

Board Office Use: Legislative File Info.	
File ID Number	11-1840
Introduction Date	8/1/11
Enactment Number	11-1429
Enactment Date	8-10-11



OAKLAND UNIFIED  
SCHOOL DISTRICT

Community Schools, Thriving Students

# Memo

**To** Board of Education  
**From** Jacqueline Minor, General Counsel  
**Board Meeting Date** August 10, 2011  
**Subject** Employment Contract for Senior Trial Lawyer, Michael Smith

**Action Requested** Approval of Employment Contract for Senior Trial Lawyer, Michael Smith

**Background** Mike Smith was employed by the District as a trial lawyer six years ago. He has now practiced law for 12 years. For the last three years, his salary has capped at \$105,000 based upon the compensation range set by Human Resources when he was first employed. Since his employment, his professional skills have evolved and developed such that he is now the senior trial lawyer for the District. In addition to advising the Board, District and General Counsel on all litigation matters, Mike advises the Police Services Department and the DHP panel and is the designated legal advisor for the Chief of Police. Mike is a graduate of Boalt Hall (UC Berkeley School of Law) and is highly regarded by his superior, colleagues and peers.

**Discussion** The District's legal department was reduced by one attorney in late 2009. Since that time, the trial lawyer has assumed more and additional responsibilities, including serving as legal advisor to the Chief and the DHP panel, EEO regulatory matters, and teacher discipline related litigation. Since joining the District six years ago, Mike Smith's skills have evolved and developed such that he now functions as the senior trial lawyer for the District. Although the need for outside counsel is unpredictable, because of Mike's ability to handle the overwhelming majority of the litigation, the savings to the District are significant.

**Recommendation** Approval of Employment Agreement with Michael Smith as Senior Trial Lawyer, for the District for a term from July 1, 2011 ending on June 30, 2014, in an amount not to exceed \$130,000 per year.

**Fiscal Impact** Funding resource name: (GP) not to exceed \$130,000.00

**Attachments**

- Employment Agreement for Senior Trial Lawyer

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**EMPLOYMENT AGREEMENT – SENIOR TRIAL LAWYER  
OAKLAND UNIFIED SCHOOL DISTRICT**

In consideration of the mutual promises made herein, the Oakland Unified School District, ("OUSD") a local public entity pursuant to Government Code § 811.2 and by the California Education and Government Codes (hereinafter "District"), and Michael Smith, an individual (hereinafter "Employee"), enter into this Employment Agreement ("Agreement") and agree as follows:

**Article 1 Acceptance of Employment and Term**

- 1.1 District hereby agrees to continue to employ Employee and Employee hereby accepts employment with the District on the terms and conditions stated herein. In approving and adopting this Agreement, the Governing Board hereby resolves and designates the position of Senior Trial Lawyer as senior management of the classified service pursuant to Education Code § 45100.5. In entering into this Agreement, Employee hereby acknowledges and agrees that, as Senior Trial Lawyer, he is a member of the senior management of the classified service and that no other employment classification is applicable to his employment with the District.
- 1.2 The term of employment as Senior Trial Lawyer shall be three years commencing on July 1, 2011 and ending June 30, 2014 ("Term"), unless extended in writing by mutual agreement of District and Employee or terminated sooner at the discretion of District.

**Article 2 Duties and Obligations of Employee**

- 2.1 Employee shall serve as the Senior Trial Lawyer of the District. In this capacity, Employee shall advise the General Counsel, the Board of Education, and senior management staff of the District on litigation and regulatory matters, including recommendations related to settlements to the Board of Education; provide advice and counsel to the Police Services Department; serve as the legal advisor to the Chief of Police; represent the District at trial in State and Federal court; prepare Federal and State litigation matters for hearings and trials; provide legal advice to the Disciplinary Hearing Panel regarding student discipline and represent the District in student discipline appeals at the County level; and represent the District and District employees in obtaining restraining order.
- 2.2 Employee shall adhere to and comply with all laws, statutes, regulations, policies and administrative bulletins that presently or prospectively govern District and the conduct of its employees.
- 2.3 District and Employee agree that any intellectual property created by Employee related to or concerning the legal work of the District is owned jointly. Employee shall grant to District the right to share equally in any royalties received by Employee arising out of any

intellectual property created by Employee related to or concerning the legal work of the District.

- 2.4 District may use Employee's name during the term of employment as necessary or convenient without additional compensation to Employee.
- 2.5 Employee warrants and represents that he has the ability and authority to enter into this Agreement, that there are no restrictions or limitations on entering into this Agreement, and that entering into this Agreement will not violate any agreement(s) Employee has with any third parties.

