CHAPTER XVIII

CLASSIFIED EMPLOYEES

The purpose of this workbook is to provide school administrators with an overview of the laws regulating classified employees in California. We hope that you will find this workbook helpful.

NATURE OF THE CLASSIFIED SERVICE

A. Classification of Positions

Persons employed in noncertificated positions are deemed to be classified employees.[1] The classified service includes every position not defined by the Education Code as requiring a certificate or credential and not specifically exempted. Every position not defined as requiring certification qualification and not specifically exempted from the classified service by the Education Code may not be designated as certificated only by the assignment of a title to the position nor may possession of a certification document be made a requirement for employment in any such position.[2] In addition, school districts are prohibited from refusing to consider a person in possession of a certificate or credential for consideration for employment in a classified position.[3]

The Education Code requires the governing board of every school district to employ persons for positions not requiring certification qualifications and to classify all such employees and positions. The employees in positions are known as the classified service.[4]

B. Contracting Out Work

In California School Employees Association v. Del Norte County Unified School District Board of Trustees, the Court of Appeal held that a contract between a school district and a private company contracting with a private company to supervise the school district's custodial and maintenance employees on a regular basis was invalid.[5] The court held that supervisory employees were within the district's merit system and classified service, and that even though Government Code section 53060 permitted a school district to contract with specially trained persons for services in specified fields, everyday supervisors are not professional experts, and therefore, supervisors must be part of the classified service.[6] The Court of Appeal stated:

> "On the basis of the above statutes and cases, we conclude that district's contract with Service Master was invalid insofar as it

[1] Education Code sections 45100 et seq.
[2] Education Code section 45104.
[3] Ibid.
[4] Education Code section 45103.
[5] CSEA v. Del Norte County Unified School District, 2 Cal.App.4th 1396, 4 Cal.Rptr.2d 35 (1992).
[6] CSEA v. Del Norte, 2 Cal.App.4th at 1404.

> authorized Service Master to provide regular supervision of maintenance and custodial employees. These positions fall within the classified service and the district's merit system. Regular supervisors are not professional experts, whatever skills Service Master personnel may bring to the job."[7]

Following the decision in Del Norte, the Legislature enacted Education Code section 45103.5.[8] Section 45103.5 authorizes a school district to enter into a contract for management consulting services relating to food service for a term not to exceed one year.[9] Any renewal of that contract or further request for proposals to provide food service management consulting services must be considered on a year-to-year basis. A contract for food service management consulting services may not cause or result in the elimination of any food service classified personnel or position.[10] A contract for food service management consulting services cannot adversely affect wages, benefits, or other terms of conditions of employment of classified employees and cannot provide for or result in the supervision of food service classified personnel by a food service management consultant.[11]

Education Code section 45103.1 states that personal services contracting for all services "currently or customarily" performed by classified school employees to achieve cost savings is permissible, when all of the following conditions are met:

1. The governing board or contracting agency clearly demonstrates that the proposed contract will result in actual overall cost savings to the school district, with specified conditions.

2. Proposals to contract out work shall not be approved solely on the basis that savings will result from lower contractor pay rates or benefits. Proposals to contract out work shall be eligible for approval if the contractor's wages are at the industry's level and do not undercut school district pay rates.

3. The contract does not cause the "displacement" of school district employees, defined to include layoff and other specified employment actions.

4. The savings shall be large enough to ensure that they will not be eliminated by private sector and district cost fluctuations that could normally be expected during the contracting period.

5. The amount of savings clearly justify the size and duration of the contracting agreement.

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[7] Id. at 1404.
[8] Added by Statutes of 1992, ch. 826, section 1.
[9] Education Code section 45103.5(a).
[10] Ibid.
[11] Education Code sections 45103.5(a) and (b).

6. The contract is awarded through a publicized, competitive bidding process.

7. The contract includes specific provisions pertaining to the qualifications of the staff that will perform the work under the contract, as well as assurance that the contractor's hiring practices meet applicable nondiscrimination standards.

8. The potential for future economic risk to the school district from potential contractor rate increases is minimal.

9. The contract is with a "firm," defined to mean a corporation, limited liability corporation, partnership, nonprofit organization, or sole proprietorship.

10. The potential economic advantage of contracting is not outweighed by the public's interest in having a particular function performed directly by the school district.

With the exception of item 7, above, the law does not expressly require a written document establishing that the conditions are met. However, a district that enters into a personal services contract must be prepared to demonstrate that all ten requirements have been satisfied.

A school district is not required to satisfy the ten conditions if a personal services contract falls within any one of the following seven exceptions:

1. The contract is for new school district functions and the Legislature has specifically mandated or authorized the performance of the work by independent contractors.

2. The services contracted are not available within the district, cannot be performed satisfactorily by school district employees, or are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the school district.

3. The services are incidental to a contract for the purchase or lease of real or personal property. Such contracts are known as "service agreements," and include agreements to service or maintain office equipment or computers that are leased or rented.

4. The policy, administrative, or legal goals and purposes of the district cannot be accomplished through the utilization of persons selected pursuant to the regular or ordinary school district hiring process.

5. The nature of the work is such that the criteria for emergency appointments apply, as defined.

6. The contractor will provide equivalent materials, facilities, or support services that could not feasibly be provided by the school district in the location where the services are to be performed.

7. The services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under the district's regular or ordinary hiring process would frustrate their very purpose.

Section 45103.1 applies only to personal service contracts entered into after January 1, 2003. The law does not apply to the renewal of contracts subsequent to January 1, 2003, where the contract was entered before January 1, irrespective of whether the contract is renewed or rebid with the existing contractor or with a new contractor. If the Commission on State Mandates determines that SB 1419 contains costs mandated by the state, reimbursement to districts for these costs will be made.

C. Substitute and Short Term Employees

Substitute and short term employees employed and paid for less than 75 percent of the school year are not part of the classified service as well as part time playground positions (unless the employee also works in the same school district in a classified position), apprentices and professional experts employed on a temporary basis for a specific project are also excluded from the classified service. Full time students employed part time and part time students employed part time in college work study program or any work experience education program conducted by a community college district which is financed by state or federal funds shall not be part of the classified service.[12] Short term employees are defined as persons who are employed to perform a service for the district, upon the completion of which the service required or a similar service will not be extended or needed on a continuing basis.[13]

Substitute employees are defined as any person employed to replace any classified employee who is temporarily absent for duty. In addition, if the district is engaged in a procedure to hire a permanent employee to fill a vacancy in any classified position the governing board may fill the vacancy for not more than sixty calendar days with one or more substitute employees unless the collective bargaining agreement then in effect provides for a different period of time.[14] Also, certain specially funded positions may be exempt from the classified service.[15]

In California School Employees Association v. Governing Board of the South Orange County Community College District,[16] the Court of Appeal held that substitute classified

[12] Education Code section 45103.
[13] Ibid.
[14] Education Code section 45103.
[15] Education Code section 45105.
[16] 124 Cal.App.4th 574, 21 Cal.Rptr.3d 451, 193 Ed.Law Rep. 538 (2004).

employees qualify for classified status if they work more than 75 percent of the academic or school year by temporarily replacing absent classified employees.

CSEA and three substitute classified employees who worked 195 days or more during the college year appealed the denial of their writ of mandate to compel the South Orange County Community College District to recognize the workers as classified employees. CSEA also sought lost wages and benefits and reinstatement for one of the employees.

The case concerned the proper interpretation of Education Code section 88003.[17] Section 88003 states in part:

> "The governing board of any community college district shall employ persons for positions that are not academic positions. The governing board . . . shall classify all those employees and positions. The employees and positions shall be known as the classified service. Substitute and short-term employees, employed and paid for less than 75 percent of a college year, shall not be a part of the classified service."

It was undisputed that short-term employees who worked more than 75 percent of the academic year qualify for the classified service because they are not specifically excluded under the statute. The dispute arises as to whether substitute employees are subject to the same requirement that they must work more than 75 percent of the college year to gain classified status or whether they are completely excluded.

The Court of Appeal concluded that the language relating to 75 percent of the school year applies to both substitute and short-term employees and rejected the community college district's argument that the 75 percent requirement applied only to short-term employees. The court pointed out that the qualifying phrase "employed and paid for less than 75 percent of the college year" is separated from its antecedents by a comma, which indicates that the qualifying clause applies to both "substitute and short-term employees."[18]

The Court of Appeal noted that in California School Employees Association v. Oroville Union High School District,[19] the Court of Appeal interpreted Education Code section 45103, an almost identically worded measure applying to school district employees, as applying the 75 percent of a school year standard to substitute employees.[20]

[17] Education Code section 45103 applies to school districts and contains almost identical language.
[18] Id. at 456.
[19] 220 Cal.App.3d 289, 269 Cal.Rptr. 90 (1990).
[20] See, also, California School Employees Association v. Trona Joint Unified School District, 70 Cal.App.3d 592, 138 Cal.Rptr. 852 (1977).

D. Paraprofessionals

The No Child Left Behind Act (NCLB) and the NCLB regulations require each school district receiving assistance under Title I funds to ensure that all paraprofessionals hired after January 8, 2002, and working in a program supported with funds under Title I shall have:

1. Completed at least two years of study at an institution of higher education;

2. Obtained an Associate's or higher degree; or

3. Met a rigorous standard of quality and can demonstrate, through a formal state or local assessment, knowledge of, and the ability to assist in instructing reading, writing, and mathematics, or knowledge of, and the ability to assist in instructing reading readiness, writing readiness, and mathematics readiness as appropriate.[21]

The regulations define a paraprofessional as an individual who provides instructional support and does not include individuals who have only non-instructional duties, such as providing technical support for computers, providing personal care services, or performing clerical duties.[22] The regulations set forth examples of instructional support duties as follows:

1. One-on-one tutoring for eligible students, if the tutoring is scheduled at a time when a student would not otherwise receive instruction from the teacher;

2. Assisting in classroom management;

3. Assisting in computer instruction;

4. Conducting parental involvement activities;

5. Providing instructional support in a library or media center;

6. Acting as a translator;

7. Providing instructional support services.[23]

Under California law, instructional aides must pass the district proficiency exam in basic reading, writing, and mathematics skills for high school seniors. While the proficiency exam has been replaced by a high school exit exam for high school seniors, state law could be amended so that the proficiency exam could be utilized to meet the requirements of the NCLB.[24]

[21] 20 U.S.C. Section 6319(c); 34 C.F.R. Section 200.58.
[22] 34 C.F.R. Section 200.58.
[23] 34 C.F.R. Section 200.59.
[24] Education Code section 45344.5.

The NCLB requires existing paraprofessionals to meet these requirements by January 8, 2006. The NCLB and the regulations contain exceptions for paraprofessionals who are proficient in a language other than English and who provide services primarily to enhance the participation of children in programs under this part by acting as a translator, or whose duties consist solely of conducting parental involvement activities. The NCLB and the regulations require that school districts, regardless of the paraprofessional's hiring date, must ensure that all paraprofessionals working in a program supported with Title I funds have earned a secondary school diploma or its recognized equivalent.[25]

The NCLB regulations states that a paraprofessional may not provide instructional support to a student, unless the paraprofessional is working under the direct supervision of a teacher if the teacher plans the instructional activities that the paraprofessional carries out, the teacher evaluates the achievement of the students with whom the paraprofessional is working, and the paraprofessional works in close and frequent physical proximity to the teacher.[26]

E. Senior Management

The governing board of a school district may adopt a resolution designating certain positions as senior management of the classified service.[27] Employees whose positions are designated as senior management of the classified service shall be part of the classified service and shall be afforded all rights, benefits and burdens of other classified employees except that they shall be exempt from all provisions relating to obtaining permanent status in a senior management position.[28] Notice of reassignment or dismissal from a position in the senior management of the classified service shall be provided pursuant to provisions in the Education Code relating to the superintendents and assistant superintendents which authorize non-renewal of an employee contract at the end of its term upon 45 days written notice.[29] In addition, the governing board of a school district may enter into a contract of employment for up to four years with a member of the senior management of the classified service.[30] The maximum number of positions which may be designated as senior management positions is regulated by the Education Code.[31]

In Gately v. Cloverdale Unified School District,[32] the Court of Appeal upheld the layoff of a classified business manager of a school district. The Court of Appeal held that the employee was not a senior management employee. Therefore, she was not entitled to a 45-day advance notice of termination. The court also held that the employee's layoff was based on bona fide financial reasons and was not pretextual or a subterfuge for a termination for cause.

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[25] 20 U.S.C. Section 6319; 34 C.F.R. Section 200.58.
[26] 34 C.F.R. Section 200.59(c).
[27] Education Code section 45100.5(a).
[28] Education Code section 45100.5(b).
[29] Education Code sections 45100.5(c), 35031.
[30] Education Code section 35031.
[31] Education Code section 45108.5(b) states: "(b) The maximum number of positions which may be designated as senior management positions shall be as follows: (1) For districts with less than 10,000 units of average daily attendance, two positions. (2) For districts with 10,000 to 25,000 units of average daily attendance, inclusive, three positions. (3) For districts with 25,001 to 50,000 units of average daily attendance, inclusive, four positions. (4) For districts with more than 50,000 units of average daily attendance, five positions."
[32] 156 Cal.App.4th 487, 67 Cal.Rptr.2d 377 (2007).

The Court of Appeal reviewed the provisions of Education Code sections 45100.5 and 45108.5 and held that in order for a classified management employee to be in a senior management position, the governing board of a school district must adopt a resolution designating the employee's position as senior management of the classified service.[33] Education Code section 45100.5 states:

> "(a) The governing board of a school district may adopt a resolution designating certain positions as senior management of the classified service. Notwithstanding the provisions of Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the decision of the governing board shall not be deemed a matter subject to negotiation, but shall be subject to review by the Public Employment Relations Board.
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> (b) Employees whose positions are designated as senior management of the classified service shall be a part of the classified service and shall be afforded all rights, benefits, and burdens of other classified employees, except that they shall be exempt from all provisions relating to obtaining permanent status in a senior management position.
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> (c) Notice of reassignment or dismissal from a position in the senior management of the classified service shall be provided in accordance with the provisions of Section 35031."

Education Code section 35031, as referred to in Section 45100.5(c), requires that a senior management employee be given at least 45 days advance written notice prior to the expiration of the term of their employment contract in order to terminate the employee. If such notice is not given, the senior management employee shall be deemed reelected for a term of the same length as the one completed, under the same terms and conditions and with the same compensation as set forth in the employment agreement. Education Code section 45108.5 limits the number of classified employees who may be designated senior management employees. The Court of Appeal rejected the employee's argument that the school board is not required to designate a position as senior management and that certain positions are automatically senior management positions.[34]

The Court of Appeal also upheld the layoff of the employee who served as the business manager of the district for lack of work and lack of funds pursuant to Education Code section 45308. The employee alleged that the layoff was due to the personal antipathy of the superintendent rather than legitimate budgetary concerns. The employee cited additional circumstances to support her argument that the layoff was pretextual, as follows:

1. The employee was asked to resign by the superintendent before she was actually given notice of her termination.

[33] Id. at 493.
[34] Id. at 494-95.

2. The employee was initially advised that her termination was based on the expiration of her contract, and only later was she told she was being laid off for lack of work or lack of funds.

3. The employee was told there was cause to terminate her, even though the district had elected not to pursue a termination for cause.

4. The district created the position of chief financial officer, which included the employee's duties as business manager and paid a higher salary.[35]

The Court of Appeal accepted these facts as true but held that other evidence supported an inference that the layoff was made for legitimate fiscal and organizational reasons. The court indicated that the record showed that there was evidence that the district's finances were in dire straits and that significant reorganization was necessary. The chief financial officer position was the highest ranking executive after the superintendent and the position required skills that the employee lacked. The court took notice that the chief financial officer position was compensated more generously than the business manager position and had more demanding duties. The court also noted that the district could not afford to fund a chief financial officer and business manager position, and that other employees were laid off at the same time.[36]

The Court of Appeal held that the laid off employee was entitled to participate in promotional examinations and could have applied for the chief financial officer position, but was not required to receive special notice under the reemployment statutes under Education Code section 45298, since this was a different position.[37]

F. School Security Guards

Education Code section 38000 states that the governing board of any school district may establish a security department under the supervision of a chief of security or a police department under the supervision of a chief of police. The governing board may also employ classified personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. In addition, a school district may assign a school police reserve officer to a school site to supplement the duties of school police personnel.

Education Code section 38000(b) states that the governing board of a school district that establishes a security department or a police department shall set minimum qualifications of employment for the chief of security or chief of police, including prior employment as a peace officer or completion of any peace officer training course approved by the Commission on Peace Officer Standards and Training.

Education Code section 38001 states that persons employed and compensated as members of a police department of a school district, when appointed and duly sworn, are peace

[35] Id. at 496-97.
[36] Id. at 497.
[37] Id. at 497.

officers for the purposes of carrying out their duties of employment pursuant to Penal Code section 830.32.

Education Code section 38001.5[38] states that it is the intent of the Legislature to ensure the safety of pupils, staff, and the public on or near California's public schools by providing school security officers with the training that will enable them to deal with increasingly diverse and dangerous situations. Section 38001.5(b) states that after July 1, 2000, every school security officer employed by a school district who works more than twenty hours a week as a school security officer shall complete a course of training developed no later than July 1, 1999, by the Bureau of Security and Investigative Services of the Department of Consumer Affairs in consultation with the Commission on Peace Officer Standards and Training. If any school security officers subject to the requirements of this section are required to carry a firearm while performing his or her duties, the school security officer shall additionally satisfy the training requirements set forth in Penal Code section 832.

Education Code section 38001.5(c) defines "school security officer" as any person primarily employed or assigned to provide security services as a watchperson, security guard, or patrol person on or about the premises owned or operated by a school district to protect persons or property or to prevent the theft or unlawful taking of district property of any kind, or to report any unlawful activity to the district and local law enforcement agencies. Section 38001.5(d) states that no school security officer shall be employed or shall continue to be employed by the school district after July 1, 2000 until both of the following conditions have been met:

1. The applicant or employee has submitted to the district two copies of his or her fingerprints for processing by the Department of Justice and Federal Bureau of Investigation.

2. The applicant or employee has been determined not to be a person prohibited from employment by a school district or by the Department of Justice from possessing a firearm if the applicant is required to carry a firearm.

Education Code section 38001.5(e) states that every school security officer employed by a school district prior to July 1, 2000, who works more than twenty hours a week as a school security officer shall meet the training requirements by July 1, 2002.

G. Professional Development

Senate Bill 590[39] adds Education Code sections 45390, 45391, and 45392, effective January 1, 2014.

Education Code section 45390(a) states that the Legislature finds and declares that classified employees play a vital role in the education of students in our public schools and community colleges. They do the essential work that keeps our campuses safe, clean, and well

[38] Stats. 1998, ch. 7745 (S.B. 1626).
[39] Stats. 2013, ch. 723.

maintained so that our pupils and students get to school, focus on learning, and succeed at their highest levels. Section 45390(b) states that because classified school employees are on the front lines working to ensure the safety and care of pupils on our campuses, they need professional development and training to update their skills and to learn the best practices for vital education programs, including campus safety, academic achievement and curriculum standards, special education, health care, child nutrition, pupil transportation, environmental safety, and parental involvement. Section 45390(c) states that teachers and administrators serving pupils in Kindergarten through 12th grade play vital roles in supporting a pupil's ability to achieve academically and providing professional development training to teachers and administrators is essential to this goal.

Education Code section 45391(a) states that if a local educational agency (defined as a school district, county office of education, charter school, or community college district) expends funds for professional development for any school site staff, the local educational agency shall consider the needs of its classified employees. Section 45391(c) states that professional development training for classified school employees to update their skills and to learn best practices may include, but is not limited to, any of the following:

1. Pupil learning and achievement, including all of the following:

    a. Training for paraprofessionals to assist teachers and administrators to improve the academic achievement of pupils.

    b. Training to ensure the curriculum framework for the instructional materials is aligned to the Common Core State Standards.

    c. Training of the management and use of state and local pupil data to improve pupil learning.

    d. Training of the best practices and the appropriate interventions and assistance to at-risk pupils.

2. Pupil and campus safety, including training and staff development in the latest and best practices for pupil safety and campus safety.

3. Education technology, including management strategies and best practices regarding the use of educational technology to improve pupil performance.

4. School facility maintenance and operations, including new research in best practices in the operation and maintenance of school facilities, such as green technology and energy efficiency that help reduce the use and the cost of energy and school sites.

5. Special education, including training and staff development on the best practices to meet the needs of special education pupils and to comply with any new state and federal mandates.

6. School transportation and bus safety, including training and staff development on the best practices and standards for pupil transportation.

7. Parent involvement, including training and staff development to enhance the ability of a school to increase parent involvement at school sites.

8. Food service, including training and staff development on new research and findings for food preparation to provide nutritional meals and food management.

