

BEFORE THE
SONOMA COUNTY SUPERINTENDENT OF SCHOOLS
SONOMA COUNTY, STATE OF CALIFORNIA

In the Matter of the Accusation Against:

GAIL ALIOTO, et. al.,

Respondents.

OAH No. 2005030692

PROPOSED DECISION

Administrative Law Judge Cheryl R. Tompkin, State of California, Office of Administrative Hearings heard this matter on April 26, 2005, in Windsor, California.

Elizabeth Mori, Esq., Assistant General Counsel, School and College Legal Services, 5350 Skylane Boulevard, Santa Rosa, California 95403, represented the Sonoma County Superintendent of Schools and Sonoma County Office of Education.

Scott A. Lewis, Esq., Perry, Johnson, Anderson, Miller & Moskowitz, LLP, 703 Second Street, Fourth Floor, Santa Rosa, California 95404 represented all of the respondents.

The matter was submitted on April 26, 2005.

FACTUAL FINDINGS

1. Carl Wong made and filed the Accusation against respondents, those individuals listed on Attachment A, in his official capacity as the Sonoma County Superintendent of Schools, Sonoma County Office of Education (SCOE).
2. Respondents are certificated employees of SCOE.
3. On March 10, 2005, the County Superintendent adopted a resolution finding it was necessary to terminate certain employees due to a reduction or discontinuance of the following particular kinds of services no later than the beginning of the 2005-2006 school year:

Nursing position	1.4 F.T.E.
Adaptive Physical Education (APE)	1.1 F.T.E.
Special Ed. Pre-School Program teaching positions	11.0 F.T.E.
Special Ed. 6-22 teaching positions	8.0 F.T.E.

Youth Development, Support and Leadership
(Alternative Education) teaching positions

8.6 F.T.E.

Total 30.1 F.T.E.

The resolution also authorized the County Superintendent to send appropriate notices to all employees affected by the reduction.

4. On March 10, 2005, the County Superintendent gave written notice to respondents, pursuant to Education Code sections 44949 and 44955, of his recommendation that notice be given them that their services would not be required for the ensuing school year. The written notice set forth the reasons for the recommendation.

5. Respondents each made a timely request in writing for a hearing to determine if cause existed for not reemploying them for the 2005-2006 school year.

6. All prehearing jurisdictional requirements have been met.

7. At hearing SCOE dismissed the Accusation against Cheryl Mattioli, Vickie Whitehead and Dottie Downing, all of whom will be retained for the 2005-2006 school year.

8. As part of its action in reducing services for the 2005-2006 school year, SCOE determined to retain, regardless of seniority, certificated employees who possess a Crosscultural, Language and Academic Development (CLAD) certificate.¹ SCOE established this "skipping criteria" to meet the needs of its diverse and scattered student population. SCOE provides educational services at 50 different sites in Sonoma County. It serves court schools and other alternative schools (e.g., juvenile hall). It also serves students on behalf of various school districts. The school districts determine which of their students' SCOE will serve. Typically, SCOE serves the "more difficult" students from school districts, including English language learners (ELLs). A significant percentage of the students served by SCOE are ELLs. Approximately 11 to 12 percent of special education students and 16.7 percent of alternative school students are ELLs. Many of the ELL students have Individualized Education Plans, which require the students to be served as near to home as possible. These ELL students are scattered across the 50 sites served by SCOE and can be in any of the courses provided by SCOE. In addition, the number and identity of the ELL students enrolled in SCOE schools, and the courses required by these students,

¹ SCOE also determined to retain, regardless of seniority, certificated employees who were speech and language therapists, teachers of deaf and hard of hearing students, teachers of visually impaired students, nurses (once the 1.4 F.T.E. reduction was satisfied) and Dottie Downing. Since no challenges to these skipping criteria were raised at hearing, they will not be discussed further in this decision.

change each year. In SCOE's Alternative Education programs, probation restraints and safety issues also limit which students can be placed in certain classes. Therefore, it is impracticable to group ELL students at the same site or in the same classroom. If even one ELL student is in a class, state law requires that the teacher be certified to teach ELLs.

During the 2001-2002 school year, a State Certification Compliance review was conducted at SCOE schools. SCOE was found out of compliance because it did not have a sufficient number of appropriately certified teachers to provide required instruction to ELLs. SCOE was required to submit a compliance plan to correct this deficiency. As part of the compliance plan SCOE agreed to create incentives for its teachers to obtain CLAD certification. It also agreed to only hire teachers who hold a CLAD certificate.

