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Vergara and AB 215: the first steps of education reform?

By Michele M. Goldsmith

Rarely does a Los Angeles County Superior Court decision, particularly a tentative decision, draw so much attention. But when the tentative decision rules that five California Education Code statutes are unconstitutional, applying the strict scrutiny standard, it is bound to draw interest.

On June 10, Judge Rolf Treu, after a trial spanning four months, issued a simply formatted and sparsely legally cited 16-page opinion that just might be the impetus for educational reform. *Vergara v. California*, 484642 (Los Angeles County Super. Ct., filed May 14, 2012). In an action filed in May 2012, nine public school students challenged five statues claiming that the statutes violated the equal protection clause of the state Constitution. The statues can be divided into three categories: (1) permanent employment statutes (granting teachers tenure after two years), (2) dismissal statutes (the procedural and substantive statutes to effectuate a dismissal of a teacher) and (2) last in and first out (LIFO) (the seniority system). In concluding that these statutes did not survive strict scrutiny, Treu equated the students' allegation — that they were deprived of their quality of education — to the decisions of *Brown v. Board of Education* (which held that public education facilities separated by race were inherently unequal and denied equal protection of the law) and *Serrano v. Priest* (which held education to be a "fundamental issue" and found that then-existing school financing was a violation of the equal protection law).

What makes *Vergara* so different is that those cases involved the discrete facts raised therein, and not the overarching considerations of quality of the educational experience as a whole.

In determining that each of the five challenged statutes were unconstitutional, and that the plaintiffs had met their burden of proof on all issues, Treu found that the challenged statutes resulted in "grossly ineffective teachers" obtaining and retaining permanent employment. In fact, in analyzing the issue of grossly ineffective teachers, he characterized the evidence as "compelling," so much so that it "shocks the conscience."

As to the permanent employment statutes, Treu reasoned that there was ample evidence proffered, even by the defense, that two years is not nearly enough time for an informed decision to be made regarding tenure. In what other profession could "tenure" be secured after merely two years? As a lawyer in a firm, at two years, and even after three, four or five years, you would be considered a junior associate.

As for the dismissal statutes, Treu found that the process takes too long, is too costly and does not eliminate enough ineffective teachers. As a professional who practices in this area, representing school districts, it is too time-consuming and the hearings are no longer "administrative," but full-blown expensive trials with extensive discovery, pre-trial motions and extensive presentations (including opening statements, expert witnesses, direct and cross-examinations, and closings). And, under the current statutory scheme, evidence cannot be admitted more than four years prior to the notice of intent — even sexual misconduct. It takes a lot of evidence and time (not to mention a good and diligent school administrator) to demonstrate that a teacher has not been performing satisfactorily. As a result, an ineffective teacher may be left in the classroom because administrators don't have the time and resources to document, visit classrooms, evaluate and report, over a long period of time. As reported in *Vergara*, Los Angeles Unified School District alone has 350 grossly ineffective teachers it wishes to dismiss, for whom the dismissal process has not yet been initiated. Although "due process" is a concern, Treu recognized that teachers should not be entitled to "uber due process." He rationalized that the *Skelly v. State Personnel Board*, 15 Cal. 3d 194 (1975), notion of due process (sufficient for classified employees) could be equally effective for certificated employees: "Does a school district classified employee have a lesser property interest in his/her continued employment than a teacher, a certified employee?" asked Treu.

As to the last statutory scheme, under LIFO, Treu recognized the significance that no matter how gifted the junior teacher and no matter how grossly ineffective the senior teacher, the junior gifted one would be let go first, and the grossly ineffective senior teacher would remain.

But the decision is not without challenge. The California Teachers Association, who intervened, promised to appeal.

Impact

Treu specifically stayed the order pending appellate review. Therefore, it is likely that the decision, once final, will be appealed and will wind its way to the state Supreme Court, perhaps even the U.S. Supreme Court. In the interim, however, the current statutes continue to control — unless the Legislature acts first. Indeed, there has been Legislative action lately, including reexamination of at least some of the challenged statutes. On June 12, the state Assembly voted 76-0 to pass Assembly Bill 215, which proposes significant legislative amendments to the dismissal statutes, including:

• *Appeal process:* For egregious misconduct cases, a school district would file charges under an expedited process. Cases of egregious misconduct would be heard by the administrative law judge (ALJ) sitting alone. This changes the current three-person commission, which is composed of the ALJ and two panel members, one selected from each side. For nonegregious cases, if the parties stipulate, they can waive the right to the commission and proceed with the ALJ sitting alone.

• *Timing of the charges:* All charges, with the exception of unsatisfactory performance, may be filed at any time during the calendar year. This changes the current prohibition against filing dismissal charges during the "summer moratorium" of May 15 through Sept. 15.

• *Commencement of the hearing:* For egregious misconduct cases, hearings must commence within 60 days after the date of request, and continuances may only extend the date for an additional 30 days. This changes the current statute that provides a 60-day start date, which can be continued by the parties or by the Office of Administrative Hearings (OAH) upon a showing of good cause. For nonegregious cases, hearings must be completed within seven months, but for good cause shown, a continuance can be granted if there is an established timetable for completion.

• *Discovery:* For egregious misconduct cases, there are no limits on discovery, but it will be the ALJ (not a superior court judge) who will resolve disputes. For nonegregious cases, there will be more of a limited discovery process, but it will also be the ALJ who will resolve disputes.

• *Suspension without pay:* If the employee is being dismissed for certain enumerated charges (i.e., immoral conduct), the district may suspend without pay, pending the appeal process. Currently, there is no process to challenge a district's suspension without pay. Under AB 215, there is a split process. Employees being dismissed for egregious matters may appeal their suspension without pay to the superior court. Nonegregious cases may request a process before the ALJ for a determination.

• *Evidence at the hearing:* Currently, no evidence that is more than four years old may be relied upon at the hearing, except in limited circumstances. Under AB 215, for egregious misconduct cases, evidence that is more than four years old may be admitted and relied upon.

The bill also addresses other minor procedural issues, such as the elimination of duplicative filings, separating out immoral and unprofessional conduct into two separate grounds, and the definition of "disciplines" for the purpose of assigning panel members of the same "discipline" to the commission.

These truncated time limits, additional discovery obligations, and new suspension without pay determinations, will, however, create an even heavier burden on the limited number of judges and already-strained staff at the OAH.

As for the other statutes struck down as unconstitutional, it is only a matter of time before other statutes will be introduced in the Legislature to address Treu's concerns. It would not be surprising to see a tenure statute of four to five years (as nine other states in the nation have), and amendments to the LIFO statute that account for grossly ineffective teachers.

But for now, Vergara will be appealed, and AB 215 is on the governor's desk awaiting signature — and awaiting implementation by practitioners like me.

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