

## School Districts that Rescind Certificated Employee Disciplinary Charges *After* the Hearing is Scheduled May be Liable for the Employee's Attorneys Fees and Costs

On June 25, 2012, the California Third District Court of Appeal issued a decision which likely will influence the way school districts proceed with disciplinary charges against certificated employees. In *Boliou v. Stockton Unified School District* (June 25, 2012) \_\_Cal.App.4th\_\_ (2012 WL 2371061), the court held that once a district's governing board elects to schedule a hearing in a dismissal against a certificated employee, the Commission on Professional Competence (Commission) must make a final determination in the matter. If the governing board decides to rescind the charges after the hearing is scheduled, the Commission is required to make a finding that the employee should not be dismissed from employment, and that the district is liable to the employee for attorney fees and court costs.

Defendant Stockton Unified School District filed an accusation against David Boliou, a tenured teacher, and recommended Mr. Boliou's dismissal on the grounds of immoral or unprofessional conduct, evident unfitness for service, and persistent violations of school laws. Mr. Boliou denied the charges, and a hearing was convened before the Commission. The presiding administrative law judge dismissed one of the charges for procedural reasons. Six months later, after the district received some unfavorable rulings and before any evidence had been presented in the case, the governing board of the district voted to rescind the remaining charges against Mr. Boliou. The Commission then dismissed the case against Mr. Boliou with prejudice.

Subsequently, Mr. Boliou sought a court order compelling the Commission to vacate its dismissal order, enter a ruling on the merits of the case in his favor, and award him reasonable attorney fees and costs. Mr. Boliou argued that he was entitled to an official ruling by the Commission that he should not be dismissed from employment. The trial court agreed with Mr. Boliou, reasoning that the governing board could not unilaterally stop the administrative proceedings by rescinding the charges, and that the Commission should have made a finding that Mr. Boliou should not be dismissed. The trial court directed the district to pay Mr. Boliou's attorney fees and court costs of nearly \$125,000.

The district appealed the decision. In determining whether the trial court properly ordered the Commission to rule in Mr. Boliou's favor and award him attorney fees and costs, the appellate court reviewed the procedures governing the discipline of certificated employees. The court noted that if an employee demands a hearing after receiving notice of the district's intent to suspend or dismiss, the governing board has two options under section 44943: (1) to schedule a hearing on the matter; or (2) to rescind the charges against the employee. Once the governing board has exercised its option to schedule a hearing, the Education Code provides no mechanism by which it may then prevent the hearing from going forward by rescinding the

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charges, and the Commission is required under section 44944, subdivision (c), to issue a written decision making one of three determinations: (1) the employee should be dismissed; (2) the employee should be suspended for a specific period of time without pay; or (3) the employee should not be dismissed or suspended.

The court affirmed that once the district's governing board opted to proceed with a hearing, section 44944 prohibited the Commission from dismissing the charges without making a final determination as to whether Mr. Boliou should be dismissed. Because the governing board dismissed the charges against Mr. Boliou, the Commission was required to find that he should not be dismissed from employment, and the governing board was liable for all expenses associated with the hearing under section 44944, subdivision (e), including Mr. Boliou's attorney fees and court costs.

At this time, we do not know whether the appellate court's decision in *Boliou v. Stockton Unified* will be appealed to the California Supreme Court. However, in light of the court's decision, districts should ensure that they are carefully following all procedural requirements in the Education Code with respect to the discipline of certificated employees. Districts should also evaluate the strengths and weaknesses of their disciplinary charges before recommending that the governing board schedule a disciplinary hearing. Once an employee requests a hearing and the governing board sets the matter for hearing, the matter must proceed to a final determination by the Commission on Professional Competence. If weakness in the evidence or an unfavorable legal ruling prevents a district from moving forward, the district may be forced to retain the employee *and* pay his or her attorney fees and court costs. Such a finding by the Commission on Professional Competence may also prevent the district from pursuing the same disciplinary charges against the certificated employee at a later date.

If you have any questions regarding *Boliou v. Stockton Unified*, how it impacts the certificated dismissal process in your school district, or the issues that flow from this decision, please feel free to contact one of our [eight offices](#) located statewide. You can also visit our [website](#) or follow Lozano Smith on [Facebook](#).

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