9. Health, counseling, and nursing services, including training and staff development on the latest and best practices for pupil health care and counseling needs.

10. Environmental safety, including training and staff development on pesticides and other possibly toxic substances so that they may be safely used at school sites.

Education Code section 45392 states that, "Nothing in this article prohibits a local educational agency from providing professional development to teachers and administrators." As discussed above, Section 45391(a) uses the term "shall consider"[40] but does not require a local educational agency to provide professional development for classified employees. It can be expected that this issue may be raised in collective bargaining negotiations with the classified bargaining unit.

DUTIES, QUALIFICATIONS AND RESPONSIBILITIES

A. Duties of Classified Employees

The governing board of each school district must fix and prescribe the duties to be performed by all persons in the classified service and other positions not requiring certification qualifications.[41] Classified employees may not be required to perform duties which are not fixed and prescribed for the position by the governing board unless the duties reasonably relate to those fixed for the position by the governing board for any period of time which exceeds five working days within a 15-calendar day period except as authorized.[42] An employee may be required to perform duties inconsistent with those assigned to the position by the governing board for a period not more than five working days provided that his salary is adjusted upward

[40] The Miriam Webster Collegiate Dictionary (11th Ed., 2008) defines the word "consider" as, ". . . to observe, think about, to think about carefully, to think especially with regard to taking some action, to take into account or kindly weigh, . . ."
[41] Education Code section 45109.
[42] Education Code section 45110.

for the entire period as required to work out of classification and in such amounts as will reasonably reflect the duties required to be performed outside his normal assigned duties.[43]

B. NCLB Requirements

The No Child Left Behind Act[44] (NCLB) sets forth additional qualifications for paraprofessionals who work in NCLB funded programs. Section 6319(c) of the Act[45] and Section 200.58[46] of the regulations require each school district receiving assistance under Title I funds to ensure that all paraprofessionals hired after January 8, 2002, and working in a program supported with funds under Title I shall have:

1. Completed at least two years of study at an institution of higher education;

2. Obtained an Associate's or higher degree; or

3. Met a rigorous standard of quality and can demonstrate, through a formal state or local assessment, knowledge of, and the ability to assist in instructing reading, writing, and mathematics, or knowledge of, and the ability to assist in instructing reading readiness, writing readiness, and mathematics readiness as appropriate.

Section 200.58[47] defines a paraprofessional as an individual who provides instructional support and does not include individuals who have only non-instructional duties, such as providing technical support for computers, providing personal care services, or performing clerical duties. Section 200.59(b)[48] sets forth examples of instructional support duties as follows:

1. One-on-one tutoring for eligible students, if the tutoring is scheduled at a time when a student would not otherwise receive instruction from the teacher;

2. Assisting in classroom management;

3. Assisting in computer instruction;

4. Conducting parental involvement activities;

5. Providing instructional support in a library or media center;

6. Acting as a translator;

[43] Ibid.
[44] 20 U.S.C. Section 6301 et seq.
[45] 20 U.S.C. Section 6319(c).
[46] 34 C.F.R. Section 200.58.
[47] Ibid.
[48] 34 C.F.R. Section 200.59(b).

7. Providing instructional support services.

Section 200.58[49] defines "a program supported with funds under subpart A of this part" as a paraprofessional in a targeted assistance school who is paid with NCLB funds, a paraprofessional in a schoolwide program school, or a paraprofessional employed by a local educational agency with NCLB funds to provide instructional support to a public school teacher who provides services to eligible private school students.

Under California law[50], instructional aides must pass the district proficiency exam in basic reading, writing and mathematics skills for high school seniors. While the proficiency exam has been replaced by a high school exit exam for high school seniors, California law[51] could be amended so that the proficiency exam could be utilized to meet the requirements of Section 6319(c)[52] and Equal Employment Opportunity Commission requirements that prohibit the imposition of false or artificial barriers to employment.

Section 6319(d)[53] requires existing paraprofessionals to meet these requirements by January 8, 2006. Section 6319(e)[54] and Section 200.58(e)[55] contain exceptions for paraprofessionals who are proficient in a language other than English and who provide services primarily to enhance the participation of children in programs under this part by acting as a translator, or whose duties consist solely of conducting parental involvement activities. Section 6319(f)[56] and Section 200.58(b)[57] require that school districts, regardless of the paraprofessional's hiring date, must ensure that all paraprofessionals working in a program supported with Title I funds have earned a secondary school diploma or its recognized equivalent.

Section 200.59(c)[58] states that a paraprofessional may not provide instructional support to a student, unless the paraprofessional is working under the direct supervision of a teacher who is highly qualified. A paraprofessional works under the direct supervision of a teacher if the teacher plans the instructional activities that the paraprofessional carries out, the teacher evaluates the achievement of the students with whom the paraprofessional is working, and the paraprofessional works in close and frequent physical proximity to the teacher.

Section 6319(h)[59] and Section 200.60[60] authorize a school district receiving Title I funds to use such funds to support ongoing training and professional development to assist teachers and

[49] 34 C.F.R. Section 200.58.
[50] Education Code section 45344.5.
[51] Education Code section 45344.5.
[52] 20 U.S.C. Section 6319(c).
[53] 20 U.S.C. Section 6319(d).
[54] 20 U.S.C. Section 6319(e).
[55] 34 C.F.R. Section 200.58(e).
[56] 20 U.S.C. Section 6319(f).
[57] 34 C.F.R. Section 200.58(b).
[58] 34 C.F.R. Section 200.59(c).
[59] 20 U.S.C. Section 6319(h).
[60] 34 C.F.R. Section 200.60.

paraprofessionals in satisfying the requirements of Section 6319[61]. Section 6319(i)[62] requires each school district to require that the principal of each school operating a program under Section 6314[63] (Schoolwide Programs) or 6315[64] (Targeted Assistance Schools) attest annually in writing as to whether the school is in compliance with the requirements of Section 6319.[65]

C. Work Week and Overtime

The work week of a classified employee is defined as forty hours, and the work day is defined as eight hours. A school district may establish a work day of less than eight hours or a work week of less than forty hours for all or any of its classified employees.[66]

The governing board of each school district is required to provide for compensation for overtime in a form of compensation or compensatory time off at a rate at least equal to time and one half the regular rate of pay of the employee authorized to perform the overtime.[67] Overtime is defined to include any time to be worked in excess of eight hours in any one day or in an excess of forty hours in any calendar week. If the governing board establishes a work day of less than eight hours but seven hours or more and a work week of less than forty hours but thirty five hours or more for all of its classified positions or for certain classes of classified positions, all times worked in excess of the established work day and work week are deemed to be overtime.[68]

This requirement does not apply to classified positions for which a work day of fewer than seven hours and a work week of fewer than thirty hours has been established or where employees are temporarily assigned to work fewer than eight hours per day or forty hours per week when such reductions in hours is necessary to avoid layoffs for lack of work or lack of funds and the consent of the majority of the affected employees to such reduction in hours has first been obtained.[69] For the purpose of computing the number of hours worked, time during which an employee is excused from work because of holidays, sick leave, vacation, compensating time off or other paid leave of absence shall be considered as time worked by the employee.[70]

A personnel commission or a governing board of the school district may specify that certain positions or classes of positions are supervisory, administrative or executive and exclude the employees serving in such positions from eligibility for overtime.[71] To be excluded from the overtime provisions, the positions or classes of positions must clearly and reasonably be management positions.[72]

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[61] 20 U.S.C. Section 6319.
[62] 20 U.S.C. Section 6319(i).
[63] 20 U.S.C. Section 6314.
[64] 20 U.S.C. Section 6315.
[65] 20 U.S.C. Section 6319.
[66] Education Code section 45127.
[67] Education Code section 45128.
[68] Ibid.
[69] Ibid.
[70] Education Code section 45128.
[71] Ibid.
[72] Education Code section 45130.

The work week shall consist of not more than five consecutive working days for any employee having an average work day of four hours or more during the work week. Such an employee shall be compensated for any work required to be performed on the sixth or seventh day following the commencement of the work week at the rate of one and a half times the regular rate of pay of the employee authorized to perform the work.[73] An employee having an average work day of less than four hours during a work week shall for any work required to be performed on the seventh day following the commencement of his work week be compensated for at a rate equal to one and a half times the regular rate of pay of the employee designated and authorized to perform work.[74]

The governing board of a school district may establish a ten hour per day, 40 hour, four consecutive day work week for all or certain classes of its classified employees. When by reason of the work location and duties actually performed by such employees their services are not required for a work week of five consecutive days, provided the establishment of such a work week has the concurrence of the concerned employee, class of employees or classes of employees as ascertained through the employee organization representing a majority of the concerned employees or classes of employee, a four day alternative work week can be implemented.[75] When a four day work week is established, the overtime rate shall be paid for all hours worked in excess of the required work day which shall not exceed ten hours. Work performed on the fifth, sixth and seventh day shall be compensated for at a rate equal to one and a half times the regular rate of pay of the employee authorized to perform the work.[76] Employees working a four day work week are entitled to pay at the rate of time and a half for holidays which fall outside their work week or on the fifth day of their work week.[77]

Assembly Bill 226[78] adds Education Code section 45133.5, effective January 1, 2014. Education Code section 45133.5 authorizes the governing board of a school district or a county superintendent of schools to establish a 12-hour per day, 80-hour for two-week work schedule for school police departments, provided the establishment of the work schedule is consented to in a valid collective bargaining agreement that contains the following provisions:

1. Express provisions for the wages, hours of work, and working conditions of employees.

2. Express provisions for meal periods of employees, and final and binding arbitration of disputes concerning application of the meal period provisions.

3. Premium wages for all overtime hours worked.

4. A regularly hourly rate of pay of not less than 30% more than the state minimum wage rate.

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[73] Ibid.
[74] Education Code section 45131.
[75] Education Code section 45132.
[76] Ibid.
[77] California School Employees Association v. Oakland Unified School District, 141 Cal.App.3d 190 (1983).
[78] Stats. 2013, ch. 73.

Education Code section 45133.5(b) states that when a 12-hour per day, 80-hour per two-week work schedule is established, it shall consist of seven work days, six of which shall be 12-hour days and one which shall be an 8-hour day. The overtime rate shall be paid for all hours worked in excess of the required work day, at a rate equal to one and one-half times the regular rate of pay for the employee. Section 45133.5(c) states that when a 12-hour per day, 80-hour per two-week work schedule is established, the work week shall be defined so that no employee will be required to work more than 40 hours during any given work week.

D. Physical Examination

A governing board of a school district may require a physical examination to be taken by a classified employee either by rule or under the direction of an authorized district administrator as a condition of employment or continuation of employment.[79] No person may be employed or retained in employment in the classified service who has been convicted of a specified sex offense, controlled substance offense, or who has been determined to be a sexual psychopath.[80]

E. Age Limits

No minimum or maximum age limits may be established for the employment or continuance in employment of persons in classified positions.[81] However, no person shall be employed in school employment while he or she is receiving a retirement allowance under any retirement system by reason of prior school employment except if an aide is needed in a class with a high pupil-teacher ratio, or an aide is needed to provide one-on-one instruction in remedial classes or for underprivileged students.[82]

F. Residency and Uniforms

No school district may adopt or maintain any rule or regulation requiring a candidate for a position in the classified service to be a resident of the district or to become a resident of the district or to maintain residency within a district.[83] The governing board of a school district may require wearing of a distinctive uniform by classified personnel. The cost of the purchase, lease or rental of uniforms, equipment, identification badges, emblems and cards required by the district must be borne by the district.[84]

G. Working out of Classification

Education Code section 45110 states that an employee shall not be required to perform duties which are not fixed and prescribed for the position by the governing board unless the duties reasonably relate to those fixed for the position by the board for any period of time which exceeds five (5) working days within a fifteen (15) calendar date. An employee may be required to perform duties inconsistent with those assigned to the position by the governing board for a

[79] Education Code section 45122.
[80] Education Code sections 45123, 45124.
[81] Education Code section 45134.
[82] Ibid.
[83] Education Code section 45111.
[84] Education Code section 45138.

period of more than five (5) working days provided that his salary is adjusted upward for the entire period he is required to work out of classification in such amounts as what reasonably reflect the duties required to be performed outside his normal assigned duties.

H. Conviction of Specified Offenses

No person who has been convicted of any sex offense or controlled substance offense may be employed or retained in employment by a school district.[85] If, however, the conviction is reversed and the person is acquitted of the offense in a new trial or the charges against the employee are dismissed, the individual is not prohibited from being employed.[86] A governing board of a school district may employ a person convicted of a controlled substance offense if the governing board of the school district determines, from the evidence presented, that the person has been rehabilitated for at least five years. The governing board shall determine the type and manner of presentation of the evidence, and the determination of the governing board as to whether or not the person has been rehabilitated is final.[87]

No person who has been convicted of a violent or serious felony shall be employed by a school district. In addition, a school district shall not retain in employment a current classified employee who has been convicted of a violent or serious felony.[88]

In Cahoon v. Governing Board of Ventura Unified School District,[89] the Court of Appeal held that a permanent classified school district employee who enters a plea of nolo contendere for a misdemeanor controlled substance offense could not be automatically terminated.

The school district terminated Cahoon after he pled nolo contendere to forging, altering and/or issuing a prescription for a controlled substance, which was a misdemeanor in violation of Health and Safety Code section 11368. The school district, relying on Education Code section 44009(b), claimed the offense was a controlled substance offense and required automatic termination pursuant to Education Code section 45123. The trial court found the nolo contendere plea was not a conviction within the meaning of Education Code section 45123(b) and ordered the employee's reinstatement. The Court of Appeal affirmed.[90]

The Court of Appeal held that Penal Code section 1016(3) provides that a plea of nolo contendere to a misdemeanor may not be used against the defendant as an admission in any civil suit based upon or growing out the act upon which the criminal prosecution is based. For purposes of Penal Code section 1016, a civil suit includes an administrative proceeding under the Education Code.[91]

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[85] Education Code section 45123. See, Appendix I for a list of prohibited offenses.
[86] Education Code section 45123(c).
[87] Education Code section 45123(d).
[88] Education Code section 45122.1. See, Appendix I for a list of violent or serious felonies.
[89] 171 Cal.App. 4th 381 (2009).
[90] Id. at 383
[91] *See*, Gebremichael v. California Commission on Teacher Credentialing, 118 Cal.App.4th 1477, 1488, 13 Cal.Rptr.3d. 777 (2004).

In Cartwright v. Board of Chiropractic Examiners,[92] the California Supreme Court held that a licensing board cannot revoke a chiropractor's license after the chiropractor pled nolo contendere to a moral turpitude offense. The Supreme Court held that a conviction by plea of nolo contendere may not be used in an administrative proceeding to impose discipline absent legislative authorization.[93]

In response to Cartwright, Education Code section 45123 was amended to prohibit a school district from employing any person convicted of a sex offense based on a nolo contendere plea.[94] Education Code section 45123(a) now states that a nolo contendere plea to a sex offense shall be deemed to be a conviction. However, the Legislature made no substantive changes with respect to convictions for controlled substance offenses, and did not amend Education Code section 45123(b) in a similar manner. Therefore, the Court of Appeal held that the employee was entitled to reinstatement and may not be terminated due to entering a plea of nolo contendere to a misdemeanor controlled substance offense. The Court noted the Legislature is free to amend Education Code section 45123(b) but has not done so.

SALARY AND STATUTORY BENEFITS

A. Salary

The governing board of a school district is required to fix, and order paid, the compensation of persons employed in classified positions.[95] During the school year, the governing board of a school district may at any time increase the annual salary of persons employed in classified positions.[96] The governing board of a school district may also condition any increase in salary upon the actual receipt by the district of anticipated revenue and if the revenue actually received is less than anticipated, the governing board may, at any time during the school year, reduce the annual salaries by an amount not to exceed the amount which was granted subject to the receipt of such revenues.[97]

In districts which have adopted a merit system, the personnel commission must recommend to the governing board of the school district salary schedules for the classified service. The governing board may approve, remand or reject those recommendations, but no amendment may be adopted until the commission is first given a reasonable opportunity to make a written statement of the effect the amendments would have on the principle of like pay for like service. Also, no changes may disturb the relationship that compensation schedules bear to one another as that relationship has been established in the classifications made by the commission.[98] Regardless of this requirement, the governing board of the school district has the authority to set salaries for individual job classifications and is required to bargain in good faith with the public employees' exclusive representative.[99]

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[92] 16 Cal.3d 762, 129 Cal.Rptr. 462 (1976).
[93] Id. at 773-74.
[94] Stats. 1990, ch. 596 (Senate Bill 2072).
[95] Education Code section 45160.
[96] Education Code section 45162(b).
[97] Education Code section 45162(a).
[98] Education Code section 45268.
[99] Sonoma County Board of Education v. Public Employment Relations Board, 33 Cal.3d 850, 191 Cal.Rptr. 800 (1983).

B. Differential Compensation

The Education Code authorizes differential compensation to be paid to classified employees for different shifts. Differential compensation is defined either as a reduction in the number of hours required to be worked or an increase in salary.[100] The governing board of every school district or the personnel commission to any merit system must determine the practices relating to morning and night shift salary differentials in the private sector in which it must compete for employees for its classified staff in considering the advisability of providing comparable salary differentials for its classified staff.[101] The governing board of a school district may provide differential compensation to those classified employees who perform duties of a distasteful, dangerous or unique nature when in the opinion of the governing board, such compensation is reasonably justified. In a merit system district, such differential pay shall be based upon the findings and recommendations of the personnel commission and shall not be applied in a manner contrary to the principle of like pay for like service.[102]

Assignment to duties for which differential compensation is designated, other than a temporary assignment of less than twenty working days, shall be made on the basis of seniority among those employees within the appropriate class who request such an assignment.[103] No employee assigned to work a shift entitled to differential compensation shall be demoted in class or grade as a result of such an assignment.[104] An employee receiving differential compensation on the basis of a shift shall not lose such compensation if he or she is temporarily, for twenty working days or less, assigned to a shift not entitled to such compensation. The regular rate of pay for all purposes of an employee assigned to a shift which provides differential compensation shall be the differential rate.[105]

C. Sick Leave and Other Benefits

All probationary and permanent part time classified employees shall be entitled to sick leave and all other benefits conferred by law on classified employees on a prorated basis in the same ratio as the regular work hours per day, days per week, weeks per month and months per year of such part time employees bear to eight hours per day, forty hours per calendar week, four calendar weeks per month or twelve calendar months during the school year.[106] A classified employee who works a minimum of thirty minutes per day in excess of his part time assignment for a period of twenty consecutive working days or more shall have his basic assignment changed to reflect the longer hours in order to acquire benefits on a properly prorated basis.[107]

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[100] Education Code section 45180.
[101] Education Code section 45181.
[102] Education Code section 45182.
[103] Education Code section 45183.
[104] Education Code section 45184.
[105] Education Code section 45185.
[106] Education Code section 45136.
[107] Education Code section 45137.

Education Code section 45136 states that all part-time probationary and permanent classified employees shall be entitled to sick leave and all other benefits conferred by law on classified employees. Such leaves and benefits may be prorated in the same ratio as the regular work hours per day, days per week, weeks per month, or months per year of such part-time employees bear to eight hours per day, 40 hours per calendar week, four calendar weeks per month, or 12 calendar months during the school year. In essence, an employee who works 20 hours per calendar week would receive 50% of sick leave and other benefits, including vacation and paid holidays.