### **Article 3 Obligations of District**

- 3.1 District agrees to defend, indemnify and hold Employee harmless against any claims, demands, actions, lawsuits, losses or damages of any kind or nature arising out of or related to the course and scope of Employee's discharge of his duties as Senior Trial Lawyer. District may continuously maintain throughout the term of employment adequate insurance for such purpose.

### **Article 4 Compensation**

- 4.1 The salary of Employee shall be fixed at One Hundred Thirty Thousand Dollars (\$130,000) per year, payable on the same schedule as other non-represented senior management employees, or at such other times as the District may provide for the payment of employee salaries. Employee shall be entitled to salary increases provided to all unrepresented management staff. Employee shall be eligible for stipends provided to other unrepresented management staff.
- 4.2 District shall have the right and obligation to deduct or withhold from compensation due Employee those sums required for applicable federal, state and local income taxes and Social Security taxes.
- 4.3 Employer shall fund Employer's portion of PERS retirement based upon the salary herein.

### **Article 5 Vacation, Sick and Personal Leave**

- 5.1 Employee shall be entitled to twenty (20) annual vacation days with pay. Employee is encouraged to take all vacation days during the year in which such days are earned. At District's option, Employee may be reimbursed annually at his daily rate of pay for any unused days not to exceed twenty (20) per year. Employee shall not accrue more than twenty-five vacation days annually without the expressed approval of the Employer.
- 5.2 Employee shall be entitled to accrue paid sick leave at the rate of 1.0 days per month up to 12 days per year. If Employee does not utilize the total amount of accrued sick leave authorized during any year, Employee may carry over the unused time to sick leave in the subsequent year.

- 5.3 Employee is entitled to accrue annual paid personal leave at the rate of 5 days per year. If Employee does not utilize the total amount of accrued personal leave authorized during any year, such leave may be carried over to unused sick leave in the subsequent year.

## **Article 6 Employee Health Benefits and Expense Reimbursement**

- 6.1 District agrees to pay directly to Employee's or future existing health, dental and vision providers, not to exceed the maximum benefits afforded to any other employee, the insurance premiums associated with Employee, and his qualified dependents under Internal Revenue Code § 152. District further agrees to maintain during the term of employment long term disability insurance for Employee.
- 6.2 District shall pay annual Employee's dues to the State Bar of California, membership in the Alameda County Bar Association and the California Counsel of School Attorneys.
- 6.3 District shall pay the reasonable expenses of Employee to attend appropriate professional and official meetings at the local, state and national level subject to constraints of the budget of the Legal Office.
- 6.4 District shall reimburse Employee, pursuant to the policies and practices of District, the necessary costs and expenses incurred by Employee in performing the duties of Senior Trial Lawyer, including but not limited to gas, travel, materials, supplies and related expenditures, all of which is properly documented by receipts.

## **Article 7 Termination of Employment**

- 7.1 District and Employee agree Employee shall serve at the pleasure of the General Counsel, and Employee agrees that this Agreement may be terminated by either party for no reason upon forty-five days written notice given pursuant to Section 7.2 below.
- 7.2 This employment contract may otherwise be terminated by:
- a. Retirement of Employee.
  - b. Death or disability of Employee. For purposes of this Agreement, "disability" means Employee's inability, by reason of physical or mental infirmity or both, to perform the duties contemplated under this Agreement for a period of 120 consecutive days or 150 days in the aggregate in a consecutive twelve (12) month period. "Disability" shall be determined by a licensed physician acceptable to District and Employee. The physician's fee shall be paid by District. Any termination for disability shall not prejudice any rights under any disability policies benefiting Employee.
  - c. Discharge for Cause. For purposes of this Agreement, "cause" shall mean Employee's (a) conviction (or a No Lo Contendre plea) to any felony; (b) dishonesty in performing his duties under this Agreement; (c) repeated and willful misconduct under this Agreement; or (d) willful neglect of his duties under this Agreement.

Prior to final determination by the Board of Education of cause for termination, Employee must have been given forty-five (45) calendar days written notice of such possible action, and of the grounds therefore, and a reasonable opportunity to be heard by the Board of Education in the way of explanation or defense.

In the event that such termination is determined by the General Counsel (or later adjudicated) to be "without cause," the sole remedy shall be to make Employee whole in salary and benefits for the balance of the term hereof, subject to the following: (i) Employee's duty to mitigate such loss through alternative available employment; (ii) offset for Employee's earnings from any active alternative employment or contractual engagements; and (iii) the limitations of Government Code § 53260 (if the remaining contract term exceeds six (6) months). The term "alternative available employment" shall not be construed to require Employee to seek, obtain or mitigate his loss through employment that is not comparable to the position of Senior Trial Lawyer, including as it pertains to salary, benefits, duties and responsibilities, or with an employer that is located outside the greater San Francisco Bay Area.

