee's reemployment rights versus a new applicant are restricted to the same class from which he or she was laid off.

District's argument that reemployment preferences under the Government Code support its argument is also flawed. Rules for reemployment found in Government Code sections 18904, 18905, 19054 and 19056 that refer to placement on reemployment lists for classes of employees are like the rights referred to in section 45308 and the second paragraph of section 45298. They are relevant to the rights of former employees in relation to each other. They do not support District's argument that would restrict an employee's preference for reemployment against new applicants to the class from which he or she was laid off.

Our California Supreme Court's analysis of another section of the Education code is instructive. Although, as District points out, *California Teachers Assn. v. Governing Board of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632 (Rialto) involved interpretation of a different statute, the court's reasoning is useful. Section 44919, subdivision (b), provides that a limited assignment supervising pupils in an athletic activity "shall first be made available to teachers presently employed by the district." (Rialto, at p. 632.) The school district had asserted the hiring preference provided by the statute only required it to make the application and interview process available to current credentialed teachers. The court, however, observed this would in effect give current teachers no advantage over other applicants. The court ruled by section 44919,

subdivision (b), the Legislature intended to give preference to employment in coaching positions to credentialed teachers currently employed by a district over noncredentialed employees or nonemployees. (Rialto, at p. 634.) The court noted because the district has the authority to set the criteria it uses to determine the qualifications for the position Section 44919, subdivision (b), does not provide a guarantee of employment, but the preference is limited to those applicants qualified for the coaching position based on the criteria that the district itself creates. A teacher applying for a coaching position would have to show he or she meets the qualifications promulgated by the district before the district would be prohibited from hiring a noncredentialed employee or non-employee in preference to the teacher. (Rialto, at p. 644.)

Here, also, section 45298 provides a preference for a laid-off employee vis-a-vis new applicants for reemployment in a position for which the laid-off employee is qualified. District's contrived reading of sections 45298 and 45303 together could eliminate any advantage for the laid-off employee versus a new applicant. By requiring that the preference be available only if the laid-off employee is applying for a position within the exact same class from which he or she was laid off, a district would be free to simply eliminate the position or class after laying off the employee, thereby doing away with the benefit the Legislature intended to afford to the laid-off employee by enacting section 45298. District has broad discretion to define the qualifications required for any position for which it seeks applicants, thus it may ensure that only applicants who meet the prerequisites of a given position will be hired. Providing a preference for laid-off employees who can fulfill the qualifications of a position protects both the interests of the laid-off employee as intended by the Legislature and the interests of the District in having an employee qualified for the position.

District's fears that an employee laid off for lack of work and/or lack of funds will have inappropriate priority over other employees are unfounded. Nothing in the statutory provisions gives the laid-off employee the right to a position currently held by another employee. 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.

We also find unpersuasive District's arguments in its reply brief regarding *Gately v. Cloverdale Unified School Dist.* (2007) 156 Cal.App.4th 487 (*Gately*). In *Gately* the court ruled the facts supported a finding that an individual who had been employed as a business manager had been laid off for legitimate fiscal and organizational reasons. (Id. at p. 497.) The court also ruled the former business manager was not entitled to special notice when the position of chief financial operations officer (CFO) became available although she could have applied for the CFO position had she chosen to do so. (Ibid.)

In *Gately* the former employee's position had been eliminated and her former duties were assumed by a CFO, the highest ranking executive after the superintendant, and whose duties were more demanding and required skills that the laid-off employee lacked. (*Gately*, 156 Cal.App.4th at p. 497.) Thus, she was not qualified for the CFO position and would not have a right of preference over a new applicant. By contrast, the record indicated Tucker, who had been laid off from a position that was eliminated, director of operations, safety and special projects, would presumably have met the qualifications for the position of maintenance manager since he earlier had been employed as director of maintenance and operations. He should have been afforded a preference over a new applicant. The holding of *Gately* does not support District's position

Under the provisions of sections 45298 and 45308, Tucker has preferential reemployment rights over any new applicants to available positions for which he is qualified.

DISPOSITION

The judgment is affirmed.

WE CONCUR: McCONNELL, P. J., HALLER, J.