D. Union Dues and Service Fees

The governing board of each school district when drawing an order for the salary or wage payment due to a classified employee of the district may, without charge, reduce the order by the amount which has been requested, in a revocable written authorization by the employee, to deduct for the payment of dues to any bona fide organization of which he is a member.[108] The revocable written authorization shall remain in effect until expressly revoked in writing by the employee.[109]

Whenever there is an increase in an amount required for such payment to the organization, the employee organization shall provide the employee with adequate and necessary data on such increase at a time sufficiently prior to the effective date of the increase to allow the employee an opportunity to revoke the written authorization if desired.[110] The employee organization shall provide the public school employer with notification of the increase at a time sufficiently prior to the effective date of the increase to allow the employer an opportunity to make the necessary changes and with the copy of the notification of the increase which was sent to all concerned employees.[111]

Upon receipt of a properly signed authorization for payroll deduction by a classified employee, the governing board shall reduce such employee's pay warrant by the designated amount in the next pay period following the closing date for receipt of changes in pay warrants. The governing board shall, on the same designated date of each month, draw its order upon the funds of the district in favor of the organization designated by the employee for the amount equal to the total of the respective deductions made with respect to such organization during the pay period. The governing board shall not require the completion of a new deduction authorization when a dues increase has been affected or at any other time without the express approval of the concerned employee organization.[112]

Pursuant to an organizational security agreement negotiated between the exclusive representative and a public school employer, the governing board of each school district, when drawing an order for the salary or wage payment due to a classified employee may, without charge, reduce the order for the payment of dues to, or for any other service provided by the

[108] Education Code section 45168.
[109] Ibid.
[110] Education Code section 45168(a).
[111] Ibid.
[112] Education Code section 45168(a).

certified or recognized organization of which the classified employee is a member, or for the payment of service fees to the certified or recognized organization as required by an organizational security arrangement. However, the organizational security arrangement shall provide that any employee may pay service fees directly to the certified or recognized employee organization in lieu of having such service fees deducted from the salary or wage order.[113]

HOLIDAYS

A. Statutory Provisions

The Education Code provides that all probationary or permanent classified employees are entitled to certain specified paid holidays provided that they were in a paid status on any part of the working day immediately preceding or following a specified holiday.[114] When a specified holiday falls on a Sunday, the following Monday shall be deemed the holiday in lieu of the day observed. When a specified holiday falls on a Saturday, the preceding Friday shall be deemed the holiday in lieu of the day observed.[115]

When the President of the United States appoints or declares a holiday, classified employees are entitled to a holiday.[116] The President's proclamation, however, must indicate that the President contemplated a national holiday.[117]

When a classified employee is required to work on any of the specified holidays, the classified employees shall be entitled to compensation or compensating time off at the rate of one and a half times the employee's regular rate of pay.[118] Although governing boards of school districts may adopt separate work schedules for certificated and classified employees, on any school day during which pupils would otherwise have been in attendance, but are not and for which certificated personnel receive regular pay, classified personnel shall also receive regular pay whether or not they are required to report for duty that day.[119]

B. Staff Development Days

In California School Employees Association v. Torrance Unified School District,[120] the Court of Appeal held that classified employees who did not work on staff development student free days were not entitled to be paid their regular wages. The Court of Appeal ruled that Education Code section 45203 did not require school districts to pay the classified employees.[121]

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[113] Education Code section 45168(b).
[114] Education Code section 45203.
[115] Ibid.
[116] Education Code sections 45203.
[117] California School Employees Association v. Governing Board, 8 Cal.4th 333, 33 Cal.Rptr.2d 109 (1994).
[118] Education Code section 45203.
[119] Education Code section 45203; California School Employees Association v. Tamalpais Union High School District, 159 Cal.App.3d 879, 206 Cal.Rptr. 53 (1984); California School Employees Association v. Azusa Unified School District, 152 Cal.App.3d 580, 199 Cal.Rptr. 635 (1984).
[120] 182 Cal.App.4th 1040, 106 Cal.Rptr.3d 375 (2010).
[121] Id. at 1042-43.

In the 2006-2007 school year, the school district provided 180 days of instruction to students, from September 7, 2006 to June 21, 2007. School was closed and no credentialed teachers worked on Saturdays, Sundays, statewide school holidays and local school holidays designated by the district pursuant to Education Code section 37220(a)(13). The school district designated the days before and after Thanksgiving, winter break from December 22, 2006 to January 5, 2007, and spring break from April 9 to April 13, 2007, as local holidays.[122]

Teachers were paid for working 185 days from September 5, 2006 to June 22, 2007. In addition to the 180 instructional days when students were present, teachers worked on September 5, 2006, two days before classes started, and June 22, 2007, the day after classes ended. Teachers also worked on three staff development student free days, also known as in-service days, which were on September 6, 2006, October 9, 2006, and February 2, 2007. In-service days were not statewide or local school holidays.[123]

Three categories of classified employees – paraeducators, instructional assistants, and educational assistants – special education were not paid for the staff development student free days on October 9, 2006 and February 2, 2007. CSEA argued that these employees were entitled to be paid their regular wages under Education Code section 45203. The relevant Section of Education Code section 45203 states, in part:

> "Notwithstanding the adoption of separate work schedules for the certificated and the classified services, on any school day during which pupils would otherwise have been in attendance but are not and for which certificated personnel receive regular pay, classified employees shall also receive regular pay whether or not they are required to report for duty that day."

The school district contended that the staff development student free days were not school days during which pupils would otherwise have been in attendance within the meaning of Section 45203. The Court of Appeal agreed.[124]

The Court of Appeal noted that in order to obtain funding from the state, the district must provide at least 180 days of instruction to its students during the academic year.[125] The district scheduled 180 days of instruction for the 2006-2007 school year. The staff development student free days were in addition to, not in lieu of, the 180 days of instruction. Therefore, the court concluded that these days were not school days during which pupils would otherwise have been in attendance. The Court of Appeal stated, "Accordingly, under the plain meaning of the statute, as applied here, classified employees who did not work on staff development student free days were not entitled to be paid regular wages for such days."[126]

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[122] Id. at 1043.
[123] Ibid.
[124] Id. at 1045.
[125] Id. at 1045. See, also, Education Code section 46200(c).
[126] Id. at 1045.

The Court of Appeal reviewed the legislative history of Section 45203 and noted that former Section 13656 (the predecessor to Section 45203) stated that classified employees were entitled to be paid on statewide school holidays and local school holidays declared by the governing board. In 1967, former Section 13656 was amended to extend to any holiday declared for classified or certificated employees. In 1974, the Attorney General issued an opinion stating that because former Section 13656 applied to both classified and certificated employees, classified employees were to be paid for local school holidays declared for certificated employees. Under the Attorney General's opinion, many classified workers who normally work during the Christmas and Easter recess periods would arguably be working on local holidays, and be entitled to overtime pay at the rate of 1.5 times their regular rate of pay. [127]

In response to the Attorney General's opinion, former Section 13656 was amended in three major ways. First, Section 13656 was amended to state that school recesses during the Christmas and Easter periods, which could be designated as local holidays, should not be considered holidays for classified employees who were normally required to work during that period. Second, former Section 13656 was amended to expressly allow school districts to adopt separate work schedules for certificated and classified employees. Third, the statute was amended to include the language in dispute, which stated that notwithstanding the adoption of separate work schedules for the certificated and classified employees, on any school day during which students would otherwise have been in attendance but are not, and for which certificated employees receive regular pay, classified personnel shall also receive regular pay, whether or not they are required to report for duty that day.[128]

The Court of Appeal concluded that the plain language of Section 45203, when read in context, and the legislative history of the statute, indicate that the phrase "any school day during which pupils would otherwise be in attendance" refers to days declared as local school holidays, such as Columbus Day or a day with severe climatic conditions, on which both students and teachers do not attend school. Section 45203, the court ruled, provides that if teachers receive regular pay on such days, classified employees shall also receive regular pay whether or not they are required to report for duty. The Court of Appeal concluded that Section 45203 does not apply to staff development student free days scheduled by the district because these days are not holidays and because they are days on which teachers work.[129]

The Court of Appeal ruled that the prior case of California School Employees Association v. Azusa Unified School District[130] did not consider the context of the disputed language of Section 45203 and did not address whether local holidays for students and professional/conference days were in lieu of student instruction days, nor did the court in Azusa Unified School District consider the legislative history of Section 45203. Therefore, the Court of Appeal stated, ". . . To the extent Azusa conflicts with our holding here, we decline to follow it."

[127] Id. at 1046. See, also, 57 Ops.Cal.Atty.Gen. 116 (1974).
[128] Id. at 1046-47.
[129] Id. at 1047-48.
[130] 152 Cal.App.3d 580, 590 (1984).

The Court of Appeal stated that, based on the language of Section 45203 and the legislative history, the classified employees who did not work on staff development student free days were not entitled to be paid regular wages for those days under Section 45203.[131]

C. Employees with Alternate Schedules

Education Code section 45206 states:

> "Any school district which requires any classified employee to work a work-week other than Monday through Friday, or if such classified employee consents to a workweek including Saturday or Sunday or both, pursuant to section 44048, and as a result thereof the employee loses a holiday to which he or she would otherwise be entitled shall provide a substitute holiday for such employee, or provide compensation in the amount to which the employee would have been entitled had the holiday fallen within his or her normal work schedule."

Therefore, if an employee works a four-day work week, for example, the employee would be entitled to holiday pay or an alternate holiday. In our opinion, this same rule would apply to part-time employees. For example, if an employee works 20 hours per week on Tuesday and Thursday, and a holiday falls on Monday, the employee would be entitled to four hours of holiday pay for the Monday holiday. The district could provide the four hours of holiday pay by giving the employee four hours off on Tuesday or Thursday, or by paying the employee four hours of pay. If the employees work ten hours per week, the employees would be entitled to two hours of holiday pay.

In California School Employees Association v. Oakland Unified School District,[132] the Court of Appeal held that with respect to full-time employees working a four-day work week, the employees were entitled to holiday pay at one and one-half times the rate of their regular pay. The district had chosen not to give the employees time off. By not giving the employees time off, the employees, in effect, worked more than 40 hours per week and, thus, were entitled to overtime or time and a half. The Court of Appeal stated:

> "A classified school employee who has a conventional five-day work week (Monday through Friday) will receive the benefit of each of these holidays as it falls within the work week. If it falls outside the work week, on a Saturday or Sunday, this employee will certainly receive its benefits because section 45203 provides that it will be observed on the preceding Friday or the following Monday. In either event, the five-day work week employee will receive the particular day off, with pay, or time plus time and a

[131] Id. at 1048-49.
[132] 141 Cal.App.3d 624 (1983).

half if he or she is required to work on that day, pursuant to the fifth sentence of section 45203."

The court held that the Legislature intended to hold the disadvantaged employees harmless from the accidental consequences of their four-day work weeks by providing in section 45206 that an employee who "loses a holiday" by reason of a work week other than Monday through Friday shall receive either a substitute holiday or compensation in money for the money lost. The court held that there was no reason to believe that the alternative compensation in money was intended to include straight time for a day on which the employee did not work and could not have worked. The court held that the alternative compensation was intended to be the time and one-half holiday premium pay the employee actually lost.

Education Code section 45206 further states that in order to receive holiday pay, an employee must be in paid status during any portion of the working day immediately preceding or succeeding a holiday did not apply to employees on alternative work schedules. The intent of section 45206 was to treat employees on alternative work schedules in the same manner as employees on five-day work schedules, and in the court's opinion, section 45206 applied to part-time employees as well. Therefore, so long as the employees on alternative work schedules were on paid status before the holiday and after the holiday, according to their work schedule, they were entitled to holiday pay. The intent of Section 45203 was to exclude employees who are on unpaid leaves of absence before or after a holiday from holiday pay, or to exclude classified employees who worked a ten-month schedule from holidays during the summer.

VACATION

The Education Code requires every public school to grant regular classified employees an annual vacation at the regular rate of pay earned at the time the vacation is commenced.[133] The Education Code specifies the means for calculating the accrual of vacation and provides part time employees with prorated vacation. Vacation may, with the approval of the school district, be taken at any time during the school year. If the employee is not permitted to take his full annual vacation, the amount not taken shall accumulate for use in the next year or be paid in cash at the option of the governing board.[134]

The employee may be granted vacation during the school year even though it has not been earned at the time the vacation is taken.[135] Upon termination from the school district, the employee shall be entitled to lump sum compensation for earned and unused vacation accumulated in the current and previous fiscal year. However, employees who have not completed six months of employment in regular status are not entitled to such compensation.[136]

The question of whether a classified employee was entitled to all of their accumulated vacation prior to the previous fiscal year was decided in Seymour v. Christiansen.[137] Plaintiff,

[133] Education Code section 45197.
[134] Education Code section 45197(d).
[135] Education Code section 45197(f).
[136] Education Code section 45197(h).
[137] Seymour v. Christiansen, 235 Cal.App.3d 1168 (1991).

Helen Seymour, was a school district secretary who retired in 1986 without having taken any vacation in 21 years. When she retired, she demanded that the district compensate her for all her unused vacation time. The district refused, and she sued the school district for breach of contract and implied covenant of good faith and fair dealing.[138]

The Court of Appeal held that a lump sum payment to a classified employee for accrued but unused vacation time would violate Article IV, section 17 and Article XI, section 10 of the California Constitution, both of which prohibit a public agency from granting, without authority of law, extra compensation to a public employee after service has been rendered. The Court of Appeal noted that courts have permitted recovery to public employees of accumulated benefits or compensation when payment was specifically authorized by statute, ordinance, resolution, rule, regulation, or contract.[139]

The Court of Appeal noted that the right of classified employees to accumulate vacation is governed by Education Code section 45197(d), which states that vacation shall accumulate for use in the next year or be paid for in cash at the option of the governing board. The Court of Appeal interpreted the statute as permitting unused vacation to be carried over for only one year during which the accumulated vacation must be used, or, at the district's option, the employee must be paid in cash. The Court concluded that neither the Education Code or any other provision of law, nor the employee's employment contract authorized a lump sum payment of all accrued vacation upon retirement, and that therefore, such payment would constitute extra compensation for work already performed in violation of Article IV, section 17 and Article XI, section 10 of the California Constitution.[140]

LEAVES OF ABSENCE

A. Sick Leave

In both merit and non-merit districts, the Education Code contains certain statutory provisions which require the governing boards of school districts to grant certain specified types of leaves of absence to classified employees. In addition, the governing boards of school districts may grant additional leaves of absence with or without pay to classified employees.[141]

Every classified employee employed five days a week by a school district is entitled twelve days leave of absence for illness or injury and such additional days as the governing board may grant.[142] Part time employees are entitled to a prorated amount of sick leave.[143] Sick leave accumulates from year to year.[144]

B. Industrial Accident and Illness Leave

[138] Ibid.
[139] Id. at 1178.
[140] Seymour v. Christiansen, 235 Cal.App.3d. at 1178.
[141] Education Code section 45190.
[142] Education Code section 45191.
[143] Education Code sections 45136, 45191.
[144] Education Code section 45191.

Classified employees are entitled to industrial accident and illness leave for not less than sixty working days in any one fiscal year for the same accident.[145] Each school district must adopt rules and regulations which include allowable leave for not less than sixty working days in any one fiscal year for the same accident, which shall not accumulate from year to year. Industrial accident or illness leave commences on the first day of absence. Payment for wages lost in any day shall, when added to an award granted the employee under the workers' compensation laws of this state, not exceed the normal wage for the day. Industrial accident leave will be reduced by one day for each day of authorized absence regardless of compensation award made under workers' compensation. When the sixty days overlap into the next fiscal year, the employees shall be entitled to only that amount remaining at the end of the fiscal year in which the illness or injury occurred.[146]

C. Extended Sick Leave

All classified employees are entitled to extended sick leave benefits for a period of five months or less whether or not the absence arises out of or in the course of employment of the employee.[147] The employee shall have deducted from his salary a sum actually paid a substitute employee employed to fill his position during his absence or if the district has adopted an alternative procedure, the employee shall be paid fifty percent of his regular salary for one hundred working days.[148] The time period for the extended sick leave benefits commences on the first day of illness.[149]

In California School Employees Association v. Tustin Unified School District,[150] the Court of Appeal held that when a classified school district employee is on disability leave for five months or less, the employer may not, under Education Code section 45196,[151] deduct from the absent employee's salary, an amount exceeding the sum actually paid a substitute employee employed to fill his position during his absence. The Court of Appeal held that a substitute employee under Education Code section 45196 does not include a currently employed classified employee who is assigned the absent employee's hours or tasks.

The Court of Appeal held that Education Code section 45103[152] defines a substitute employee as any person employed to replace any classified employee who is temporarily absent from duty. The Court of Appeal concluded that the term substitute employee, as used in Section 45196 and defined in Section 45103, means a person hired for the purpose of filling in for a temporarily absent employee. The Court of Appeal held that a substitute employee does not include a current classified employee who is assigned voluntarily or involuntarily the absent employee's hours or tasks.[153]

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[145] Education Code section 45192.
[146] Ibid.
[147] Education Code section 45196.
[148] Ibid.
[149] 53 Ops.Cal.Atty.Gen. 111 (1970).
[150] 148 Cal.App.4th 510, 55 Cal.Rptr.3d 739 (2007).
[151] Education Code section 88196 for community college districts.
[152] Education Code section 88003 for community college districts.
[153] 148 Cal.App.4th 510, 514 (2007).

The Court noted that in CSEA v. Tustin Unified School District, the school district did not adopt Education Code section 45196's alternative scheme for compensating temporarily disabled employees which authorizes school districts to maintain a policy for crediting regular classified employees with not less than 100 working days per year of paid sick leave compensated at 50% of the employee's regular salary.

The Court of Appeal reviewed that the underlying facts and found that the employee was placed on a five month disability leave of absence. Since 1978, the school district had maintained the practice of offering some or all of the hours made available by a classified employee's disability leave of absence to other regular classified employees willing to work additional hours. When other qualified employees from the same job classification are not available to accept the hours made available by the disability leave of absence, the school district hires nonemployee substitutes to work the absent employee's hours. The school district deducts from the wages of a classified employee on disability leave the amount paid to the current employee or hired substitute who worked the absent employee's hours. On any given day of absence, the total amount deducted does not exceed the amount of the absent employee's pay for that day.[154]

In this case, the school district utilized nine different people to work the employee's hours while she was on disability leave. Six of those persons were school district employees. They voluntarily accepted the additional work normally assigned to the employee to supplement their income. The other three were nonemployees from the school district's roster of substitutes. The school district deducted from the employee's pay the amounts paid both to the existing classified employees and to the hired nonemployee substitutes who worked her hours.[155]

The Court of Appeal held that the plain language of Section 45196 does not permit a school district to deduct from the employee's pay the amounts paid to the six existing employees. The Court of Appeal pointed out that as an alternative, a school district may adopt and maintain a rule requiring the school district to credit a regular classified employee with at least 100 working days per year of sick leave, compensated at not less than 50 percent of the employee's regular pay.[156]

Districts should consider adopting the alternative rule if districts have a practice of assigning existing employees additional hours when an employee is on leave.

In CSEA v. Colton Joint Unified School District,[157] the Court of Appeal held that a school district may not run the 100-days under Education Code section 45196 concurrently with accrued vacation leave, even if the district and the union have agreed to such coordination in their collective bargaining agreement.[158]

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[154] Id. at 515.
[155] Ibid.
[156] Id. at 520.
[157] 170 Cal.App.4th 857, 88 Cal.Rptr.3d 486 (2009).
[158] Id. at 859.

Education Code section 45196 provides in part:

> ". . . The foregoing provisions shall not apply to any school district which adopts and maintains in effect a rule which provides that a regular classified employee shall once a year be credited with a total of not less than 100 working days of paid sick leave, including days to which he is entitled under Section 45191. Such days of paid sick leave in addition to those required by Section 45191 shall be compensated at not less than 50 percent of the employee's regular salary. **The paid sick leave authorized under such a rule shall be exclusive of any other paid leave, holidays, vacation, or compensating time to which the employee may be entitled**." [Emphasis added.]

Notwithstanding the language in bold from the statute, the district believed it could run the vacation and 100-day leave concurrently because of the language of its collective bargaining agreement which provided:

> "When entitlement for industrial accident or illness leave has been exhausted (60 days), the District will coordinate the following: a. Temporary Disability; b. Sick Leave; c. Vacation; d. Long-Term Illness Leave (100-day half-pay benefit) keeping the employee in a full-pay status with benefits as long as accumulated benefits allow."[159]

The past practice of the District was to run vacation leave and 100-day leave concurrently. The Court, however, held that the agreement did not clearly permit this practice and even if it did, the statutory rights of the employees would prevail over the agreement.[160]

The Court held that the plain language of Section 45196 provides that 100-day leave is exclusive of vacation. All districts (those who have implemented a 100-day leave provision and those who have not) should allow employees to use their accrued vacation before deducting from the employee's differential/50% pay leave entitlement.

D. Leaves of Absence – Break in Service

Periods of leaves of absence, paid or unpaid, shall not be considered a break in service. During all paid leaves of absence, whether industrial accident leave, sick leave, vacation, compensated time off or other leave provided by law or the action of the governing board, the employee shall endorse to the district wage loss benefit checks received under the workers' compensation laws of the state to the district.[161] The district in turn shall issue the employee

[159] Id. at 864.
[160] Id. at 864-65.
[161] Education Code section 45192.

appropriate warrants for payment of wages or salary and shall deduct normal retirement and other authorized reduction.[162]

E. Exhaustion of Leave

When all available leaves of absence, paid or unpaid, have been exhausted, and if the employee is not medically able to assume the duties of his or her position, the employee may, if not placed in another position, be placed on a reemployment list for thirty-nine months.[163] Prior to placing the employee on the 39-month reemployment list, the district should engage in the interactive process of reasonable accommodation as required by federal and state disability laws. If the employee cannot be reasonably accommodated, then the district may place the employee on the 39-month reemployment list. When available, during the thirty-nine month period, the person shall be employed in a vacant position in the class of the person's previous assignment over all other available candidates except for a reemployment list established because of lack of work or lack of funds, in which case the person shall be listed in accordance with appropriate seniority regulations.[164]

Education Code section 45195 contains similar language. Section 45195 states in part, "Upon resumption of duty, the break in service will be disregarded and the employee shall be fully restored as a permanent employee."[165] However, an employee, ". . . who has been medically released for return to duty and who fails to accept an appropriate assignment shall be dismissed."[166]

Therefore, an employee who has failed to accept an appropriate offer of a position may be taken off the 39-month reemployment list and considered terminated as a matter of law. An employee who has accepted an offer of an appropriate assignment, upon resumption of their duties, the break in service will be disregarded and the employee will be restored to all the rights and duties of a permanent employee. However, if that employee fails to report for work on a regular basis, the employee may be documented and disciplined in the same manner as other permanent classified employees.