In December 2002 SCOE imposed the requirement that all of its teachers, except preschool teachers, obtain CLAD certification. The requirement is still in effect. By letter dated December 9, 2002, the County Superintendent advised teachers of the new requirement and of SCOE's need for teachers certified to teach ELLs, especially in its alternative education and special education classes. The letter also advised that participating in training and earning a certificate would help protect existing teachers from the possibility of reassignment or exposure to layoff for not having the required certification. The letter noted the state compliance target date of September 2005 for all teachers to obtain ELL instruction certification. In a December 10, 2003, letter to teachers the Director of Certified Personnel advised that in the event of a layoff, teachers with less seniority who had CLAD certification would be skipped while teachers with more seniority but who did not have CLAD certification would be laid-off. The letter also specifically noted that the requirement to obtain ELL instruction certification was currently in effect, and that staff needed to meet the certification requirements now. A similar message was repeated in a series of several letters and memoranda to teachers from SCOE between January and November 2004.

9. Respondent Patsy Truxaw holds Standard Secondary Credentials in Sociology, English, Drama and Administration. SCOE currently employs Truxaw as a 1.0 F.T.E. Principal. SCOE has assigned Truxaw a seniority date of September 1, 1993. Truxaw is being laid off as part of the F.T.E. reduction in Youth Development, Support and Leadership (Alternative Education) positions.

10. Respondent David Hardin holds a Multiple Subject Clear Teaching Credential and a Single Subject Adaptive Physical Education (APE) credential. SCOE currently employs Hardin as a 1.0 F.T.E. APE teacher. SCOE has assigned Hardin a seniority date of December 18, 1992. Hardin is being laid off as part of the F.T.E. reduction in Youth Development, Support and Leadership positions.

11. Respondent Jens Oetiker holds a Preliminary Level 1, Moderate/Severe Credential and a Multiple Subject, Education Specialist/Learning Handicapped Credential. SCOE currently employs Oetiker as a 1.0 F.T.E. Special Education teacher. SCOE has assigned Oetiker a seniority date of February 23, 2001. Oetiker is being laid off as part of the F.T.E. reduction in special education positions.

12. Scott Morris holds a Professional Clear Level II, Special Education Credential. SCOE currently employs Morris as a 1.0 F.T.E. Special Education teacher. SCOE has assigned Morris a seniority date of August 27, 1998. Morris is being laid off as part of the F.T.E. reduction in special education positions.

13. Tina De Mattei is a preschool teacher who is currently on a 39 month disability leave that ends January 6, 2008. De Mattei is being laid off as part of the F.T.E. reduction in preschool positions.

14. Kathy Allen is a court/community teacher who is currently on STRS disability leave. Allen has been on leave approximately three years. Her leave is scheduled to end on August 5, 2006. SCOE has assigned Allen a seniority date of January 7, 1986. Allen is being laid off as part of the F.T.E. reduction in Youth Development, Support and Leadership positions.

15. Respondents Truxaw, Oetiker, Morris and Hardin were all in the process of obtaining CLAD certification when SCOE's March 15, 2005, deadline for submitting proof of credentials and certifications expired.² (See *Campbell v. Abbot* (1978) 76 Cal.App.3d 796, 814-815 [school district not required to consider credentials acquired after the March 15 deadline for sending layoff notices]; *Degener v. Governing Bd. of Wiseburn School District* (1977) 67 Cal.App.3d 689 [credential must be on file with district in order to be effective].) Allen and De Mattei were on disability leaves of absence when the deadline expired. Neither submitted proof of CLAD certification prior to the deadline. As a result of SCOE's skipping criteria, respondents Truxaw, Oetiker, Morris, Hardin, Allen and De Mattei will be laid off in lieu of less senior employees who hold CLAD certificates.

16. Education Code section 44955, subdivision (d) permits a school district to deviate from terminating a certificated employee in order of seniority if it demonstrates a specific need for personnel to teach a specific course or course of

² Truxaw, Oetiker and Morris are seeking CLAD certification through the University of San Diego. Truxaw has finished her coursework and has submitted her paperwork to the University for approval. She obtained a temporary certification from SCOE on April 26, 2005. Morris finished his coursework on March 15, 2005, and has submitted his paperwork to the University for approval. He obtained a temporary certification from SCOE on March 22, 2005. Oetiker finished his coursework on March 25, 2005, and plans to submit his paperwork to the University for approval very soon. Hardin is also in the process of obtaining his CLAD certification. He passed a portion of the CLAD examination in December 2004. On June 25, 2005, he plans to re-take the portion of the examination that he did not pass.

study, and that the certificated employee has special training and experience necessary to teach the course or course of study, which others with more seniority do not possess.

