

BEFORE THE
COUNTY SUPERINTENDENT OF SCHOOLS
COUNTY OF NEVADA
STATE OF CALIFORNIA

In the Matter of :

JENNIFER HUGHES,

Respondent.

OAH No. N2004030776

PROPOSED DECISION

Administrative Law Judge M. Amanda Behe, Office of Administrative Hearings, State of California, heard the noticed Order To Show Cause re. Motion to Dismiss in this matter on April 16, 2004, at the Office of Administrative Hearings, Sacramento, California. Counsel for the parties appeared telephonically.

Raymond W. Dunne, Attorney at Law, Mary Beth de Goede & Associates, represented the Nevada County Superintendent of Schools.

Andrea Price, Attorney at Law, Langenkamp & Curtis, represented respondent.

The record consists of the following:

1. Superintendent's March 15, 2004, letter and Order No. 04-001 with Proof of Service, Respondent's Request for Hearing received March 16, 2004, Notice of Hearing with Proof of Service, Notice of Defense.
2. Superintendent's Verified Request for Dismissal filed April 12, 2004.
3. Respondent's Opposition to Request for Dismissal, Declaration of Jennifer Hughes.
4. Superintendent's Reply Brief, Supplemental Declaration of Susan Clarabut.

FACTUAL FINDINGS

1. Dr. Terence K. McAteer is the Nevada County Superintendent of Schools (the Superintendent) and made Order No. 04-001 and filed various jurisdictional documents in his official capacity.

2. Since July 2000 Jennifer Hughes (respondent) has been employed as a Special Education Services Nurse, a position which requires a credential. Her current "Certificated Offer of Employment" dated August 13, 2003, identifies her as "probationary" and "Support Staff" in the job class "Special Education Nurse."

Respondent holds a Professional Clear School Nurse Services Credential. She has never served as a teacher with the Nevada County Superintendent of Schools and does not hold a teaching credential.

Respondent belongs to the Nevada County Special Educators Group whose collective bargaining agreement with the Superintendent of Schools provides that it represents certificated probationary and permanent employees.

3. On March 15, 2004, the Superintendent adopted Order No. 04-001 which provided that Special Education Nursing Services would be reduced by .4 FTE¹ certificated employees for the next school year.

4. On March 15, 2004, the Superintendent served respondent with written notice pursuant to Education Code sections 44949 and 44955 that her services would not be required for the next school year.

5. Respondent filed a timely written request for a hearing and a joint Notice of Defense was filed on behalf of respondent and another employee, whose case has since been resolved.

6. Respondent argued that she is entitled to the procedural rights of Education Code sections 44949 and 44955, and she should be reemployed² for the next school year. Those issues were addressed in the Prehearing Conference and the Order set forth below was issued.

7. Assistant Superintendent Susan Clarabut declared that respondent was erroneously served with a layoff notice for the reduction in her position from her current 1.0 FTE to a .60 FTE for the 2004-05 School Year. Respondent filed a Request for Hearing, but no Accusation was filed against her.

¹ The acronym FTE stands for "Full Time Equivalent" and refers to a full time certificated position.

² Respondent's Opposition to Petitioner's Verified Request For Dismissal uses the term "reemployed." As respondent's position is being reduced from a 1.0 FTE to a .60 FTE the term apparently refers to the subject proposed decrease in her position.

Ms. Clarabut further declared that the identification of respondent as probationary in her annual contracts was "due to a mistake of fact." Ms. Clarabut was not aware of the provisions of Education Code and the appellate court decision *Neumarkel v. Allard* (1985) 163 Cal.App.3d 457, which provide that probationary and permanent status as well as layoff procedures and protections are limited to teachers.

8. Respondent contended that by commencing layoff procedures the Superintendent is estopped from asserting that she is not entitled to a layoff hearing. She argued that "Petitioner's issuance of a layoff notice to Respondent on March 8, 2004 confirmed Respondent's long held belief that she was a probationary employee." [Respondent's Opposition to Request for Dismissal, page 5, lines 8-9].

Estoppel does not lie against the Superintendent of Schools in these circumstances. Four elements are necessary for estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of the facts; and (4) he must rely upon the conduct to his injury. Estoppel may be assert against the government where these four elements are present and "right and justice require it," but estoppel will not be applied against the government if to do so would effectively nullify a strong rule of policy adopted for the benefit of the public. *Lentz v. McMahon* (1989) 49 Cal.3d 393, 399.

Here the party to be estopped was not apprised of the correct facts, and respondent did not rely on the conduct to her injury. She is in no worse a position because of the erroneous issuance of notice regarding her layoff. More importantly, estoppel will not be applied against the Superintendent because it would effectively nullify the strong rule of policy set forth in the Education Code section 1293 *et seq.*

9. Education Code section 1293 gives the County Superintendent the power to "enter into contracts of employment with persons employed by him in positions requiring certification qualifications for periods of not to exceed the end of the school year in which the term for which the county superintendent of schools was elected or appointed expires and in no event, for more than four years and six months." As noted in *Neumarkel*, supra, at 464: "Nothing in this section grants permanent status to certificated employees. To the contrary, a maximum contract employment period is set forth."

Education Code section 1294.5 permits the County Superintendent to employ certificated persons "in programs and projects to perform services conducted under contract with public or private agencies, or other categorically funded projects of indeterminate duration. ... Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees. ..."

Education Code section 1296(b) pertains to classification of permanent employees of a county office of education in teaching positions. Education Code section 1296(c) states that, "as used in this section, 'teaching position' means any certificated position designated as of January 1, 1983, by the county board of education or the county superintendent of schools as a teaching position for the purpose of granting probationary or permanent status."

Thus the Superintendent has the authority under the Education Code to define "teaching positions" for purpose of granting probationary or permanent status to certificated employees. This is consistent with the legislative intent of the statutes governing county boards of education and county superintendents, namely "the Legislature's recognition in [Education Code] section 1700 that the county superintendent is a separate legal entity performing a transitory function to meet the specific and limited needs of some school districts....It is reasonable to assume the Legislature's recognition of the county superintendents' transitory function caused it to recognize also the need to minimize the number of employees who enjoy tenure and tenure-related benefits." *Neumarkel*, supra, 163 Cal.App.3d at 466.

10. Respondent argued that *Neumarkel* is "... flawed and does not bind this court because the court in *Neumarkel* mischaracterized layoff and hearing rights as benefits of tenure rather than rights of all certificated probationary and permanent employees in a layoff situation." [Respondent's Opposition to Request for Dismissal, page 3, lines 24-28]. She further argued that the *Neumarkel* court "... got off track when it held that county superintendent employees must hold teaching positions in order to achieve tenure and be entitled to layoff and hearing rights." [Respondent's Opposition to Request for Dismissal, page 4, lines 2-5]

In the Prehearing Conference respondent's counsel acknowledged that there is no authority for an administrative law judge to disregard the holding in a published appellate court opinion. As provided in Education Code section 1293 *et seq.* and *Neumarkel*, respondent is not entitled to classification as a probationary employee.

As provided in Education Code section 1293 *et seq.* and *Neumarkel*, respondent is not entitled to the layoff procedures and provisions of Education Code sections 44949 and 44955 because she does not hold a teaching position.

LEGAL CONCLUSIONS

1. Respondent is not entitled to classification as a probationary employee.
2. Respondent is not entitled to the layoff procedures and provisions of Education Code sections 44949 and 44955.

ORDER

The Motion to Dismiss IS GRANTED.

Dated: _____

M. AMANDA BEHE
Administrative Law Judge
Office of Administrative Hearings