An employee is not entitled to a hearing prior to being placed on the thirty-nine month reemployment list. Placement on the list is not a disciplinary action.[167]

F. Pregnancy Leave

The governing board of a school district may provide for leave of absence from duty due to pregnancy or convalescence following childbirth.[168] The employee shall be entitled to sick leave benefits for absence due to illness or injury resulting from pregnancy.[169]

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[162] Ibid.
[163] Education Code section 45192.
[164] Ibid.
[165] Education Code section 45195.
[166] Education Code section 45192(f).
[167] Trotter v. Los Angeles County Board of Education, 167 Cal.App.3d 891, 213 Cal.Rptr. 841 (1985).
[168] Education Code section 45193.
[169] Ibid.

G. Bereavement Leave

Every classified employee must be granted a bereavement leave of absence, not to exceed three days or five days if out of state travel is required, on account of the death of any member of his immediate family. No deduction shall be made from the salary of such employee nor shall such leave be deducted from leave granted by other sections of this code or provided by the governing board of the district.[170] Members of the immediate family are defined as mother, father, grandmother, grandfather, or a grandchild of the employee or of the spouse of the employee and the spouse, son-in-law, daughter, daughter-in-law, brother, or sister of the employee or any relative living in an immediate household of the employee or any relative defined by the governing board.[171]

H. Transfer of Sick Leave

Any classified employee of the school district or county superintendent of schools who has been employed for a period of one calendar year or more whose employment is terminated other than for cause and who subsequently accepts employment with another school district, community college district, or county superintendent of schools within one year of such termination of his former employment, is entitled to have his sick leave transferred to the second district or county superintendent of schools.[172]

I. Personal Necessity Leave

Classified employees shall be entitled to personal necessity leave not to exceed seven days in any school year in the event of death of a member of the immediate family when additional leave is required beyond bereavement leave, the cause of an accident involving his person property or the personal property of a member of his immediate family, the appearance in any court before any administrative tribunal and for such other reasons as may be prescribed by the governing board.[173]

J. Due Process Before Being Placed on Sick Leave

Classified employees are entitled to notice and an opportunity for a hearing before being placed on involuntary sick leave. Under what circumstances classified employees are entitled to a hearing is somewhat unclear.[174]

In Bostean v. Los Angeles Unified School District,[175] the Court of Appeal held that a permanent classified school district employee was entitled to notice and a hearing before being placed on involuntary sick leave.

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[170] Education Code section 45194.
[171] Ibid.
[172] Education Code section 45202.
[173] Education Code section 45207.
[174] Bostean v. Los Angeles Unified School District, 63 Cal.App.4th 95, 73 Cal.Rptr.2d 523 (1998).
[175] Ibid.

Plaintiff George Bostean was a permanent classified employee who suffered from diabetes and epilepsy. Since September 1990, he had been working subject to certain restrictions which had been imposed by his personal physician. In November 1993, he was placed on indefinite, unpaid, involuntary sick leave. He was not provided notice of any allegations prior to being placed on involuntary sick leave, nor was he afforded a hearing.

The employee appealed to the district personnel commission under a rule permitting such appeals from placement of an employee on involuntary illness leave. Eventually, the employee was examined by a district-appointed physician, who concluded that the employee was capable of working with certain minimal restrictions. Approximately seven months after the employee was placed on involuntary sick leave, the personnel commission granted his appeal and determined that he could return to work. The district denied the employee's request for back pay for the period of the leave. The employee sued the district, the personnel commission, and the personnel director, alleging violation of the due process clause of the United States Constitution.

The Court of Appeal held that the employee had a protectable property interest in maintaining his job that was impaired when he was involuntarily placed on unpaid sick leave. In this regard, the court stated that the district's action was tantamount to a suspension without pay, and can properly be viewed as punitive or disciplinary. The court held further that the employee was entitled to a hearing before he was placed on involuntary sick leave. The court held that since the employee was wrongfully deprived of a property interest, he was entitled to a writ of mandate directing that the district reinstate his lost benefits and/or salary for the period of the involuntary leave.

Since George Bostean was eventually reinstated in his position, the court did not address whether a pretermination hearing would be required prior to placement of a classified employee on the 39-month reemployment list. In Trotter v. Los Angeles County Board of Education,[176] the Court of Appeal held that a probationary personnel analyst with the county board of education was not entitled to hearing after due notice concerning her placement on the 39-month list caused by her inability to perform her duties due to medical reasons because her placement on the list was not disciplinary.

MERIT SYSTEM

A. Adoption of the Merit System

The Education Code permits school districts to adopt a merit or civil service system for its classified employees.[177] In any district that has an average daily attendance of three thousand or more, the classified employees may petition the governing board of the school district for an election to determine if the merit system shall be established in the district.[178] The governing board of a school district whose average daily attendance is three thousand or more may, by affirmative vote of a majority of its members and the county superintendent of schools with the

[176] 167 Cal.App.3d 891 (1985).
[177] Education Code sections 45220, et seq.
[178] Education Code section 45221.

consent of the majority of the members of the County Board of Education, adopt a merit system, provided an employee petition has not been received.[179]

The merit system may also be adopted by the voters of the school district by a majority of votes after it has been placed on the ballot by written petition of at least ten percent of the qualified voters voting in the last election for a member of the governing board.[180] If the voters reject establishment of a merit system, the classified employees of the district may not again petition for an election until at least two years has lapsed since the last election.[181] If the merit system is adopted, the governing board shall employ, pay, and otherwise direct the services of classified employees only in accordance with the Education Code provisions relating to the merit system.[182]

B. Termination of the Merit System

In order to terminate a merit system, a petition of the qualified electors (not less than ten percent of the number voting in the last election for a member of the governing board) calling for the termination of the merit system after it has been in operation for not less than five years may be placed on the ballot. If the majority of the voters approve the abolition of the merit system, it will terminate on the date specified in the ballot proposition.[183] If the governing board of the school district receives a written petition from forty percent of the classified employees calling for the termination of the merit system and the merit system has been in operation for not less than five years, the governing board shall conduct an election by secret ballot of its classified personnel to determine whether or not they desire to have the merit system terminated within the district. If a majority of the classified employees vote in favor of abolishing the merit system, it shall be abolished on the date specified by the governing board.[184]

C. Personnel Commission – Authority and Responsibility

Any school district adopting the merit system must appoint a personnel commission composed of three members.[185] One member of the commission shall be appointed by the governing board of the district, one member, nominated by the classified employees of the district, shall be appointed by the governing board and those two members shall, in turn, appoint the third member.[186]

The personnel commission shall appoint a personnel director within ninety days after the adoption of the merit system from an eligibility established from a competitive examination given under the auspices of the personnel commission.[187] The personnel director shall be

[179] Education Code section 45224.
[180] Education Code section 45244.5.
[181] Education Code section 45225.
[182] Education Code section 45241.
[183] Education Code section 45319.
[184] Ibid.
[185] Education Code section 45243.
[186] Education Code section 45245.
[187] Education Code section 45264. See, Personnel Commission v. Board of Education, 223 Cal.App.3d 1463, 273 Cal.Rptr. 288 (1990), in which the Court of Appeal held that the Personnel Commission has the sole authority to appoint, supervise, and determine the work week of the personnel director.

responsible to the personnel commission for carrying out all procedures for the administration of the classified personnel in conformity with the rules and regulations of the personnel commission. The personnel director shall act as secretary of the personnel commission and shall prepare or cause to be prepared an annual report which shall be sent by the personnel commission to the governing board of the school district.[188] The personnel director may not advise or make recommendations to the personnel commission regarding any disciplinary action appealed to the personnel commission if the personnel director is the party who brought the action against the employee.[189]

It is the responsibility of the personnel commission to classify all classified employees, allocating positions to all appropriate classes, arranging classes into occupational hierarchies, determining reasonable relationships within occupational hierarchies and preparing written class specifications.[190] It is the responsibility of the personnel commission to establish eligibility lists for all vacancies in the classified service as well as promotional appointments.[191] Appointments to vacate positions shall be made from the established eligibility list.[192] Examinations for vacant positions shall be administered objectively and relate to job performance.[193]

However, a personnel commission may not sue the governing board of a school district when it disagrees with the governing board's decision to lay off employees and contract out the services they performed. The court left open under what limited circumstances a personnel commission may sue the governing board of a school district.[194]

Education Code section 45240 et seq. establishes procedures for the appointment of a Personnel Commission and describes the Commission's responsibilities and authority. Education Code section 45256(a) requires the Commission to classify all employees in positions within the jurisdiction of the governing board or of the Commission, except those that are exempt from the classified service.

However, Education Code section 45241 states that the governing board shall employ, pay and otherwise control the services of persons in positions not requiring certification qualifications. "Thus, while the Commission classifies employees and positions, the primary authority to make employment decisions concerning classified employees resides with the governing board of the school district."[195]

The Commission, however, has authority to review certain decisions at the instance of the affected employee. For example, Section 45305 provides an employee who has been suspended, demoted or dismissed may appeal to the Commission. Section 45306 authorizes the Commission to investigate the matter on appeal and order a hearing at the request of the employee. If it sustains the position of the employee, the Commission has the power to order back pay and

[188] Education Code section 45266.
[189] Ibid.
[190] Education Code section 45256.
[191] Education Code section 45272.
[192] Ibid.
[193] Education Code section 45273.
[194] Personnel Commission v. Barstow Unified School District, 43 Cal.App.4th 871, 50 Cal.Rptr.2d 797 (1996).
[195] Personnel Commission v. Barstow Unified School District, 43 Cal.App.4th 871, 878 (1996).

reinstatement and may direct such other action as it may find necessary to effect a just settlement of the appeal.[196]

Personnel Commissions are granted the authority to prescribe, amend and interpret such rules as may be necessary to ensure the efficiency of the classified service and the selection and retention of employees upon the basis of merit and fitness.[197] Section 45260(a) states in part:

> "The rules shall not apply to bargaining unit members if the subject matter is within the scope of representation, as defined in Section 3543.2 of the Government Code, and is included in a negotiated agreement between the governing board and that unit. The rules shall be binding upon the governing board, but shall not restrict the authority of the governing board provided pursuant to other sections of this code."

In other sections of the Education Code, the governing boards of school districts are given broad authority to act in any manner which is not in conflict with, inconsistent with or preempted by any law and which is not in conflict with the purposes for which school districts are established.[198] There are no similar provisions granting such broad authority to personnel commissions.

Education Code section 45261(a) grants the Personnel Commission the authority to establish rules and procedures to be followed by the governing board as they pertain to the classified service regarding applicants, examinations, eligibility, appointments, promotions, demotions, transfers, dismissals, resignations, layoffs, reemployment, vacations, leaves of absence, compensation within classification, job analysis and specifications, performance evaluations, public advertisement of examinations, rejection of unfit applicants without competition, and any other matters necessary to carry out the provisions and purposes of this article. However, Section 45261(b) states:

> "With respect to those matters set forth in subdivision (a) which are a subject of negotiation under the provisions of Section 3543.2 of the Government Code, such rules as apply to each bargaining unit shall be in accordance with the negotiated agreement, if any, between the exclusive representative for that unit and the public school employer."

Section 45268 establishes the authority of the commission with respect to salary schedules for the classified service. Section 45268 states:

> "The commission shall recommend to the governing board salary schedules for the classified service. The governing board may approve, amend, or reject these recommendations. No amendment shall be adopted until the commission is given a

[196] See, Education Code section 45307.
[197] See, Education Code section 45260(a).
[198] See, Education Code section 35160.

> reasonable opportunity to make a written statement of the effect the amendments will have upon the principle of like pay for like service. No changes shall operate to disturb the relationship which compensation schedules bear to one another, as the relationship has been established in the classification made by the commission."

In a 1971 opinion, the Attorney General reviewed the provisions of Education Code section 45268 and concluded:

> "It is concluded that although the duty to make recommendations to the governing board relative to salaries is imposed upon the personnel commission, other interested parties may make their own proposals to the board. Recommendations by other interested parties, or proposed action by the governing board on its own motion, relating to salary schedules for classified service may be adopted by the board only if such changes do not operate to disturb the relationship which salary schedules bear to one another, as that relationship has been established in the classification made by the commission."[199]

The Attorney General then gave the example of the secretary to the superintendent being assigned to a higher class than the secretary to the assistant superintendent and each would be in a higher class than a payroll clerk or secretary. Each of these classifications would be assigned an appropriate salary range by the governing board which would reflect adjustments for internal consistency and external competitiveness. The Attorney General noted:

> "The classification by the commission resulting in the secretary to the superintendent having a higher classification than the secretary to the assistant superintendent is within the exclusive control of the commission, Section 13712. [now 45256];
>
> It then would be the duty of the board to assign the higher classification to a higher salary range than is assigned to each lower classification within each occupational group. This classification relationship may not be disturbed by action of the governing board in making changes in the compensation schedule; however, we do not view such relationships as being necessarily 'disturbed' if the governing board decreases or increases the salary differential between two nonequal positions, so long as each remains effectively higher or lower as such relative relationships have been established by the personnel commission classification."[200]

D. Personnel Commission – Collective Bargaining

[199] 54 Ops.Cal.Atty.Gen. 77, 85 (1971).
[200] Id. at 85.

Subsequent to the Attorney General opinion, the Legislature enacted the Educational Employment Relations Act (EERA) (also known as the Rodda Act), Government Code sections 3540 et seq. effective July 1, 1976. The EERA authorizes public school employees to join employee organizations for purposes of exclusive representation with public school employers on matters pertaining to employment relations, including wages.[201] In 1977, Education Code section 45261 was amended to require that commission rules covering matters within the scope of representation under the EERA must be in accordance with the negotiated agreement.

In Sonoma County Board of Education v. Public Employment Relations Board,[202] the Court of Appeal was required to reconcile the provisions of Education Code sections 45240, et seq., relating to personnel commissions and the EERA, Government Code section 3540, et seq., relating to collective bargaining. In Sonoma County Board of Education, the employee organization demanded that the Sonoma County Board of Education meet and negotiate regarding the salaries of individual job classifications within its representative unit, even though the Personnel Commission was conducting a study of the salaries of the various classified positions and the proposed realignment or reclassification of certain positions on the salary schedule.

The County Board of Education rejected the request on the grounds that the matter of salaries and salary ranges fell within the exclusive jurisdiction of the Personnel Commission and was thus beyond the scope of negotiations. The employee organization then filed an unfair labor practice charge, and the Public Employment Relations Board (PERB) determined that the Sonoma County Board of Education's refusal to meet and negotiate the question of salaries to be paid to individual job classifications violated Government Code section 3543.5(c) and PERB issued a cease and desist order with the proviso that the Sonoma County Board of Education had no obligation to bargain on proposals which would change the relationship of individual job classifications as established by the Commission within an occupational group. The Sonoma County Board of Education appealed to the Court of Appeal.

The Court of Appeal reviewed the history of the merit system and noted that in 1935, the Legislature introduced merit systems into local public school personnel administration in accordance with a comprehensive statutory scheme.[203] An independent personnel commission was established to classify all school employees and positions not otherwise exempted.[204] The court noted that while the governing board alone is empowered to fix the compensation for classified employees, the commission is authorized to recommend salary schedules for the classified service which the governing board may approve, amend or reject provided that no changes shall operate to disturb the relationship between the compensation schedules established in the classification by the commission.[205] The Court of Appeal noted that the controversy centered upon the final sentence of Section 45268 which states, "No changes shall operate to disturb the relationship which compensation schedules bear to one another, as the relationship has been established in the classification made by the commission."

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[201] See, Government Code section 3543.2.
[202] 102 Cal.App.3d 689 (1980).
[203] See, Education Code sections 45240 et seq.
[204] See, Education Code Sections 45256 and 45258.
[205] See, Education Code section 45268; Los Angeles City Employees Union v. Los Angeles City Board of Education, 12 Cal.3d 851, 856-857 (1974).

The Court of Appeal took note of the 1971 Attorney General opinion which concluded that the governing board could adopt salary proposals initiated by other interested parties or on its own motion so long as each position remained effectively higher or lower as such relative relationships had been established by the Personnel Commission.[206] The Court of Appeal noted that the relevant statutory language interpreted by the Attorney General remained unchanged despite the adoption of the EERA, but noted that commission rules may not conflict with lawful collective bargaining agreements as a result of an amendment of a related statute.[207]

The Court of Appeal reviewed the possible conflicting statutory provisions relating to the Personnel Commission and collective bargaining and concluded that since the power to fix compensation for classified employees resides exclusively within the governing board, the governing board may exercise such power so long as it does not alter the relationship among classes as established by the Personnel Commission's classification plan.[208] The Court of Appeal noted that the Legislature's failure to amend the statute following the publication of the Attorney General's 1971 opinion and the subsequent amendment of Section 45261 requiring commission rules to conform to negotiated agreements further reinforced legislative intent that the governing boards retained the power to fix compensation. The Court of Appeal stated:

> "We construe the statutory intendment as manifesting a legislative policy that in the areas of collective bargaining authorized under the provisions of the Rodda Act, those provisions prevail over conflicting enactments and rules and regulations of the public school, merit or civil service system relating to the matter of wages or compensation of its classified service. Accordingly, we hold that the board is under a duty to bargain in good faith with SCOPE concerning proposals relating to the salaries or wages of the represented unit within the classified service. We further hold that no restriction is imposed upon the board under the provisions of Section 45268 and negotiating salary adjustments for individual job classifications within the same occupational group provided that the relationship between such individual positions as established by the commission remains intact."[209]

The Court of Appeal concluded that their holding accomplishes the intended purpose of the Legislature. The Court of Appeal also noted that the Commission retains the residual power to recommend salary schedules for the board's action and to consider any adjustments in salary obtained through collective bargaining and the establishment of appropriate classifications and salary schedule placements.[210]

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[206] Id. at 696-97.
[207] See, Education Code section 45261(b).
[208] Id. at 700.
[209] Id. at 701-702.
[210] Id. at 702-703.

E. Employer of Classified Employees

In Hood v. Compton Community College District,[211] the Court of Appeal held that under California law, in merit system school and community college districts, classified employees assigned to a personnel commission are employees of the district and not employees of the commission. The court clarified that although a personnel commission has supervisory powers over the commission-related activities of staff assigned to it, these staff members are nonetheless classified employees of the district.

In reaching its decision the Court of Appeal interpreted Education Code section 88084,[212] which states that a personnel commission "shall supervise the activities of those employees that are performed as part of the functions of the commission," but also states that employees on the personnel commission staff "shall be . . . classified employees of the community college district and shall be accorded all the rights, benefits, and burdens of any other classified employee serving in the regular service of the district . . ." Applying principles of statutory construction the court concluded that the above-quoted portion of Section 88084 clearly states that classified employees assigned to a personnel commission are employees of the district.

The court noted that in interpreting statutes, "an overriding principle . . . is that the individual portions of a statute should be harmonized with each other and the entire statute should be harmonized with the body of law of which it forms a part." The court noted that by statute, a district's governing board sets the level of compensation and pays the classified employees, which by definition includes staff of a personnel commission.[213]

The court also noted that in determining the amount of compensation to be paid to classified employees, a governing board considers the personnel commission's recommendations but is not required to approve them.[214] Governing boards also control the leaves of absence, vacations, and sick leave taken by classified employees.[215]

F. Appointments from Eligibility Lists

The Education Code provision regarding appointments from eligibility lists states that appointments shall be made from the first three ranks. Education Code section 45272(a) provides in pertinent part:

> ". . . The commission shall place applicants on the eligibility list in the order of their relative merit as determined by competitive examinations. The final scores of candidates shall be rounded to the nearest whole percent for all eligibles. All eligibles

[211] 127 Cal.App.4th 954, 26 Cal.Rptr.3d 180, 196 Ed.Law Rep. 642 (2004).
[212] Education Code section 45264 contains identical language for K-12 school districts.
[213] See, Education Code sections 88084, 88087, 88160. The Court also noted here that the plaintiffs provided documentary evidence to the effect that their paychecks were issued by the District, not the Commission, and that their W2 Wage and Tax statements listed the District as their employer.
[214] See, also, Education Code section 45268.
[215] Education Code section 88190. See, also, Education Code section 45190; Education Code section 88191. See, also, Education Code section 45191.

> with the same percentage score will be considered as having the same rank. Appointments shall be made from the eligibles having the first three ranks on the list who are ready and willing to accept the position." (Emphasis added.)