- 7.3 Pursuant to Education Code § 35031, Employee shall be provided written notice at least forty-five (45) days in advance of the expiration of his term if he is not to be reemployed.

## **Article 8 Evaluation**

- 8.1 Employer shall evaluate Employee not less than annually upon a schedule to be determined by Employer. The evaluation and assessment shall be reasonably related to the position description of the Employee and to the goals and objectives of the District for the year in question.
- 8.2 In the event that the General Counsel determines that the performance of the Employee is unsatisfactory in any respect, it shall describe in writing and in reasonable detail specific instances of unsatisfactory performance. The evaluation shall include recommendations as to areas of improvement in all instances where the General Counsel deems performance to be unsatisfactory. A copy of the written evaluation shall be delivered to the Employee. Employee shall have the right to make a written response to the evaluation and be placed in the personnel file along with the evaluation.

## **Article 9 Changes in Agreement**

- 9.1 Additional written amendments may be added to the Agreement by mutual consent of the Employee and the General Counsel at any time during the period of this Agreement.

## Article 10 General Provisions

10.1 All notices required to be given under this Agreement shall be delivered via hand delivery, by first class mail or via email as follows:

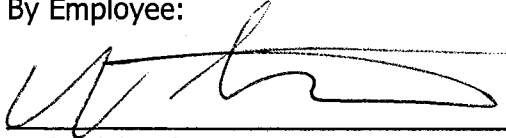
To District:	To Employee:
Jacqueline P. Minor, General Counsel	Michael Smith
Oakland Unified School District	Oakland Unified School District
1025 Second Avenue, Rm. 406	1025 Second Avenue, Rm. 406
Oakland, CA 94606	Oakland, CA 94606
Email: jacqueline.minor@ousd.k12.ca.us	Email: mike.smith@ousd.k12.ca.us

The General Counsel or Employee may change the designated address for the giving of notices by providing to the other amended notice information in writing.

- 10.2 Any controversy between OUSD and Employee involving the construction or application of any of the terms, provisions, or conditions of this Agreement shall, on the written request of either party served on the other, be submitted to binding arbitration. Arbitration shall comply with and be governed by the provisions of the California Arbitration Act. District and Employee shall agree on the selection of one person to hear and determine the dispute. If the parties are unable to agree on a single arbitrator to hear the dispute, they shall obtain a list of arbitrators from the American Arbitration Association and select the arbitrator by alternative strike method. The arbitration shall be governed by the California Arbitration Act, Code of Civil Procedure § 1280 *et seq.*
- 10.3 "Year" as used in this Agreement means a fiscal year, July 1 through and including June 30<sup>th</sup>.
- 10.4 No waiver of any rights or obligations under this Agreement may occur unless provided in writing.
- 10.5 This Agreement constitutes the entire agreement between District and Employee concerning the subject matter of this Agreement. Any prior agreements or understandings between District and Employee concerning the same subject matter not contained within this Agreement are null and void.
- 10.6 This Agreement is subject to all applicable laws of the State of California, to the rules and regulations of the State Board of Education, and to the lawful rules and regulations of the Board.
- 10.7 If during the term of this Agreement it is found that a specific clause of the Agreement is illegal under Federal or State law, the remainder of the Agreement not affected by such a ruling shall remain in force.
- 10.8 This Agreement may be modified or extended only in writing and must be signed by District and Employee.


10.9 This Agreement shall be effective upon execution by Employee and the President and Secretary of the Board of Education.

By Employee:

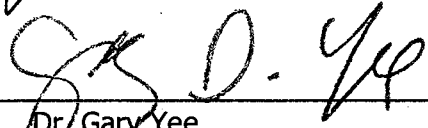
  
\_\_\_\_\_  
Michael Smith

Date: 7/20/11

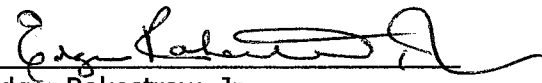
By District:

By:   
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Jacqueline P. Minor  
General Counsel

Date: 8/09/11

By:   
\_\_\_\_\_  
Dr. Gary Yee  
President, Board of Education  
Oakland Unified School District

Date: 8/15/11

By:   
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Edgar Rakestraw, Jr.  
Secretary, Board of Education  
Oakland Unified School District

Date: 8/15/11

**Legislative File**

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