Respondents contend SCOE has failed to establish a need to only retain teachers with CLAD certification. They note that approximately 90 percent of SCOE teachers have the required certification, while only about 16.7 percent of SCOE's alternative education students and 11 to 12 percent of its special education students are ELLs. Respondents also note that the state has extended its compliance date for obtaining ELL instruction certification to January 1, 2008. Respondents reason that since there is no state mandate for current ELL certification, and since there is a much higher percentage of CLAD certified teachers than ELL students, SCOE has failed to establish a need for teachers with CLAD certification.

Respondents' contentions are not persuasive. The evidence established that ELL students are scattered throughout the classes and across the many locations SCOE serves. It is impracticable for SCOE to group these students at a single site or in a restricted set of classes. An ELL student may be in any SCOE class. SCOE therefore has a need for teachers with CLAD certificates. SCOE is only retaining teachers with rankings lower than respondents who have such a certificate. Section 44955, subdivision (d) authorizes such retention.

17. Respondents next contend teachers with CLAD certification are not being retained to teach a particular course of study because they are not teaching what they learn in their CLAD coursework to the students in their classroom.

Respondent's strained interpretation of Education Code section 44955, subdivision (d) is not persuasive. Subjects taught in elementary and secondary schools are curricular offerings. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 637-638.) Under state law, ELL certification is required in order to teach these curricular offerings whenever an ELL student is present in the classroom. It is therefore found that CLAD certified teachers are being retained to teach a particular course or course of study.

18. Respondent Truxaw additionally seems to suggest that SCOE should be estopped to lay her off because on a date which is not clear from the record, she was advised by Ethan Hack, Director of Certificated Personnel and Gerald Lapinski, Director of Youth Development, Support and Leadership, not to worry about obtaining a CLAD certificate. She was told she could retreat to the classroom if she were laid off from her administrative position as a principal. (CLAD certification is not a requirement for administrative positions.) However, in February 2005 Truxaw (who was laid off from her administrative position and sought to exercise her right to bump into a teaching position) was advised that she would be laid off because she did not have CLAD certification.

The elements of estoppel are (1) a misrepresentation or concealment of material facts; (2) made with knowledge of the facts; (3) to a party ignorant of the truth; (4) with intention that the latter act upon it; and (5) the party must have been induced to act upon it. (See 7 Witkin, Summary of Cal. Law (1974 ed.) Equity § 132, p. 5352, and cases cited therein.) "Where one of these elements is missing there can be no estoppel." (*California School Employees Assn. v. Jefferson Elementary School District* (1975) 45 Cal.App.3d 668, 692.) No showing was made that SCOE intentionally concealed a known material fact with the intent that Truxaw act on it to her detriment. Rather the evidence indicates that Truxaw was aware that her right to retreat to the classroom was subject to her possessing the necessary credentials and qualifications. The evidence also reveals that Truxaw was aware that in the event of a layoff, teachers with less seniority who had CLAD certification would be skipped while teachers with more seniority but who did not have CLAD certification would be laid-off. The evidence did not establish at what point Hack and Lapinski expressed their belief that Truxaw did not have to worry about CLAD certification; however, Truxaw was clearly aware no later than 2004 that teachers, and therefore anyone hoping to retreat to a teaching position, needed CLAD certification in order to protect their seniority rights. She chose to delay in obtaining that certification. Truxaw has failed to prove that estoppel is warranted.

19. Respondents Allen and De Mattei are disabled teachers on unpaid leave status. Allen and De Mattei contend that laying them off would usurp their rights under Education Code section 44978.1. Allen and De Mattei also suggest that laying them off deprives them of the right of accommodation due to their disability, which is mandated by the Fair Employment and Housing Act (FEHA).

Respondent's contentions are not persuasive. Education Code section 44978.1 provides that a permanent employee who is medically unable to perform her duties shall be placed on a reemployment list for a period of 39 months, and shall be returned to work in a position in which she is *credentialed and qualified* during this 39 month period whenever she is medically able. Nothing in that section entitles an employee to employment in a position for which she is not qualified. Neither Allen nor Mattei has the CLAD certification necessary to avoid layoff. Thus, both are subject to layoff under the same skipping criteria applied to other SCOE employees.