Education Code section 45277 provides limited exceptions to the requirement for appointment from the first three ranks, authorizing appointments to be made from other than the first three ranks when the ability to speak, read, or write a language in addition to English or possession of a valid driver's license is a requirement of the position to be filled. Other than the limited exceptions specified in Section 45277, we find no other exception to the requirement that appointments must be made from the first three ranks of eligibles. Although there are no appellate decisions or Attorney General's opinions interpreting Education Code section 45272(a), there are several appellate decisions arising under other California civil service systems. An early decision addressing a civil service commission's obligation to comply with governing law is Ferdig v. State Personal Board.[216] In Ferdig, the California Supreme Court stated:

> "It is settled principle that administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute. [Citations] An administrative agency, therefore, must act within the powers conferred upon it by law and may not validly act in excess of such powers. [Citations] In accordance with these principles, it has been held in this state, in matters pertaining to civil service and in other contexts, that when an administrative agency acts in excess of, or in violation, of the powers conferred upon it, its action thus taken is void."[217]

The civil service provisions, Government Code section 19057 and following, parallel the Education Code provisions regarding the rule of three ranks. California Code of Regulations, Title II section 254, provides additional guidance for multiple vacancies:

> "For a class in which the certification of eligibles is under Government Code sections 19057.1, 19057.2, and 19057.3, the appointing power shall fill a vacancy in a class by selection from the eligibles in the three highest ranks certified who are willing to accept employment under the conditions of employment specified. If the appointing power has at the same time more than one vacancy in the same class, the first and every succeeding vacancy shall be filled in like manner by selection in turn from the eligibles in the highest three remaining ranks. The provisions of this rule do not apply if the certification is from a reemployment list under Government Code section 19056."

[216] 71 Cal.2d 96 (1969).
[217] Id. at 104.

In interpreting these provisions, the California Supreme Court determined that a hiring rule negotiated by the employer impermissibly impaired the statutory and constitutional requirements to uphold the merit principle[218] Citing to previous decisions, the court stated, "Case law establishes that state employers generally may not make permanent appointments or promotions in the absence or disregard of competitive examinations and the ranking of examination takers."[219]

Based on the above analysis of applicable Education Code provisions and court decisions regarding analogous provisions within the state civil service, there appears to be no authority for a practice of making appointments from the first five ranks of eligibles when multiple vacancies are to be filled. The Personnel Director may certify an additional rank after one of the first three ranks has been exhausted, either by the eligible in the rank accepting or declining an offer for the position.

For example, for a position with multiple vacancies, the Personnel Commission established an eligibility list where Rank 1 includes two eligibles, Rank 2 includes one eligible, and Rank 3 includes two eligibles. If for the first vacancy, the Rank 2 eligible was selected, Rank 2 is now exhausted. For the next vacancy during which the eligibility list is still active, the new eligibility list containing eligibles from Rank 1, Rank 3 (the "new Rank 2"), and Rank 4 (the "new Rank 3") would be forwarded to the hiring authority.

LAYOFF AND REEMPLOYMENT

A. Layoff for Lack of Work or Lack of Funds

Classified employees may be laid off for lack of work or lack of funds.[220] Whenever an employee is laid off, the order of layoff 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 order of seniority.[221]

Length of service is defined as all hours in paid status, but does not include any hours compensated solely on an overtime basis.[222] The governing board of a school district may negotiate an agreement with the exclusive representative of the classified employees to define length of service as the hire date of the employee.[223]

B. Reemployment after Layoff

Persons laid off due to lack of work or lack of funds are eligible for reemployment for a period of thirty-nine months and must be reemployed in preference to new applicants.[224]

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[218] California State Personnel Bd. v. California State Employees Ass'n, 36 Cal.4th 758, 775 (2005).
[219] Id. at 769, citing to Professional Engineers in Cal. Government v. State Personnel Board, 90 Cal.App.4th 678 (2001); Kidd v. State of California, 62 Cal.App.4th 386 (1998).
[220] Education Code section 45308.
[221] Ibid.
[222] Education Code section 45308.
[223] Ibid.; Stats. 2011, ch. 116 (AB 1269).
[224] Education Code section 45308.

Employees who have been laid off have the right to participate in promotional examinations within the district during the thirty-nine month period. If the person reemployed in a new position and fails to complete the probationary period in the new position, he or she shall be returned to the reemployment list for the remainder of the 39-month period. The remaining time period shall be calculated as the time remaining in the 39-month period as of the date of reemployment.[225]

Employees who take voluntary demotions or voluntary reductions in assigned time in lieu of layoff or remain in their present positions rather than be reclassified or reassigned, shall be granted the same rights as persons laid off and shall retain eligibility to be considered for reemployment for an additional period of up to twenty-four months.[226] Employees who have taken voluntary demotions or voluntary reductions in assigned time in lieu of layoff shall be, at the option of the employee, returned to the position in their former class or to positions with increased assigned time as vacancies become available, without limitation of time, but if there is a valid reemployment list, they shall be ranked on that list in accordance with their seniority.[227]

The governing board of a school district may reduce the hours of an entire class of teacher aides for a lack of funds.[228] These procedures apply to both merit and non-merit districts.[229]

In Tucker v. Grossmont Union High School District,[230] the Court of Appeal held that the Grossmont Union High School District was required to reemploy a classified employee in preference to new applicants for any available position with the district for which the employee applied and for which he was qualified. The Court of Appeal broadly interpreted Education Code section 48298.[231]

The plaintiff, Charles Tucker, began working for the school district in 1982 as a general maintenance worker, and after one and one-half years was promoted to maintenance supervisor. Tucker worked for another school district from 1988 until 1996. In 1996, Tucker returned to work for the school district and held the position of director of maintenance and operations. He later assumed additional responsibilities in connection with the building of the new high school, and some of his former responsibilities were delegated to others. His job title became director of operations, safety and special projects.[232]

In 2004, the school district asked 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

[225] Education Code section 45298.
[226] Education Code section 45298.
[227] Ibid.; Stats. 2011, ch. 116 (AB 1269).
[228] Education Code section 45298.
[229] California School Employees Association v. King City Union Elementary School District, 116 Cal.App.3d 695, 172 Cal.Rptr. 368 (1981).
[230] 168 Cal.App.4th 640, 85 Cal.Rptr.3d 527 (2008).
[231] Education Code section 88117 contains identical language for community colleges.
[232] 168 Cal.App.4th 640, 643 (2008).

January 13, 2005, the governing board of the district voted to eliminate Tucker's position because of lack of work and/or lack of funds. He was laid off effective April 2005.[233]

In April 2005, Tucker applied for the position of maintenance manager with the district. This position was of a lower class and had different job responsibilities than Tucker's previous position. The court found that Tucker was qualified for the position. However, the district hired an individual who had never before worked for the district.[234]

Tucker filed a lawsuit against the district alleging that the school district violated Education Code section 45298 which gives employees laid off for lack of work or lack of funds reemployment preference over new applicants.[235]

The Superior Court found that the district had legitimately laid off Tucker for lack of work and/or lack of funds, and also found that Tucker had, and continues to have, the right to be reemployed in preference to new applicants under Education Code section 45298, and that this right was violated when he was not reemployed in April 2005 as maintenance manager. The Superior Court found Section 45298 does not limit reemployment to a job within a particular classification. The Superior Court stated in order to exercise his right to reemployment, Tucker must apply for an available position and satisfy the qualifications promulgated by the district for the position sought.[236]

Education Code section 45298 states in part:

> "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. In addition, such persons laid off have the right to participate in promotional examinations within the district during the period of 39 months."[237]

The school district argued that Section 45298 must be read together with Section 45308,[238] which states 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 layoff 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."

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[233] Id. at 643.
[234] Ibid.
[235] Id. at 643-44.
[236] Id. at 644.
[237] Education Code section 45298 has since been amended (Stats. 2012, ch. 586, A.B. 2307).
[238] Education Code section 88127 contains identical language for community colleges.

The school district argued that Sections 45298 and 45308, when read together, provide that a laid off classified employee has reemployment rights into the previous position, but not any preference for reemployment in a lower or different class, even if the laid off employee is qualified for the position. The Court of Appeal rejected this argument.[239]

The Court of Appeal held that if the Legislature had intended to limit laid off employees' rights to reemployment, it could have added language to Section 45298 that indicated that reemployment rights were limited to the same class from which the employee was laid off, but it did not do so. The Court of Appeal held that the language of Section 45298 does not suggest that a laid off employees' reemployment rights versus a new applicant are restricted to the same class in which he or she was laid off.[240] The Court of Appeal stated:

> "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. The 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."[241]

In summary, the Court of Appeal held that laid off classified employees have a right to reemployment under Education Code section 45298 to positions in a lower classification if they possess the qualifications required for the position. In such cases, the district would not be able to hire another applicant, but would be required to reemploy the laid off classified employee.

In California School Employees Association v. Governing Board of the East Side Union High School District,[242] the Court of Appeal held that when a permanent classified employee is laid off from her position and is thereafter employed by the school district in a different, lower position, the employee is required to serve a probationary period in the new position. The Court of Appeal held that the employee's permanent status is restricted to the position or class in which it was attained and is not retained when the employee is reemployed in a different, lower position.[243]

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[239] Id. at 645.
[240] Id. at 646.
[241] Id. at 647-48.
[242] 193 Cal.App.4th 540, 122 Cal.Rptr.3d 799 (2011).
[243] Id. at 540-42.

The employee was employed by the East Side Union High School District in a school community liaison position in November 1989. In March 2008, the district eliminated all of its school community liaison positions due to lack of funds. The employee was placed on a 39-month reemployment list and was laid off as of June 30, 2008.[244]

In August 2008, the district posted openings for eight campus monitor positions which was a lower position than the school community liaison position. The duties for the campus monitor position were considerably different than the school community liaison position. The campus monitor position was limited to ensuring the safety of persons and property on campus, while the school community liaison position involved dealing with a wide range of problems, including behavioral, academic, attendance, and family problems.[245]

The employee was hired for the campus monitor position and was hired in September 2008. At the outset, the employee was informed that she would be on a probationary status for the first six months. She began working in the campus monitor position in September 2008, and in February 2009, before she had served six months in the campus monitor position she was notified by the district that she was being released from her probationary position.

The employee and the California School Employees Association (CSEA) filed a lawsuit in May 2009. The lawsuit sought reinstatement on the ground that the employee's permanent status did not end when she was laid off from the school community liaison position, but instead continued when she was reemployed in the campus monitor position. The Court of Appeal rejected CSEA's arguments and held that under Education Code section 45101 (Section 88001 for community college districts), a permanent employee is defined as an employee who has tenure in the classification in which the employee passed the required probationary period. Therefore, the Court of Appeal held that permanence is attained in a classification rather than generally by employment with a school district.[246] The Court of Appeal concluded:

> "We hold that, because permanent status in a non-merit system school district is attained in a position or class, Singer did not have permanent status when she was reemployed in a new and different position in which she had never attained permanent status. Consequently, she was a probationary employee with no right to notice or a hearing before the termination of her employment."[247]

C. Use of Layoff Procedures

The layoff procedures may not be used as a subterfuge to avoid terminating an employee for cause.[248] In Short v. Nevada Joint Union High School District, the school district eliminated the high school security department, an action which effectively terminated the former chief of security's employment with the district. The Court of Appeal held that the plaintiff's evidence of

[244] Id. at 542.
[245] Ibid.
[246] Id. at 543-47.
[247] Id. at 547.
[248] Short v. Nevada Joint Union High School District, 163 Cal.App.3d 1087, 210 Cal.Rptr. 297 (1985).

breach of contract was sufficient to establish a prima facie case of "dual motive" discharge. The Court of Appeal held that there was sufficient evidence to show that the district may have eliminated the security department and the employment of the former security chief for reasons other than budgetary considerations.[249] The Court of Appeal held that the school district had the burden to show that the security department would have been eliminated for budget reasons, even had plaintiff's performance been satisfactory to all concerned.[250]

The Court of Appeal stated:

> "Under the but-for test, a school district's broad budgetary discretion . . . is not limited; it is, however, confined to truly 'budgetary' issues. A termination may be reasonable and within permissible discretion on strictly budgetary grounds, but if the actual decision to terminate would not have been made but for disciplinary reasons, the termination may not stand unless notice and hearing have been afforded the employee. Conversely, if the termination would have been made on budgetary grounds alone, it will be allowed to stand. This rule fully protects the legislative intent underlying section 45117, that classified school employees not be employed where there is no existent funding with which to pay them. . . ."[251]

In Anaheim Union High School District v. American Federation of State, County and Municipal Employees,[252] the Court of Appeal held that a merit system school district could not reduce classified employees' work year in lieu of layoff for lack of funds without complying with its collective bargaining agreement. The Court of Appeal upheld the arbitrator's award invalidating the reduction in the work year.

The Court of Appeal held that while Education Code sections 45308 and 45107 allow school districts to layoff classified employees for lack of work or lack of funds, these statutory provisions do not apply to a reduction in the employee's work year in lieu of layoff. The Court of Appeal held that Education Code section 45101(g) which defines layoff for lack of funds or layoff for lack of work to include any reduction of hours of employment voluntarily consented to by the employee, does not apply to merit system school districts.

The Court of Appeal noted that the same conclusion was reached by the Public Employment Relations Board in North Sacramento School District.[253] The PERB held in North Sacramento School District, that a school district's decision to offer to reduce certain employee's work hours in lieu of layoff was within the scope of representation and therefore the school district violated the Educational Employment Relations Act (EERA) by taking a unilateral action without negotiating with the employee's union. The PERB stated that layoffs and reduction of

[249] Id. at 1095.
[250] Id. at 1098.
[251] Id. at 1099.
[252] 222 Cal.App.4th 887 (2013).
[253] PERB Decision No. 193 (1981).

hours are separate actions: one suspends the employment relationship entirely and the other maintains the relationship but alters some of its terms. PERB also held that Education Code section 45101(g) does not apply to merit system school districts.

Therefore, the Court of Appeal held that a merit system school district could not reduce the classified employee's work year in lieu of layoff for lack of funds without complying with its collective bargaining agreement.

DISMISSAL FOR CAUSE

A. Permanent and Probationary Status

Classified employees who have obtained permanent status following their designated probationary period (not to exceed one year) may be dismissed only for cause.[254] The governing board of the school district establishes the length of the probationary period. Probationary classified employees may be dismissed without cause prior to the end of their probationary period.[255]

A permanent employee who accepts a promotion and fails to complete the probationary period for that promotional position is required to be employed in the classification from which he or she was promoted.[256]

B. Adoption of Rules and Regulations

The Education Code requires the governing boards of school districts to adopt rules and procedures for disciplinary proceedings.[257] The rules must provide procedures for informing the employee by written notice of the specific charges against him, written notice of the employee's right to an administrative hearing on the charges against him, the time in which the administrative hearing may be requested (not less than five days after service of the notice on the employee) and a card or paper, the signing and filing of which shall constitute a demand for a hearing and a denial of all charges.[258]

C. Denial of Due Process

In California School Employees Association v. Livingston Union School District,[259] the Court of Appeal held that a school district denied a classified employee due process when it implemented its employee discipline policy and did not provide the employee with sufficient time to request a hearing.

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[254] Education Code section 45114.
[255] Education Code section 45113.
[256] Education Code section 45113(a).
[257] Education Code section 45113.
[258] Ibid.
[259] 149 Cal.App.4th 391, 56 Cal.Rptr.3d 923 (2007).

The employee was employed by the school district as a bus driver and custodian. He was a full-time permanent employee who worked during the school year. In the spring of 2004, a parent complaint resulted in a review of the employee's job performance.[260]

On June 24, 2004, the school district sent the employee a statement of charges and recommendation for immediate suspension without pay and dismissal from employment. The document indicated that the employee was ordered immediately suspended without pay, effective July 30, 2004. It indicated that the employee had a right to respond orally or in writing to the charges and if the employee wished to respond orally, a meeting would be arranged. There was no date or deadline for requesting a meeting.[261]

The next section of the notice stated that the employee had a right to a hearing on the charges. The notice stated that if the employee wished to request a hearing, the employee must do so within five (5) days after service of the notice of statement of charges and recommendation for immediate suspension without pay and dismissal from employment. Enclosed was a form the employee could use to demand a hearing before the governing board of the school district.[262]

Attached to the notice sent to the employee were sections of the Education Code and the district's Board Policy 220.04. Board Policy 220.04 stated in part, "The notification to a permanent employee of proposed disciplinary actions shall be deemed sufficient when it is delivered in person to the employee or when it is deposited in the U.S. Certified Mail, postage prepaid, and addressed to the last known address of the employee…"[263]

The notice was mailed by the school district certified mail, return receipt, on June 24, 2004. The record does not indicate when delivery was first attempted but the employee's wife signed for the notice on July 8, 2004. The employee submitted a declaration stating that he and his wife had been out of town from June 21, 2004 through the evening of July 7, 2004. On July 13, 2004, the employee delivered a demand for a hearing to the school district and informed the school district he had been out of town.[264]

The employee and a CSEA representative met with the district superintendent on July 21, 2004. By letter dated July 22, 2004, the superintendent notified the employee that there was evidence which provided sufficient cause for the employee's termination from employment and that the employee waived his right to an evidentiary hearing. The parties agreed that the claim of waiver was based on the employee's failure to submit a request for hearing within five (5) days after the notice was mailed to him.[265]

On August 12, 2004, the governing board met and voted to terminate the employee's employment effective August 13, 2004. The employee filed a lawsuit against the district.

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[260] Id. at 394.
[261] Ibid.
[262] Id. at 394-95.
[263] Id. at 395.
[264] Ibid.
[265] Ibid.

Judgment was rendered in favor of the school district and the employee appealed. The Court of Appeal reversed the lower court's decision.[266]

The Court of Appeal held that in order to satisfy due process requirements of the Fourteenth Amendment, a person is entitled to notice in a governmental proceeding that is reasonably calculated to actually notify the employee. Giving notice that is merely a token or formalistic gesture does not comply with the requirements of the Fourteenth Amendment to the United States Constitution.[267] The requirements of due process in a particular setting must be based upon an evaluation of the totality of the circumstances.[268] If the notice permits or requires action by the person notified, the notice must be given in time to reasonably permit action.[269] Further, when the notice involves an important issue such as a government employee's loss of permanent employment, the notice should be clear, concise, and easily understandable and not ambiguous or confusing.[270]

In Livingston Union School District, the Court of Appeal held that the board policy was not clear and understandable but was ambiguous and confusing. The board policy states that notice is sufficient when it is delivered in person to the employee or when it is deposited in the mail. However, the court held that the rule does not define when service is complete. The Court of Appeal stated:

> "In any event, it cannot be said that BP 220.04 fully informs an employee of the date by which he or she must request a hearing. It certainly does not do so in the full language of the employer rule quoted in White v. DeMartini. . . ."[271]

The court went on to state that even if the language of BP 220.04 could be construed to clearly adopt a complete upon mailing rule for service by mail, the policy, so construed, would fail to satisfy the requirements of due process. The court noted that under Civil Code of Civil Procedure section 1013, service is complete at the time of the deposit in the mail but any period of notice and any right or duty to do any act when making a response within any period or on a date certain after the service of the document shall be extended by five (5) calendar days if the notice is mailed to and from California addresses.[272]

The Court of Appeals also noted that Education Code section 45113 does not purport to authorize a five day notice period when service is complete upon mailing. Instead, Section 45113 provides the minimum standards for employee disciplinary notices and locally adopted rules must contain a provision for informing the employee, the time within which the hearing may be requested that shall not be less than five days after service of the notice to the employee. The court concluded that in the case of personal delivery of a disciplinary notice, five days within which to respond would satisfy due process. However, under the circumstances, when a

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[266] Id. at 396.
[267] Id. at 399. See, also, Mullane v. Central Hanover Trust Company, 339 U.S. 306, 315 (1950).
[268] Id. at 397. See, also, In Re Emily R., 80 Cal.App.4th 1344, 1352 (2000).
[269] Id. at 399-400. See, also, Coburn v. State Personnel Board, 83 Cal.App.3d 801, 806 (1978).
[270] Id. at 397. See, also, White v. DeMartini, 183 Cal.App.2d 665, 669 (1960).
[271] Id. at 398.
[272] Ibid.

majority of the school district's classified employees are not year round employees and the school district does not have daily access to employees during the entire year, the court concluded that the school district knows it would not be able to deliver notices in person through normal work channels. The court concluded that due process requires that respondent's system of notice take this reality into account and give employees a realistic opportunity to respond.[273]

The Court of Appeals stated:

> "In the present case, both respondent's rule and respondent's practice ignored the circumstance that permanent employees will be away from their employment for months at a time, on a regular basis. Due process requires that respondent take this circumstance into account in establishing and administering the procedures required by Education Code section 45113: those procedures must be 'reasonably calculated under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[274]

The Court of Appeal concluded that under the Education Code and under the Constitution, the school district has great latitude in establishing its policies for giving notice and permitting employees to respond and request a hearing. The school district might, for example, adopt a different time frame for personal service and service by mail, and it might adopt a different time frame for notice to employees during the school year and during summer breaks. However, the Court of Appeal concluded, ". . . respondent cannot do what it did here, administering its policy in such a manner that the notice became a mere formality and the opportunity to respond and request a hearing vanished altogether."[275]

D. Reassignments and Due Process

In Lawrence v. Hartnell Community College District,[276] the Court of Appeal held that the transfer of two executive assistants from positions supporting the district superintendent/ president to vice presidents of academic affairs and student services was not a demotion and did not trigger a due process right to a hearing.

The Court of Appeal reviewed the provisions of Education Code section 88001[277] and determined the reassignments were not demotions or disciplinary actions that triggered notice and hearing rights under Section 80013(c).[278] The Court of Appeal concluded that neither employee had been reassigned to an inferior position or status. Therefore, the reassignments did not deny the employees due process because the employees enjoyed no property rights in their specific former assignments.

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[273] Id. at 400. See, also, Coburn v. State Personnel Board, 83 Cal.App.3d 801, 803 (1978).
[274] Id. at 400. See, also, Mullane v. Central Hanover Trust Company, 339 U.S. 306, 314 (1950).
[275] Id. at 400.
[276] 194 Cal.App.4th 687, 123 Cal.Rptr.3d 535 (2011).
[277] Education Code section 45101for school districts.
[278] Education Code section 45113(c) for school districts.

On July 25, 2007, the superintendent/president made various personnel changes. The two employees were transferred to equivalent positions assisting vice presidents of academic affairs and student services. The assistants to those vice presidents were moved to the office of the superintendent/president. The reassignments did not affect the employees' job classifications, titles, wages or benefits. It was made clear to all involved that the reassignments were not performance related. It was also made clear that the moves were temporary and that all four reassignments would be reassessed in February of 2008.[279]

The two plaintiffs never reported to their new assignments. Instead, they obtained doctors' notes stating without qualification that they were unable to return to work. Notwithstanding the unqualified nature of the doctors' notes, however, both plaintiffs informed the district that they were at all times available to return to their former jobs in the offices of the superintendent/president.[280]

The district held plaintiffs' new jobs open for more than five months. On December 21, 2007, the district informed plaintiffs in writing that their entitlement to paid leave would be exhausted as of January 9, 2008, that their most recent doctors' notes extended their "unable to work" status beyond that date, and that they would be released from employment and placed on the 39-month reemployment list unless they obtained written releases from their doctors and returned to work before January 9, 2008.[281]

The plaintiffs never submitted medical releases and never returned to work. On January 8, 2008, the district's board of trustees approved plaintiffs' separation from employment and placed them on the 39-month reemployment list pursuant to Education Code section 88195.[282]

The Court of Appeal held that the transfer was not to an inferior position and noted that in Reed v. City Council of the City of Roseville,[283] the Court of Appeal held that assignment to an inferior position means that the court must compare the qualifications and duties of the two positions. If, after a comparison of the qualifications and/or duties of the two positions, it appears that a person qualified to perform the duties of Position A would not be qualified to perform the duties of Position B, then Position A is, in the Court of Appeal's view, the inferior position.[284]

The Court of Appeal noted that the written job descriptions for the senior executive assistant and executive assistant positions both describe standard secretarial and administrative support duties. The plaintiffs, at trial, were unable to identify specific concrete differences between their former and new assignments. The Court of Appeal held that status, as used in the Education Code, refers to full- or part-time status, or confidential or non-confidential status. It does not refer to the prestige of a particular position.[285]

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[279] 194 Cal.App.4th 687, 691 (2011).
[280] Id. at 692.
[281] Ibid.
[282] Ibid.; Education Code section 45195 for school districts.
[283] 60 Cal.App.2d 628, 636 (1943).
[284] 194 Cal.App.4th 687, 696-97 (2011).
[285] Id. at 698-99.

The Court of Appeal further held that the plaintiffs did not have a property interest in their particular positions, but only a property interest in continued employment. That property interest may be damaged by demotion or dismissal, but in the present case there was no loss of a property interest created by statute because plaintiffs' reassignments did not constitute demotions within the meaning of Education Code section 88001(d).[286]

In addition, the Court of Appeal held that the plaintiffs were not terminated for cause, but instead, pursuant to Section 88195, separated from employment and placed on the 39-month reemployment list once their available leave was exhausted. The court concluded that the employees were released from employment because they had run out of leave, not because they had abandoned their positions. The Court of Appeal held that the plaintiffs were not entitled to a hearing before being placed on the 39-month reemployment list.[287]

E. Notice of Disciplinary Action and Skelly Meeting

No disciplinary action may be taken for any cause which arose prior to the employee becoming permanent or more than two years preceding the date of the filing of the notice of cause unless the cause was concealed or not disclosed by the employee.[288] The burden of proof shall be on the governing board of the school district to establish cause for dismissal.[289]

The notice of disciplinary action must contain a statement in ordinary and concise language of the specific act or omissions upon which the disciplinary action is based, a statement of cause for the action taken and if it is claimed that an employee has violated a rule or regulation of the employer, the rule or regulations must be specified in the notice.[290]

Prior to giving the employee written notice of disciplinary action, the employer is required to meet with the employee to give the employee an opportunity to respond to the allegations against the employee and to explain his or her actions.[291]

In Skelly v. State Personnel Board, the California Supreme Court held that public employees were entitled to certain pre-removal due process protection which includes notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond either orally or in writing to the authority initially imposing the discipline.[292] The person meeting with the employee should be the superintendent and assistant superintendent or an administrator who has the authority to make a recommendation to the governing board that an employee should be dismissed.[293] The employee has the right to be represented by a union representative if the employee has reason to believe that disciplinary action may result from or occur at the meeting.[294]

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[286] Id. at 699-700.
[287] Id. at 701-02; citing, Trotter v. Los Angeles County Board of Education, 167 Cal.App.3d 891, 896 (1985).
[288] Education Code section 45113.
[289] Ibid.
[290] Education Code section 45113.
[291] Education Code section 45116.
[292] Skelly v. State Personnel Board, 15 Cal.3d 194, 124 Cal.Rptr. 14 (1975).
[293] Jones v. Los Angeles Community College District, 702 F.2d 203 (9th Cir. 1983).
[294] Redwood Community College District v. Public Employment Relations Board, 159 Cal.App.3d 617 (1984).

In Thornbrough v. Western Placer Unified School District,[295] the Court of Appeal held that a classified employee's due process rights were not violated when the school district amended the charges against the classified employee for dismissal. The school district offered continuances to allow the classified employee to respond to the amended charges as they arose. The court held that no statute or rule precluded the filing of amended charges.

The Court of Appeal held that several amendments to the district charges did not violate Education Code section 45113. Section 45113(c) states:

> "The governing board shall adopt rules of procedure for disciplinary proceedings which shall contain a provision for informing the employee by written notice of the specific charges against him or her, a statement of the employee's right to a hearing on those charges, and the time within which the hearing may be requested which shall be not less than five days after service of the notice to the employee, and a card or paper, the signing and filing of which shall constitute a demand for hearing, and a denial of all charges. The burden of proof shall remain with the governing board, and any rule or regulation to the contrary shall be void."

The Court of Appeal concluded:

"In short, the overwhelming evidence shows that termination was the appropriate penalty based on the facts wholly unrelated to any claims of improper consideration. Accordingly, we find no miscarriage of justice in the judgment denying Thornbrough's mandamus petition."[296]

Attached are several templates that districts may wish to use for a classified employee discipline and reasonable accommodation. The first sample form (Appendix II) is a proposed Notice of Disciplinary Action, Statement of Charges and Notice of Skelly Hearing. The second form is a Notice of Disciplinary Action, Termination of Employment, Statement of Charges and Results of Skelly Hearing (Appendix III). The third form is a Sample Reasonable Accommodation Request for Information to Employee's Physician (Appendix IV).

F. Hearings in Non-Merit Districts

In non-merit districts, which do not have a personnel commission, following the notice of disciplinary action, the employee may request a hearing before the governing board. The hearing is conducted in a formal manner, all witnesses are sworn and the district and employee are given the opportunity to present opening statements, present witnesses, cross-examine witnesses, present testimony and introduction of documentary evidence and make closing statements.[297]

[295] 223 Cal.App.4th 169, 167 Cal.Rptr.3d 24 (2013).
[296] Id. at 200.
[297] Education Code section 45113.

Non-merit districts may retain the services of a hearing officer to conduct a hearing. However, to avoid the possibility of bias and favor of the district, districts must have a policy that establishes a panel of attorneys to hear cases under a pre-established system of rotation.[298]

G. Hearings in Merit Districts

In merit districts which have a personnel commission, an administrator makes a recommendation to the governing board to dismiss an employee following a meeting with the employee as required by Skelly v. State Personnel Board. The governing board then takes action and if the governing board dismisses the employee, the employee may appeal the dismissal action to the personnel commission.[299] The chairman of the personnel commission then conducts the hearing in the same manner as if it were conducted before the governing board and the personnel commission makes the final administrative decision.[300]

H. Third Party Hearing Officer

In both merit and non-merit districts, the district may negotiate with the exclusive representative a procedure by which the governing board delegates its authority to determine whether sufficient cause exist for disciplinary action to an impartial third party hearing officer.[301] The governing board retains authority to review the hearing officer's decision. However, that review is limited to the specific grounds set forth in the Code of Civil Procedure.[302]

In California School Employees Association v. Bonita Unified School District,[303] the Court of Appeal ruled that pursuant to Education Code section 45113(e), school districts may enter into collective bargaining agreements delegating authority to an arbitrator to determine whether sufficient cause exists for disciplinary action against classified employees. The Court of Appeal held that the governing board of the school district's authority is limited in reviewing the arbitrator's award under Code of Civil Procedure section 1286.2.

The holding in this case illustrates the importance of exercising caution in entering into an arbitration agreement to determine whether sufficient cause exists for disciplinary action against classified employees and also illustrates the importance of progressive discipline in the documentation of employee misconduct.[304]

In Bonita Unified School District, the Court of Appeal upheld the arbitrator's decision to reinstate the employee with full back pay. The Court of Appeal held that the governing board of the school district lacked sufficient grounds to overturn the arbitrator's award under Code of Civil Procedure section 1286.2.[305]

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[298] Haas v. County of San Bernardino, 27 Cal.4th 1017, 119 Cal.Rptr.2d 341 (2002).
[299] California School Employees Association v. Personnel Commission, 3 Cal.3d 139, 89 Cal.Rptr. 620 (1970).
[300] Ibid.
[301] Education Code section 45113(e).
[302] Education Code section 45113(e); see, also, Code of Civil Procedure 1286.2 (limiting the vacation of arbitration awards to fraud, corruption, arbitrator misconduct or other undue means).
[303] 163 Cal. App. 4th 387, 77 Cal.Rptr.3d 486 (2008).
[304] Id. at 408.
[305] Ibid.

The employee involved was employed by the Bonita Unified School District since 1995. Since 2001, the employee held the position of lead maintenance mechanic in the district's Facilities Department.[306]

On June 3, 2004, the district superintendent sent the employee a notice of termination and suspension without pay. The notice specified nine causes and 24 reasons for suspending and discharging the employee. The causes included the following:

1. Incompetence.

2. Dishonesty.

3. Insubordination.

4. Immoral conduct.

5. Evident unfitness for service.

6. Absence without authority.

7. Violation of school laws.[307]

The reasons for termination were:

1. Communicating regularly with staff members in rude, abusive, sexually explicit and threatening language.

2. Creating a sexually hostile work environment for two female employees.

3. Refusing to do assigned duties.

4. Failing to comply with supervisor's directions.

5. Permitting a subordinate to damage district equipment and to harass other maintenance department employees.

6. Taking district property home for personal use.

7. Destroying district property.

8. Intimidating employees of the maintenance department on a regular basis.

[306] Id. at 391.
[307] Id. at 391-92.

9. Exposing the district to liability under state and federal anti-discrimination laws.[308]

The employee challenged the discipline in two ways. First, the employee requested a traditional hearing, authorized by statute, before the governing board.[309] Second, under the collective bargaining agreement, the employee filed a grievance claiming that there was a violation, misinterpretation or misapplication of the specific provisions of the collective bargaining agreement. The grievance, if not informally resolved by the parties, is decided by an arbitrator whose award, according to the collective bargaining agreement, is final and binding. The collective bargaining agreement also stated that the arbitrator shall have no power to alter, amend, change, add to or subtract from any term of the collective bargaining agreement and shall consider evidence of past practice of the parties in interpreting or applying the terms of the collective bargaining agreement.[310]

The collective bargaining agreement also required the district to use "progressive discipline," including, but not limited to, verbal counseling, verbal warning, written warning, and letters of reprimand, and that progressive discipline shall not be bypassed unless the serious nature of the offense warrants it. Whether the nature of the offense was so serious as to require bypassing progressive discipline, under the terms of the collective bargaining agreement, may be submitted to arbitration.[311]

To streamline the decision making process, the parties agreed to conduct the board hearing and the arbitration in a consolidated proceeding before a third party. The agreement stated that if the arbitrator determines that the nature of the offenses against the employee is not so serious as to require bypassing progressive discipline, the termination decision cannot stand. The arbitrator's decision on whether progressive discipline can be bypassed will be binding on the parties and the governing board in accordance with the collective bargaining agreement. If the arbitrator determines that the charges are sufficiently serious as to require bypassing progressive discipline, the matter would then go to the hearing before the board and the arbitrator would become the board's hearing officer.[312]

The arbitrator conducted a 25-day evidentiary hearing and issued a 16-page decision concluding that the nature of the offenses by the employee were not so serious as to require bypassing progressive discipline steps, and found that the district had violated the collective bargaining agreement by not implementing progressive discipline steps. The arbitrator ordered the reinstatement of the employee to his former employment with full back pay and benefits, less any interim earnings, if any.[313]

The arbitrator's award indicated that there was insufficient evidence to conclude that the employee's continued presence at work presented an unreasonable risk of harm to district employees or property that would justify bypassing progressive discipline. The arbitrator cited

[308] Id. at 392.
[309] See, Education Code section 45113(c).
[310] Id. at 392-93.
[311] Id. at 393.
[312] Ibid.
[313] Ibid.

as examples of serious offenses that would authorize bypassing progressive discipline as the unprovoked forceful striking of a co-worker or supervisor, stealing district property or similar outrageous conduct that any employee would or reasonably should know was not only prohibited but would likely result in summary suspension and termination of their employment.[314]

The arbitrator concluded that the testimony supported a conclusion that many employees found Mr. Roberts to be unpleasant, but none gave evidence that he behaved in a physically threatening manner toward them or made any threats toward them. The arbitrator found that the major complaint against Roberts was that he would glare at other employees and coupled with a rumor that Roberts maintained a collection of firearms led the employees to unreasonably conclude that Roberts would explode with violence against them. Roberts denied that he maintained firearms at his residence and there was no evidence that at any time Roberts threatened any employee with violence or possessed any firearms.[315]

The arbitrator found that with regard to the charges regarding Roberts' work performance, these allegations required the application of progressive discipline and were not so egregious as to justify bypassing the collective bargaining agreement's mandate to apply progressive discipline. The arbitrator also found that much of the conduct alleged against Roberts was engaged in by Roberts' co-employees, including inappropriate comments and pranks against other employees.[316]

The governing board overturned the arbitrator's award and the employee appealed. The trial court issued a statement of decision confirming the arbitration award and the district appealed. The Court of Appeal affirmed the trial court's confirmation of the arbitration award. The Court of Appeal noted that under Code of Civil Procedure section 1286.2, which is specifically referred to in Education Code section 45113(e), the grounds for vacation of an arbitration award are severely limited.[317] Section 1286.2 states:

> "(a) Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following:
>
> (1) The award was procured by corruption, fraud or other undue means.
>
> (2) There was corruption in any of the arbitrators.
>
> (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.
>
> (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.
>
> (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon

[314] Id. at 393-94.
[315] Id. at 394-95.
[316] Id. at 395-96.
[317] Id. at 396-97.

sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

(6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives.

(b) Petitions to vacate an arbitration award pursuant to Section 1285 are subject to the provisions of Section 128.7."

Education Code section 45113(e) states:

> "Nothing in this section shall be construed to prohibit the governing board, pursuant to the terms of an agreement with an employee organization under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, from delegating its authority to determine whether sufficient cause exists for disciplinary action against classified employees, excluding peace officers as defined in Section 830.32 of the Penal Code, to an impartial third party hearing officer. However, the governing board shall retain authority to review the determination under the standards set forth in Section 1286.2 of the Code of Civil Procedure."

The Court of Appeal found that the governing board's contention that the arbitrator exceeded his powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted was misplaced and insufficient. The Court of Appeal noted that the 2001 addition of Section 45113(e) by the Legislature overturned prior case law and authorized the arbitration of certain disciplinary matters involving classified employees.[318]

The Court of Appeal concluded that Education Code section 45113(e) specifically authorized the governing board to enter into a collective bargaining agreement to arbitrate whether sufficient cause exists for disciplinary action against classified employees and authorized the board to review the arbitration award under the statutory standards set forth in Code of Civil Procedures section 1286.2. The Court of Appeal held that the statutory language

[318] Id. at 400-01. See, also, San Mateo City School District v. Public Employment Relations Board, 33 Cal. 3d 850 (1983); United Steel Workers of America v. Board of Education, 162 Cal.App.3d 823 (1984).

of Section 45113(e) was clear and unambiguous and therefore, any legislative history to the contrary was not binding on the court.[319]

The Court of Appeal held that under Code of Civil Procedure section 1286.2, the grounds for overturning an arbitration award were severely limited. The Court of Appeal held that an arbitration award could not be overturned due to an error of fact or an error of law. The Court of Appeal held that the arbitrator's interpretation of the phrase "serious offense" was consistent with case law regarding "just cause" set forth in prior cases.[320]

The Court of Appeal concluded that the governing board of the school district did not establish a basis for vacating the arbitration award and that the trial court correctly granted the petition to confirm the arbitration award.[321]

In summary, districts should be very cautious in agreeing to any language in a collective bargaining agreement that would delegate authority to an arbitrator to determine whether sufficient cause exists for disciplinary action against classified employees. Districts that agree to such arbitration will be bound by the decision of the arbitrator in most cases, as it is extremely difficult to overturn or vacate an arbitrator's award under Code of Civil Procedure section 1286.2. Districts should also pay close attention to any progressive discipline language contained in their collective bargaining agreement and make sure that the provisions are complied with when documenting employee misconduct in seeking to terminate a classified employee.

In Absmeier v. Simi Valley Unified School District,[322] the Court of Appeal held that the administrative law judge was properly removed for cause, but that the school district acted beyond its authority when it retained a law firm to substitute for the administrative law judge to write the administrative decision using transcripts to weigh the evidence and make findings on credibility.

The Court of Appeal held that based on the facts and circumstances in Absmeier, the school district was justified in removing the administrative law judge but that it should have appointed a new hearing officer and reheard the case rather than hiring a law firm to review the transcript and exhibits and make a recommendation to the Personnel Commission. The Court of Appeal noted that the law firm could only review the transcripts of the hearing, but weighing the credibility of the witness requires a personal presence that a transcript cannot convey. Therefore, the Court of Appeal invalidated the Personnel Commission's dismissal of the employee and remanded the matter back to the trial court to order the Personnel Commission to set aside its decision and appoint an administrative law judge or a hearing officer to conduct a new hearing.

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[319] Id. at 402-03.
[320] Id. at 404-05. See, also, Cranston v. City of Richmond, 40 Cal.3d 755 (1985); Glassman v. McNab, 112 Cal.App.4th 1593, 1598 (2003); Jordan v. Department of Motor Vehicles, 100 Cal.App.4th 431, 443 (2002).
[321] Id. at 408.
[322] 196 Cal.App.4th 311 (2011).

I. Appeal of the Hearing Decision

If the governing board of the school district or the personnel commission dismisses the classified employee, the employee may appeal to the superior court.[323] The superior court then reviews the transcript and makes a decision based on its review of the transcript. If the court determines that the governing board or a personnel commission's decision was based on substantial evidence, the superior court will affirm the decision to dismiss. If the superior court determines that the dismissal was not based on substantial evidence, then the superior court may order reinstatement of the employee and back pay.[324]

J. Reinstatement and Back Pay

In Davis v. Los Angeles Unified School District Personnel Commission,[325] the Court of Appeal held that a classified employee who was demoted from his position of employment with the Los Angeles Unified School District was not entitled to immediate reinstatement or full back pay. The Court of Appeal found that while the employee was wrongfully demoted, the employee began a disability leave for reasons unrelated to his employment and has remained unavailable to return to work. Therefore, the court concluded that the employee was not entitled to immediate reinstatement or full back pay given that he was medically unable to return to work.