Allen and De Mattei have also failed to establish that laying them off will deprive them of their right of accommodation under the FEHA. SCOE has expressed its intent to comply with its employment obligations toward Allen and Mattei. Moreover, it must be presumed that SCOE will perform its official duties and comply with legislative mandates. (*Campbell v. Abbot, supra*, 76 Cal.App.3d 796; *Gallup v. Loma School Dist.* (1996) 41 Cal.App.4th 1571.) Also, it must be noted that even if SCOE's action in laying off Allen and De Mattei were a violation of FEHA, such a violation would not prevent the SCOE from exercising its authority under the Education Code to reduce services. Respondents' remedy for a violation of FEHA lies in another forum.

20. Respondents also argue that since the resolution authorizing layoffs identified a specific the number of positions to be reduced in each of five service categories, "SCOE can only reduce the number of teaching positions within the particular kind of service that they announced in their resolution." As an example, respondents note that although the resolution authorized the elimination of 8.6 F.T.E. Youth Development teaching positions (or 30.7 percent of SCOE's 28 Youth Development teachers), 13 F.T.E. Youth Development teachers (or 46 percent of Youth Development teachers) were noticed for layoff. Citing *San Jose Teachers Association v. Allen, supra*, 144 Cal.App.3d 627, respondents contend SCOE cannot notice a higher *percentage* of positions for layoff under a particular category of services than is authorized by its resolution.

Respondents are mistaken. The purpose of the initial notice of non-reemployment is to notify employees of the probability that their services will not be required for the ensuing school year so that they may consider looking elsewhere for employment. (*Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648, 653.) In order to ensure that all employees who potentially may be affected by a layoff receive proper notice, it is often necessary for a school district to notice more employees than will actually be laid off. Such broad noticing may be necessary when issues of seniority, bumping, etc. have not been finally determined by the statutory deadline for issuing layoff notices. *San Jose Teachers Association v. Allen, supra*, does not preclude this process. It simply indicates that if a school district (or county office of education) specifies a specific number of positions to be eliminated in its authorizing resolution, it is bound by the resolution. In this case, there is no evidence SCOE will eliminate more positions than those authorized in its resolution.

21. Respondents have failed to establish that District should be required to retain their services.

22. The evidence established that the SCOE will be reducing services for the ensuing school year.

23. No certificated employee junior to any respondent is being retained to perform services which any respondent is certificated and competent to render.

24. The reduction or discontinuance of services is related to the welfare of SCOE and its pupils.

LEGAL CONCLUSIONS

1. Each of the services set forth in Finding 3 is a kind which may be reduced or discontinued in accordance with applicable statutes and case law. (See Ed. Code § 44955; *Campbell v. Abbot, supra*, 76 Cal.App.3d 796; *Degener v. Governing Bd., supra*, 67 Cal.App.3d 689.) The decision to reduce or discontinue the

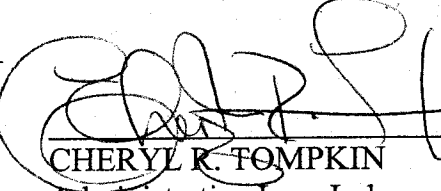
services is neither arbitrary nor capricious but rather a proper exercise of the County Superintendent's discretion.

2. Cause exists for termination of 30.1 full-time equivalent positions as a result of the reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

ORDER

Notice may be given to respondents that their services will not be required for the 2005-2006 school year because of the reduction or discontinuation of particular kinds of services.

DATED: 5/5/05


CHERYL R. TOMPKIN
Administrative Law Judge
Office of Administrative Hearings

Respondents

Alioto, Gail
Allen, Karen
Allen, Kathy
Bissada, Karina
Colt, Joanna
Corvino, Cheryl
De Mattei, Tina
Dimock, Tim
Downing, Dottie
Doyle, Lisa
Gau-Cunningham, Collette
Hardin, David
Hartnett-Laube, Maria
Hoy, Carolyn
Keig, Carol
Kreinkamp, Marsha
Mattioli, Cheryl
McAllister, Debra
McDonald, Steve
McDougall, Vicki
Morris, Scott
Oetiker, Jens
Overstreet, Michael
Parolini, Elena
Stone, Elaine
Swisher, Linda
Temple, Laura
Truxaw, Patsy
Whitehead, Vicki
Wright, Eric

ATTACHMENT A