The underlying facts were that in 1999, Davis became the Director of Information Systems for the school district. In July, 2001, Davis' immediate supervisor received an anonymous interoffice memorandum accusing Davis of wrongdoing. The matter was referred for investigation. In the interim, Davis was relieved of his duties and assigned to a new work location.[326]

On November 8, 2001, Davis was presented with a notice outlining the allegations against him. After a meeting to discuss the allegations, Davis went home and saw his physician who placed him on disability. Since November 8, 2001, Davis has been disabled and has not returned to work.[327]

In Davis' court actions, Davis does not identify or describe his illness or disability. On December 11, 2001, the Board of Education of the Los Angeles Unified School District adopted the charges and demoted Davis to Senior Software Engineer, a lower paying job, effective December 12, 2001. Davis was informed of the demotion by letter and appealed to the Personnel Commission.[328]

Davis filed a workers' compensation claim which was denied on the ground that his illness was not work related. Davis did not seek further review of the denial.[329]

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[323] Code of Civil Procedure section 1094.5.
[324] Ibid.
[325] 152 Cal.App.4th 1122, 62 Cal.Rptr.3d 69 (2007).
[326] Id. at 1127.
[327] Ibid.
[328] Id. at 1127-28.
[329] Id. at 1128.

In February, 2003, Davis exhausted his paid leave benefits. Davis decided not to request unpaid leave and he was placed on a reemployment list for a period of 39 months.[330] If Davis became able to assume the duties of his prior position during the 39 month period, Davis would be reemployed in that position, his break in service would be disregarded and he would be fully restored as a permanent employee.[331]

Davis' appeal to the Personnel Commission was ultimately successful and in July, 2003, the Personnel Commission rescinded the demotion, restored Davis to his prior position effective as of the date of the demotion, held that Davis' separation from employment, due to the length of his absence was not a bar to reinstatement, ordered that Davis be paid the difference between the amount of pay he received at the lower classification and the pay he should have received had he not been demoted, including differences in sick leave pay, vacation pay, and any other benefits, and rejected Davis' request that he be awarded medical costs and damages for emotional distress.[332]

On October 17, 2003, the Los Angeles Unified School District paid Davis an additional $24,324.00 in back pay consisting primarily of vacation pay that was based on his higher pre-demotion rate of pay. Davis did not provide the Los Angeles Unified School District with a statement from his treating physician releasing him to return to work. As a result, Davis was not reinstated.[333]

Davis commenced two lawsuits against the Los Angeles Unified School District. However, based on the facts described above, the Court of Appeal ruled in favor of the Los Angeles Unified School District.[334]

The Court of Appeal held that the Personnel Commission had the authority to condition Davis' reinstatement on a release from his physician. The Court of Appeal held that when the Personnel Commission sustains an employee's appeal, the Personnel Commission has the authority to order the reinstatement upon such terms and conditions as it may determine appropriate.[335] The Court of Appeal held that the Personnel Commission was not required to grant Davis an indefinite leave of absence permitting reinstatement whenever he might recover from his non-industrial illness, nor was the Personnel Commission required to reinstate him at full salary while he is medically unable to return to work.[336]

The Court of Appeal noted that reinstatement should only be ordered where the plaintiff, upon returning to work, successfully performs all the required duties of his or her position with or without reasonable accommodation notwithstanding any disability the employee might have. Reinstatement is not merely to take advantage of company benefits.[337]

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[330] Ibid. See, Education Code section 45195.
[331] Ibid. See, Education Code section 45195.
[332] Id. at 1128-29.
[333] Id. at 1129.
[334] Ibid.
[335] Id. at 1129-30. See, also, Education Code section 45307.
[336] Id. at 1131.
[337] Ibid.

With respect to back pay, the Court of Appeal concluded that Davis' unavailability for work due to his non-industrial illness justified the Personnel Commission's denial of full back pay. The Court of Appeal noted that even if the Los Angeles Unified School District had not wrongfully demoted Davis, Davis would not have appeared for work because of his illness, which the trial court found to be unrelated to his demotion and unemployment.[338]

The Court of Appeal noted that the purpose of back pay is to compensate the employee for the employer's wrongdoing. An award should give the employee what he or she would have earned with the employer, less any net earnings during the time between his wrongful discharge and reinstatement. The remedy should return the employee to the financial position the employee would have been in had the unlawful conduct not occurred. The offending employer is made responsible only for the losses suffered by the employee as a result of the employer's misconduct.[339]

In considering an award of back pay, the Court of Appeal stated that courts must take care not to grant the employee a windfall.[340] As a general rule, a wrongfully discharged employee will not be allowed back pay during any periods of disability and an employer who has committed a wrongful discharge need not reimburse the plaintiff for salary loss attributable to the plaintiff and unrelated to the discharge.[341] The appropriate standard for the measurement of a back pay award is to take the difference between the actual wages earned and the wages the individual would have earned in the position but for the employer's wrongful conduct. An employer is allowed to offset any amount the employee did not actually receive but should have received if reasonably diligent, but a claimant will not be allowed back pay during any periods of disability.[342] The only exception to the rule that an employer is not liable for back pay during periods that an improperly discharged employee is unavailable for work due to disability is if the employer caused the disability.[343] The Court of Appeal concluded:

> "Here, the employer established that a wrongfully demoted employee would not have received a salary because of an illness unrelated to his demotion and employment. Under the causation principles applied by the California and federal courts, the Commission properly concluded that Davis was not entitled to lost earnings for the period of his unavailability. He would not have been able to work and would not have had any earnings regardless of whether the LAUSD had demoted him."[344]

In Norton v. San Bernardino City Unified School District,[345] the Court of Appeal held that the school district must reinstate an employee to the same position and same duties and responsibilities as the employee held prior to the district's action to terminate the employee.

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[338] Id. at 1131-32.
[339] Id. at 1133.
[340] Id. at 1133-34.
[341] Ibid.
[342] Id. at 1134-35.
[343] Ibid.
[344] Id. at 1141.
[345] 158 Cal.App.4th 749, 69 Cal.Rptr.3d 917 (2008).

The Plaintiff was the Director of Building Services for San Bernardino Unified School District. The District terminated his employment and the employee appealed the district's decision pursuant to Education Code section 45305. After a lengthy administrative hearing, the appointed hearing officer upheld only one ground for discipline and recommended that the employee be suspended for one month without pay, and that the employee be reinstated to his position as Director of Building Services and receive backpay accordingly. The district's Personnel Commission adopted the hearing officer's recommendation.[346]

The Plaintiff filed a petition in Superior Court alleging that the school district had failed to properly reinstate the employee as ordered by the Personnel Commission. The district had reinstated to a position entitled Director of Building Services, but the duties and responsibilities had changed and another employee was performing the duties and responsibilities that the employee had prior to the district's action.[347]

The hearing officer found that the only misconduct proven by the district was that the employee had been dishonest with regard to the paperwork involving the acquisition of the miniature bug detector and that the employee indirectly falsified information given to the district. The hearing officer concluded that the district failed to establish just cause for firing the employee because the purchase of the miniature bug detector in and of itself was not inappropriate. The hearing officer recommended the Personnel Commission impose a one month suspension without pay for the employee's act of dishonesty and falsification of a document related to the bug detector.[348]

The Court of Appeal held that since the Personnel Commission upheld the recommendation of the hearing officer and as a matter of law the district did not comply with the Personnel Commission's order by not fully reinstating the employee to the same duties and responsibilities, the Court of Appeal remanded the matter back to the trial court to issue a writ of mandate compelling the district to fully reinstate the employee to the title, salary and duties and responsibilities of his former position as Director of Building Services, as they existed on March 28, 2003. The Court of Appeal upheld the one month suspension without pay.[349]

The Court of Appeal reversed the lower court's judgment and ordered the trial court to order the school district to conduct a hearing on the dismissal of the employee.

K. Amount of Back Pay

In Candari v. Los Angeles Unified School District,[350] the Court of Appeal affirmed the trial court's decision, remanding the matter back to the Personnel Commission of the Los Angeles Unified School District to determine the amount of back pay owed to Candari.

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[346] Id. at 752-53.
[347] Id. at 754-55.
[348] Id. at 754.
[349] Id. at 763-65.
[350] 193 Cal.App.4th 402, 122 Cal.Rptr.3d 53 (2011).

The Court of Appeal held that under controlling law, the employer must demonstrate the availability of comparable or substantially similar positions before projected earnings of alternative employment opportunities not sought by the discharged employee are properly considered. The Court of Appeal held that the school district did not discharge their burden on their affirmative defense by merely showing Candari had not sought other carpentry opportunities. The court held that the school district must show that there were comparable carpentry opportunities available.[351]

The Court of Appeal held that an earlier case, Davis v Los Angeles Unified School District Personnel Commission[352] was inapplicable to the present case. In Davis, the personnel commission found that the employee had been wrongfully demoted and was entitled to reinstatement, but was not entitled to full back pay for a period of time when he was not available for work due to a nonindustrial illness. The Court of Appeal in Davis held that since back pay was a make whole remedy, intended to restore the employee to the financial situation that would have existed, but for the employer's wrongful conduct, the employee was not entitled to earnings he would not have received due to a nonindustrial illness.[353]

The Court of Appeal held that while Education Code section 45307 grants the personnel commission discretion to determine whether back pay should be awarded, the employer has the burden of proof to show the availability of comparable or substantially similar positions before projected earnings or alternative employment opportunities not sought by the discharged employee are properly considered.[354] Section 45307 states in part, "If the commission sustains the employee, it may order paid all or part of his full compensation from the time of suspension, demotion, or dismissal, and it shall order his reinstatement upon such terms and conditions as it may determine appropriate. . . ."

LIMITATION ON POST-RETIREMENT EARNINGS FOR CLASSIFIED EMPLOYEES

A. Earnings Limitations for CalPERS Retirees

The Government Code limits CalPERS retirees to working 960 hours per fiscal year, which is cumulative for all assignments.[355] The pay rate that the retiree earns must be the same as that paid to other employees on an hourly basis performing comparable duties.

Government Code section 7522.44 applies to all public agency retirees in states that retirees are not eligible to return to work for at least 180 days after retirement unless the following conditions are met:

- The employer certifies the nature of the employment.

[351] Id. at 409; citing Parker v. 20th Century-Fox Film Corp., 3 Cal.3d 176, 181-182, 89 Cal.Rptr. 737 (1970).
[352] 152 Cal.App.4th 1122, 62 Cal.Rptr.3d 69 (2007).
[353] 193 Cal.App.4th 402, 407-11 (2011).
[354] Id. at 411.
[355] Government Code section 21221(h).

- The employer certifies that the appointment is necessary to fill a critically-needed position before 180 days have passed.

- The appointment has been approved by the governing body of the employer in a public meeting (the appointment cannot be placed on a consent calendar).

If the employee received a retirement incentive, there can be no exception for meeting the 180-day requirement before returning to work. Once the 180-day requirement has been met, Government Code section 7522.56 specifies that a CalPERS retiree can return to work without reinstating to active service either during an emergency to prevent stoppage of public business, or because the retired person has skills needed to perform work of limited duration.

In addition, there are several statutes that allow CalPERS retirees to return to work without reinstating to active service if they are employed in the following capacities:

- Employment in a position found by the governing body, by resolution, to be available because of a leave of absence granted to another employee for a period not to exceed one year, and found by the governing body to require specialized skills.[356]

- Upon interim appointment by the governing board of a contracting agency to a vacant position during recruitment for a permanent appointment and deemed by the governing body to require specialized skills or during an emergency to prevent stoppage of public business, however, the retiree can only be appointed once to this vacant position and cannot receive any benefits or compensation in addition to the hourly pay.[357]

- Upon appointment during an emergency to prevent stoppage of public business or because the retiree has specialized skills needed in performing work of limited duration, however, the retiree cannot receive any benefits or compensation in addition to the hourly pay.[358]

B. Independent Contractors and CalPERS Retired Employees

Recently, the California Public Employees' Retirement System (CalPERS) issued a Circular Letter[359] that provided CalPERS employees with an overview of post-service retirement employment requirements (copy attached). The requirements include the following:

[356] Government Code section 21221(g).
[357] Government Code section 21221(h).
[358] Government Code section 21224.
[359] Circular Letter 200-002-14, dated January 14, 2014.

1. A retired annuitant may be employed up to a maximum of 960 hours per fiscal year for all CalPERS employers, without exception. A retired annuitant may not volunteer while employed. Retired annuitants who work more than the 960 hour maximum per fiscal year under any circumstances are out of compliance with the statute and subject to mandatory reinstatement.[360]

2. The compensation paid to retirees cannot be less than the minimum, nor exceed the maximum monthly base salary paid to other employees performing comparable duties, divided by 173.33 hours per month, to equal an hourly rate. Retirees cannot receive any benefit, incentive, compensation in lieu of benefits, or other form of compensation in addition to the hourly pay rate.

3. Retirees cannot be hired into vacant permanent or regular staff positions, except as an interim appointment, regardless of whether the positions are part-time or full-time.[361] Retirees should be hired into retired annuitant designated positions only, and a retired annuitant appointment should have a beginning date and an end date. A retiree can be hired to perform work of limited duration, meaning extra help work, such as the elimination of the backlog, to perform special project work, or to perform work in excess of that which regular staff can do. Limited duration work does not mean an indefinite appointment to a permanent part-time position.

4. There should be some showing in the retiree's work history that he or she has previous experience in the skill set needed to perform the desired work.

The governing bodies of contracting agencies are authorized to appoint a retiree to fill a vacant position on an interim basis during the recruitment to permanently fill the vacant position.[362] These appointments must be made by the governing body of the employer and are generally used for single or unique positions, such as interim city manager, police chief, director, or other managerial and executive positions. An open recruitment to permanently fill the vacant position is required in order to appoint a retiree, a retiree hired as an interim appointment without an open retirement could be subject to mandatory reinstatement. A retiree hired as a permanent appointment is subject to mandatory reinstatement. A retiree can be appointed only once to the position and the employment terms must specify an end date and cannot be amended to extend the appointment term. A retiree appointed more than once is subject to mandatory reinstatement.

Retiree employment that begins after January 1, 2013 is subject to a 180 day waiting period.[363] There are four exceptions that apply to the 180 day waiting period. The main exception that applies to school employers is if a school employer provides a resolution

[360] Government Code section 7522.56 (d).
[361] Government Code section 21221(h).
[362] Government Code section 21221(h).
[363] Government Code section 7522.56.

certifying the nature of the employment, and that the appointment is necessary to fill a critically needed position before 180 days has passed. However, if a retiree receives a golden handshake or any other retirement related incentive, the 180 day wait period applies without exception. If a retiree is employed without meeting the 180 day wait period, and without an allowable exception, he or she is subject to immediate reinstatement from retirement. There is no provision in the retirement law to retroactively remedy a violation of the 180 day wait period.

Another major exception is for retirees who are retained as independent contractors through third party employers. Under federal and state law, independent contractors are independent business people who are hired to perform specific tasks. Independent contractors are in business for themselves and provide services just as a vendor would provide goods. Independent contractors are not eligible for unemployment, disability, or workers' compensation benefits.

The key factor in determining whether an individual is an independent contractor is who has the right to control the worker as to how the work is to be accomplished. If the district controls the means by which the work is done, then the individual is legally an employee.[364] If the district can exercise control only as to the results of the work, the worker is usually an independent contractor. Labor Code section 3353 defines an independent contractor as follows:

> "'Independent contractor' means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished."

These rules would apply to retired employees who return to perform services for a district. Whether the retired employee is properly classified as an employee or independent contractor is determined by the same factors as all other individuals.

In determining whether a particular individual is an independent contractor or an employee, the courts will look to the following factors:

1. Did the district instruct the individual on how to accomplish the work? If the district gave specific directions or instructions to the individual on how to accomplish the work, the individual will be determined to be an employee.

2. Did the district provide training to the individual? If the district provided training to the individual to teach them how to do the work rather than the individual using their own methods to accomplish the work, then the individual will be determined to be an employee.

3. Do the services have to be provided by a particular individual? If the district insists that the services must be provided by a particular individual and the contractor does not have the right to hire others to

[364] S.G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal.3d 341, 350 (1989).

do the actual work or to assist in the work, then the individual might be found to be an employee depending on the circumstances.

4. Does the district set the individual's work hours? If the district sets the work hours of the individual, it is likely that the individual will be determined to be an employee.

5. Does the district decide who the contractor will hire, supervise, or pay with regard to the contractor's assistants? If the district directs the contractor on who to hire, who to supervise, or how much to pay the contractor's assistants, then it may be determined that the individual is an employee. The contractor should have sole discretion over who the contractor hires, supervises, and how much they pay them.

6. Does the district determine the job location of the individual? If the district determines the job location of an individual, then it may be determined that the individual is an employee. An independent contractor controls where they work. However, in some circumstances, such as individuals who make presentations to school employees, by contract, it may be stipulated that the presentation will be at a specified location. However, that individual's preparation time and where it occurs will be up to the contractor.

7. Does the district determine the order and sequence of the work? If the district determines the order and sequence of the work, it is likely that the individual will be determined to be an employee. Generally, contractors will determine the order and sequence in which they will perform the work.

8. How is the district paying for the individual? Generally, contractors are paid by the job or if they are paid on a fixed hourly rate, this is determined before the job commences.

9. Does the individual work for other districts or companies? Contractors generally work for more than one district or company at a time, and if the contractor works only for a school district, it may be determined, coupled with other factors, that the individual is an employee.

10. Does the district provide the individual with tools? Generally, contractors furnish their own tools, therefore, for example, contractors generally type their own reports and do not utilize district secretarial support.

11. Does the individual invest in his own equipment to perform services? Contractors generally invest in equipment or facilities to

perform their trade such as office furniture, equipment, machinery, secretarial support.

12. Are the individual's services available to others? Generally, contractors make their services available to other districts or to the general public by having an office, by advertising, listing their services in a business directory, or advertising their services.

13. Does the individual have the possibility of making a profit or loss? Generally, contractors make a profit or loss, employees cannot suffer a loss.

14. Is the means of discharge or termination regulated by contract? Generally contractors enter into a contract with the district to produce a result which meets the contract's specifications, and the contract can only be terminated under the terms of the agreement.

15. Is the individual entitled to compensation whether he completes the job or not? Generally, contractors are responsible for satisfactory completion of the job or they will not be compensated. Generally, the contract with the district will require them to complete the job before they receive final payment.[365]

The above factors are factors that the courts and various federal and state agencies will look at in determining whether an individual is an independent contractor or not. There may be unusual circumstances in a given case that would render an individual an independent contractor even if one of the factors above is violated. These factors should be used as a general guideline, and if districts have specific concerns about a particular situation, districts should consult with legal counsel.

[365] See, Estrada v. FedEx Ground Package System, Inc., 154 Cal.App.4th 1, 11 64 Cal.Rptr.3d 327 (2007); JKH Enterprises, Inc. v. Department of Industrial Relations, 142 Cal. App.4th 1046, 1064, n. 14, 48 Cal.Rptr.3d 563 (2006). These factors substantially include: (1) whether there is a right to fire at will without cause; (2) whether the one performing services is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the services are to be performed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is a part of the regular business of the principal; (9) whether or not the parties believe they are creating an employer-employee relationship; (10) whether the classification of independent contractor is a bona fide and not a subterfuge to avoid employee status; (11) the hiree's degree of investment other than personal service in his or her own business and whether the hiree holds himself or herself out to be in business with an independent business license; (12) whether the hiree has employees; (13) the hiree's opportunity for profit or loss depending on his or her managerial skill; and (14) whether the service rendered is an integral part of the alleged employer's business.

APPENDICES

APPENDIX I

January 2014

Offenses prohibiting employment in the classified service[366]:

Education Code Provision	Type of Offense	Penal Code Section	Cited Offenses
45122.1	Violent felony	667.5 (c)	(1) Murder or voluntary manslaughter. (2) Mayhem. (3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262. (4) Sodomy as defined in subdivision (c) or (d) of Section 286. (5) Oral copulation as defined in subdivision (c) or (d) of Section 288a. (6) Lewd or lascivious act as defined in subdivision (a) or (b) of Section 288. (7) Any felony punishable by death or imprisonment in the state prison for life. (8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7, 12022.8, or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of Section 12022.3, or Section 12022.5 or 12022.55. (9) Any robbery. (10) Arson, in violation of subdivision (a) or (b) of Section 451.

[366] See section 45123 regarding employment after conviction for sex offense or controlled substance offense.

			(11) Sexual penetration as defined in subdivision (a) or (j) of Section 289. (12) Attempted murder. (13) A violation of Section 18745, 18750, or 18755. (14) Kidnapping. (15) Assault with the intent to commit a specified felony, in violation of Section 220. (16) Continuous sexual abuse of a child, in violation of Section 288.5. (17) Carjacking, as defined in subdivision (a) of Section 215. (18) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1. (19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22 of the Penal Code. (20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22 of the Penal Code. (21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary. (22) Any violation of Section 12022.53. (23) A violation of subdivision (b) or (c) of Section 11418. The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person.

	Serious felony	1192.7 (c)	(1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (6) lewd or lascivious act on a child under 14 years of age; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing bodily injury, great bodily injury, or mayhem; (17) exploding a destructive device or any explosive with intent to murder; (18) any burglary of the first degree; (19) robbery or bank robbery; (20) kidnapping; (21) holding of a hostage by a person confined in a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life;
		18-74	(23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering, giving, or offering to sell, furnish

45123/44010	Sex offense		(a) Any offense defined in Section 220, 261, 261.5, 262, 264.1, 266, 266j, 267, 285, 286, 288, 288a, 288.5, 289, 311.1, 311.2, 311.3, 311.4, 311.10, 311.11, 313.1, 647b, 647.6, or former Section 647a, subdivision (a), (b), (c), or (d) of Section 243.4, or subdivision (a) or (d) of Section 647 of the Penal Code. (b) Any offense defined in former subdivision (5) of former Section 647 of the Penal Code repealed by Chapter 560 of the Statutes of 1961, or any offense defined in former subdivision (2) of former Section 311 of the Penal Code repealed by Chapter 2147 of the Statutes of 1961, if the offense defined in those sections was committed prior to September 15, 1961, to the same extent that an offense committed prior to that date was a sex offense for the purposes of this section prior to September 15, 1961. (c) Any offense defined in Section 314 of the Penal Code committed on or after September 15, 1961. (d) Any offense defined in former subdivision (1) of former Section 311 of the Penal Code repealed by Chapter 2147 of the Statutes of 1961 committed on or after September 7, 1955, and prior to September 15, 1961. (e) Any offense involving lewd and lascivious conduct under Section 272 of the Penal Code committed on or after September 15, 1961. (f) Any offense involving lewd and lascivious conduct under former Section 702 of the Welfare and Institutions Code repealed by Chapter 1616 of the Statutes of 1961, if that offense was committed prior to September 15, 1961, to the same

			extent that an offense committed prior to that date was a sex offense for the purposes of this section prior to September 15, 1961. (g) Any offense defined in Section 286 or 288a of the Penal Code prior to the effective date of the amendment of either section enacted at the 1975–76 Regular Session of the Legislature committed prior to the effective date of the amendment. (h) Any attempt to commit any of the offenses specified in this section. (i) Any offense committed or attempted in any other state or against the laws of the United States which, if committed or attempted in this state, would have been punishable as one or more of the offenses specified in this section. (j) Any conviction for an offense resulting in the requirement to register as a sex offender pursuant to Section 290 of the Penal Code. (k) Commitment as a mentally disordered sex offender under former Article 1 (commencing with Section 6300) of Chapter 2 of Part 2 of the Welfare and Institutions Code, as repealed by Chapter 928 of the Statutes of 1981.
45123/44011	Controlled substance offense		(a) Any offense in Sections 11350 to 11355, inclusive, 11361, 11366, 11368, 11377 to 11382, inclusive, and 11550 of the Health and Safety Code. (b) Any offense committed or attempted in any other state or against the laws of the United States which, if committed or attempted in this state, would have been punished as one or more of the above-mentioned offenses. (c) Any offense committed under former Sections 11500 to 11503,

			inclusive, 11557, 11715, and 11721 of the Health and Safety Code. (d) Any attempt to commit any of the above-mentioned offenses.

Education Code section 45122.1

(a) In addition to any other prohibition or provision, no person who has been convicted of a violent or serious felony shall be employed by a school district pursuant to this chapter. A school district shall not retain in employment a current classified employee who has been convicted of a violent or serious felony, and who is a temporary, substitute, or a probationary employee who has not attained permanent status.

(b) This section applies to any violent or serious offense which, if committed in this state, would have been punishable as a violent or serious felony.

(c) (1) For purposes of this section, a violent felony is any felony listed in subdivision (c) of Section 667.5 of the Penal Code and a serious felony is any felony listed in subdivision (c) of Section 1192.7 of the Penal Code.

(2) For purposes of this section, the term "school district" has the same meaning as defined in Section 41302.5.

(d) When the Department of Justice ascertains that an individual who is an applicant for employment by a school district has been convicted of a violent or serious felony, the department shall notify the school district of the criminal information pertaining to the applicant. The notification shall be delivered by telephone and shall be confirmed in writing and delivered to the school district by first-class mail.

(e) Notwithstanding subdivision (a), a person shall not be denied employment or terminated from employment solely on the basis that the person has been convicted of a violent of serious felony if the person has obtained a certificate of rehabilitation and pardon pursuant to Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.

(f) Notwithstanding subdivision (e), a person shall not be denied employment or terminated from employment solely on the basis that the person has been convicted of a serious felony that is not also a violent felony if that person can prove to the sentencing court of the offense in question, by clear and convincing evidence, that he or she has been rehabilitated for the purposes of school employment for at least one year. If the offense in question occurred outside this state, then the person may seek a finding of rehabilitation from the court in the school district in which he or she is a resident.

(g) Notwithstanding any other provision of law, when the Department of Justice notifies a school district by telephone that a current temporary, substitute, or probationary employee who has not attained permanent status, has been convicted of a violent or serious felony, that employee shall immediately be placed on leave without pay. When the school district receives written notification of the fact of conviction from the Department of Justice, the employee shall be terminated automatically and without regard to any other procedure for termination specified

in this code or school district procedures unless the employee challenges the record of the Department of Justice and the Department of Justice withdraws in writing its notification to the school district. Upon receipt of written withdrawal of notification from the Department of Justice, the employee shall immediately be reinstated with full restoration of salary and benefits for the period of time from the suspension without pay to the reinstatement.

(h) Notwithstanding Section 47610, this section applies to a charter school.

Education Code section 45123

(a) No person shall be employed or retained in employment by a school district who has been convicted of any sex offense as defined in Section 44010. A plea or verdict of guilty, a finding of guilt by a court in a trial without jury, or a conviction following a plea of nolo contendere shall be deemed to be a conviction within the meaning of this subdivision.

(b) No person shall be employed or retained in employment by a school district, who has been convicted of a controlled substance offense as defined in Section 44011.

(c) If, however, a conviction is reversed and the person is acquitted of the offense in a new trial or the charges against him or her are dismissed, this section does not prohibit his or her employment thereafter.

(d) The governing board of a school district may employ a person convicted of a controlled substance offense if the governing board of the school district determines, from the evidence presented, that the person has been rehabilitated for at least five years.

The governing board shall determine the type and manner of presentation of the evidence, and the determination of the governing board as to whether or not the person has been rehabilitated is final.

Education Code section 44010

"Sex offense," as used in Sections 44020, 44237, 44346, 44425, 44436, 44836, and 45123, means any one or more of the offenses listed below:

(a) Any offense defined in Section 220, 261, 261.5, 262, 264.1, 266, 266j, 267, 285, 286, 288, 288a, 288.5, 289, 311.1, 311.2, 311.3, 311.4, 311.10, 311.11, 313.1, 647b, 647.6, or former Section 647a, subdivision (a), (b), (c), or (d) of Section 243.4, or subdivision (a) or (d) of Section 647 of the Penal Code.

(b) Any offense defined in former subdivision (5) of former Section 647 of the Penal Code repealed by Chapter 560 of the Statutes of 1961, or any offense defined in former subdivision (2) of former Section 311 of the Penal Code repealed by Chapter 2147 of the Statutes of 1961, if the offense defined in those sections was committed prior to September 15, 1961, to the same extent that an offense committed prior to that date was a sex offense for the purposes of this section prior to September 15, 1961.

(c) Any offense defined in Section 314 of the Penal Code committed on or after September 15, 1961.

(d) Any offense defined in former subdivision (1) of former Section 311 of the Penal Code repealed by Chapter 2147 of the Statutes of 1961 committed on or after September 7, 1955, and prior to September 15, 1961.

(e) Any offense involving lewd and lascivious conduct under Section 272 of the Penal Code committed on or after September 15, 1961.

(f) Any offense involving lewd and lascivious conduct under former Section 702 of the Welfare and Institutions Code repealed by Chapter 1616 of the Statutes of 1961, if that offense was committed prior to September 15, 1961, to the same extent that an offense committed prior to that date was a sex offense for the purposes of this section prior to September 15, 1961.

(g) Any offense defined in Section 286 or 288a of the Penal Code prior to the effective date of the amendment of either section enacted at the 1975–76 Regular Session of the Legislature committed prior to the effective date of the amendment.

(h) Any attempt to commit any of the offenses specified in this section.

(i) Any offense committed or attempted in any other state or against the laws of the United States which, if committed or attempted in this state, would have been punishable as one or more of the offenses specified in this section.

(j) Any conviction for an offense resulting in the requirement to register as a sex offender pursuant to Section 290 of the Penal Code.

(k) Commitment as a mentally disordered sex offender under former Article 1 (commencing with Section 6300) of Chapter 2 of Part 2 of the Welfare and Institutions Code, as repealed by Chapter 928 of the Statutes of 1981.

Education Code section 44011

"Controlled substance offense" as used in Sections 44346, 44425, 44436, 44836, and 45123 means any one or more of the following offenses:

(a) Any offense in Sections 11350 to 11355, inclusive, 11361, 11366, 11368, 11377 to 11382, inclusive, and 11550 of the Health and Safety Code.

(b) Any offense committed or attempted in any other state or against the laws of the United States which, if committed or attempted in this state, would have been punished as one or more of the above-mentioned offenses.

(c) Any offense committed under former Sections 11500 to 11503, inclusive, 11557, 11715, and 11721 of the Health and Safety Code.

(d) Any attempt to commit any of the above-mentioned offenses.

APPENDIX II

[District Letterhead]

[Date]

Via Personal Delivery

[Address]

Re: Proposed Notice of Disciplinary Action (Five Day Suspension without Pay), Statement of Charges, and Notice of Skelly Hearing on _____, 201_

Dear Mr. _____:

This correspondence serves as written notice of the recommendation to suspend you without pay for five (5) days. The causes and grounds described below form the basis for the recommended action. This disciplinary action is taken pursuant to Education Code sections 45100, 45113 and 45116, Administrative Regulation 4218, Article XX of the collective bargaining agreement between ____ School District and the California School Employees Association, and, District Policy _____ or Personnel Commission Rules _____.

CAUSES AND GROUNDS FOR DISCIPLINARY ACTION

1. Incompetency, below standard work performance, and continued negligence in the performance of assigned duties;
2. Insubordination;
3. Inattention to or dereliction of duty, or persistent failure to efficiently manage time; and
4. Willful and persistent violation of the Education Code or rules, regulations, or procedures adopted by the District.

FACTUAL BASIS FOR DISCIPLINARY ACTION

[insert facts]

SKELLY HEARING

This proposed Notice of Disciplinary Action also provides you with notice that you will have an opportunity to refute the charges and present your version of the events to the Superintendent's designee. This will be your opportunity to explain why you should not be suspended without pay. You may respond in person or in writing. If you wish to provide your version of events in person, a meeting has been scheduled for _____, 201_, at _____ a.m. with _____, at her office.

If you wish to avail yourself of this opportunity for hearing, you must file your written request within ten (10) calendar days after you have received this Notice of Disciplinary Action. You may request a hearing by signing and filing the hearing request form included with this Notice. Any other written document signed and appropriately filed within the specified time limit shall constitute sufficient notice of your request for a hearing. A hearing request must be delivered to my office during normal work hours or faxed to _____. It must be received no later than the time limit stated herein.

The meeting with the Superintendent's designee is referred to as a "Skelly hearing," and you have the opportunity to appear on your own behalf or be accompanied by a representative as you deem necessary. If you cannot attend the Skelly hearing as scheduled, you may submit a written response to the allegations by close of business on _____, 201_.

If you fail to notify the District of your request for hearing within the stated ten (10) days, it shall be deemed you have waived your right to a hearing before the Superintendent's Designee and the recommendation to suspend you without pay will be made to the Governing Board.

You have a right to see and obtain copies of all evidence and documentation to support the District's case against you. Attached are the exhibits on which the District intends to rely.

This Notice will be placed in your personnel file after 10 days. Prior to the 10 days, you have the right to provide a written response, and have your response attached to this Notice and also placed in your personnel file.

Sincerely,

Attachments:

Exhibits 1-
Education Code sections 45100, 45113 and 45116
Administrative Regulation 4218
District Policy _____
Personnel Commission Rules _____
Article XX of the CSEA Agreement

cc: Personnel File

To:

Re: Request for Hearing

Dear _____:

I hereby request a hearing before _____ concerning the proposed disciplinary action.

_____ _____
Date

APPENDIX III

Date

Via Hand Delivery

Name
Street Address
City, State, Zip

RE: [PROPOSED] NOTICE OF DISCIPLINARY ACTION, TERMINATION OF EMPLOYMENT, STATEMENT OF CHARGES, RESULTS OF *SKELLY* HEARING

On _____, 201_, a Proposed Notice of Disciplinary Action (Termination of Employment), Statement of Charges, and a Notice of Skelly Hearing on January 14, 2013 were sent to you via Certificated Mail. The Skelly Hearing was held on January 14, 2013, in the Conference Room at the District Office.

This correspondence serves as written notice of the District's proposed intent to terminate your employment with the _____ School District. The causes and grounds described below form the basis for the recommended action. This disciplinary action is taken pursuant to Education Code Sections **[list sections]**, Administrative Regulation _____, and Article _____of the collective bargaining agreement between _____ School District and the California School Employees Association (CSEA).

CAUSES AND GROUNDS FOR DISCIPLINARY ACTION

[FOR EXAMPLE]

1. Incompetency, below standard work performance, and continued negligence in the performance of assigned duties (Article _____, Section ____) (Administrative Regulation _____.)

2. Insubordination (Article _____, Section _____) (Administrative Regulation _____.)

FACTUAL BASIS FOR DISCIPLINARY ACTION

The recommended disciplinary action is based on the following facts:

[FOR EXAMPLE (list in chronological order and include exhibits, if any)]

A. On November 9, 201_, at approximately _____ a.m./p.m., while driving District Vehicle number 103 you hit a parked vehicle while attempting to turn right from _____ Drive onto _____Drive, just north of the Maintenance and Operations yard and _____ School. Both vehicles were damaged. **(Exhibit 1.)**

B. On _____, 201_, . . . and so on.

HEARING RESULTS

On January 14, 201_, you appeared at a due-process (*Skelly*) hearing where you were provided the opportunity to refute the charges and present your version of the events cited and explain why you should not be terminated. In that hearing you were accompanied by ____ representatives from the California School Employees Association. You explained to me your version of the events. On January 14, 201_, you shared the following points in presenting your case regarding the vehicle accident on November 9, 201_:

1. Your Statement: You have been an employee of the District for the past ____ years.

District's Response: Agreed.

2. Your Statement: You may have misinterpreted the direction of Mr. _____ regarding how to clean up the broken glass fragments. You stated that you were afraid to clean up the glass fragments yourself as you did not want to get injured. Therefore, you drove back to _____ Glass and requested that they clean up the glass.

District's Response: Mr. _____ gave you clear directions to clean up the broken glass fragments using the shop vacuum at the Maintenance and Operations shop prior to driving the vehicle to ABC Glass to have the window replaced. He gave you these directions so that you would not be injured by the glass fragments while driving the District vehicle to ABC Glass.

3. Your Statement:

District's Response: On _____ and so on. . .

My determination is to recommend termination based on the evidence I have reviewed, as well as your testimony at the *Skelly* Hearing on January 14, 201_, in accordance with Article _____, Section _____, of the CSEA Contract. Article _____, Section _____ states: ". . . If possible, the Superintendent will issue a decision within _____ (___) working days after said hearing to either continue the proposed disciplinary action to the next level or to half all

proposed disciplinary action. If the decision is to continue the proposed discipline, the employee may appeal to the next level."

RIGHT TO APPEAL

A copy of this decision will be placed in your official personnel file. As per Article _____ of the CSEA Contract, you have the right to appeal this recommendation for termination to the Board of Trustees. You must file your appeal within _____ (___) **working** days after you have received this Notice of Disciplinary Action. You may indicate your desire for an appeal by signing the appeal request included with this notice. Any other written document signed, and appropriately filed within the specified time limit shall constitute a sufficient notice to appeal.

An appeal request is filed only by delivery to the Office of _____ during normal working hours of that office or an appeal request may be mailed to the office of _____, Assistant Superintendent, at 10055 Slater Avenue, Fountain Valley, CA 92708. However, it must be received or postmarked no later than the time limit stated herein. If you fail to notify the District of your intent to appeal within the stated _____ (___) working days, it shall be deemed that you have waived your right to appeal and the Board may order the proposed disciplinary action to be placed into effect immediately.

Sincerely,

Enclosures:
Exhibits 1-__
Education Code Sections **[list sections]**
Board Policy _____
Administrative Regulation _____
Personnel Commission Rule _____
Article ____ of the collective bargaining agreement

cc: Personnel File

APPENDIX IV

SAMPLE REASONABLE ACCOMMODATION
REQUEST FOR INFORMATION
TO EMPLOYEE'S PHYSICIAN

[District Letterhead]

Date:

To: Dr. _____

From:

The purpose of this letter is to request you to assist the _____ School District in determining whether your patient, _____, may need reasonable accommodations to perform the essential functions of his/her job as a _____ (insert title of position). In order to help us specifically identify functional limitations and what accommodations are needed for him/her to perform the essential functions of the position, we are requesting that you complete the following questionnaire and return the questionnaire to me by _____**.** We have attached a Job Description and/or Job Analysis for this position for your review in answering the questions.

Please respond only to the questions contained herein. The District **does not seek information regarding the employee's medical cause, diagnosis, or medical history**.

> THE GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008 (GINA) PROHIBITS EMPLOYERS AND OTHER ENTITIES COVERED BY GINA TITLE II FROM REQUESTING OR REQUIRING GENETIC INFORMATION OF AN INDIVIDUAL OR FAMILY MEMBER OF THE INDIVIDUAL, EXCEPT AS SPECIFICALLY ALLOWED BY LAW. TO COMPLY WITH THIS LAW, **WE ARE ASKING THAT YOU NOT PROVIDE ANY GENETIC INFORMATION WHEN RESPONDING TO THIS REQUEST FOR MEDICAL INFORMATION**. 'GENETIC INFORMATION' AS DEFINED BY GINA, INCLUDES AN INDIVIDUAL'S FAMILY MEDICAL HISTORY, THE RESULTS OF AN INDIVIDUAL'S OR FAMILY MEMBER'S GENETIC TESTS, THE FACT THAT AN INDIVIDUAL OR FAMILY MEMBER SOUGHT OR RECEIVED GENETIC SERVICES, AND GENETIC INFORMATION OF A FETUS CARRIED BY AN INDIVIDUAL OR AN INDIVIDUAL'S

FAMILY MEMBER OR AN EMBRYO LAWFULLY HELD BY AN INDIVIDUAL OR FAMILY MEMBER RECEIVING ASSISTIVE REPRODUCTIVE SERVICES.

Please address the following questions.

1. Does this employee have a physical or mental disability or medical condition as those terms are defined in the California Fair Employment and Housing Act, Government Code section 12926? (See attached)

   ___ Yes ___ No

2. Is this employee currently able to perform the essential functions of his/her position as listed in the enclosed Job Description/Analysis?

   ___ Yes, the employee can perform the essential functions **without** accommodations

   ___ Yes, the employee can perform the essential functions **with** reasonable accommodation(s)

   ___ No, the employee cannot perform the essential functions even with reasonable accommodations.

3. If the employee needs an accommodation(s), what are his/her functional limitations related to the essential functions of this position?

   _____

   _____

   _____

   _____

4. If the employee needs an accommodation(s), what reasonable accommodations do you believe would enable the employee to perform his/her job duties?

   _____

   _____

   _____

   _____

5. If your recommendation includes restrictions for this employee, please state the length of time you expect the restriction(s) to be in place.

_____

_____

_____

_____

6. If an employee requests, as a reasonable accommodation, leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's disability, please confirm the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery.

_____

_____

_____

_____

7. If an employee requests leave on an intermittent or reduced schedule basis for the employee's disability that may result in unforeseeable episodes of incapacity, such as the onset of migraines or epileptic seizures, please confirm the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity.

_____

_____

_____

_____

8. *[If applicable]*. Can the employee perform the job without posing a direct threat (i.e., a significant risk) to the health or safety of him/herself or others?

_____

_____

_____

_____

Thank you for your assistance in this matter. If you have any questions regarding this matter, please do not hesitate to contact my office at _____.

Enclosures (Job description/analysis; Ca. Govt. Code 12926)

Physician's Signature: _____
Date: _____

Physician's Name: _____

Address: _____

Telephone: _____

Board Certifications/
Specialty: _____