

BEFORE THE
GOVERNING BOARD OF THE
SONOMA VALLEY UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against: PAMELA NADEAU , Respondent,	OAH No. 2008040017
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PROPOSED DECISION

On April 22, 2008, in Santa Rosa, California, within the facilities of the County Office of Education at 5340 Skylane Boulevard, Santa Rosa, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter.

Noel J. Shumway, Attorney at Law, School and College Legal Services of California, 5350 Skylane Boulevard , Santa Rosa, California 95403, represented Superintendent Barbara Young, Sonoma Valley Unified School District.

James D. Allen, Attorney at Law, 726 College Avenue, Santa Rosa, California 95404, represented Respondent Pamela Nadeau.

On April 22, 2008, the parties submitted the matter and the record closed.

FACTUAL FINDINGS

1. On April 8, 2008, in her official capacity, Barbara Young, Superintendent (the Superintendent), Sonoma Valley Unified School District (the District), made and filed the Accusation regarding Pamela Nadeau (Respondent Nadeau).
2. Respondent Nadeau is fully credentialed and certificated employee of the District. The District extends designation to Respondent Nadeau as a permanent teacher.
3. On March 11, 2008, the Superintendent presented the District's Board of Trustees a recommendation that the District give notice that particular kinds of services (PKS), then offered through the District, be reduced or eliminated by the District for the ensuing school year (2008-2009).

4. On March 11, 2008, the District's Governing Board unanimously adopted Resolution number 08-14.

The subject resolution recites that it has become necessary for the District to reduce and/or to eliminate, no later than the beginning of the 2008-2009 school year, particular kinds of services in the form of 6.2 full-time equivalent (FTE) certificated positions as follows:

0.20	FTE	German language at the high school level;
0.20	FTE	Library Services at the high school level;
0.40	FTE	Music at the high school level;
0.40	FTE	Independent Study at the high school level;
1.00	FTE	Science at the high school level;
1.00	FTE	Physical Education at the high school level;
0.60	FTE	Computer Graphics at the high school level;
1.40	FTE	English at the high school level;
0.60	FTE	Social Science at the middle school level;
0.40	FTE	Music at the elementary school level

5. By a letter, dated March 13, 2008, the District's Superintendent dispatched preliminary notices to a number of FTE position holders, including Respondent Nadeau, that the District's Board of Trustees had an intention to reduce or to eliminate the particular service provided by each person who received the notice. Hence, due to the prospective elimination or reduction of the particular kind of service now rendered to the District, Respondent Nadeau learned the District would not reemploy her in the certificated position she had worked over the past school year.

Also the letter, dated March 13, 2008, which had attached to it the Board's resolution and other pertinent documents, conveyed to Respondent Nadeau that no certificated employee of the District having less seniority than Respondent Nadeau would be retained for the 2008-2009 school year to render a service that she was credentialed and competent to render to students.

6. The written preliminary notice to Respondent Nadeau from the Superintendent and the District Board's resolution set out legally sufficient reasons of the District Board's intent to eliminate the elementary school teacher position held by Respondent Nadeau.

7. Respondent Nadeau timely requested in writing a hearing to determine whether or not cause exists for not reemploying Respondent Nadeau for the ensuing school year.

8. The Superintendent timely served upon Respondent Nadeau the Accusation, dated April 8, 2008, and related documents. Respondent Nadeau filed a timely notice of defense.

9. All pre-hearing jurisdictional requirements were met.

Motion to Dismiss Due to the District's Failure to Comply with Respondent's Discovery Request

10. At the hearing, Respondent Nadeau made a motion for dismissal of the Accusation on the ground that Complainant had failed to comply with her Request for Discovery in accordance with Government Code section 11507.6.

Complainant, through counsel, persuasively conveyed that Respondent Nadeau's discovery request was not received within the offices of its attorneys. Only on the day of the proceeding was Complainant's counsel aware of the dispatch of the discovery request. The proof of service on Respondent Nadeau's discovery request, dated April 8, 2008, shows only the addressee as being "Barbara Young, Superintendent, Sonoma Vallwy (sic) Unified School District, 17850 Railroad Avenue, Sonoma, CA 95476."

In the declaration by counsel for Respondent Nadeau, a representation was made that "legal counsel for the school district contacted [respondent's lawyer and the lawyers] held a discussion about Ms. Nadeau. . . .," thereafter he placed in the mail a true and correct copy of the request for discovery. But, Respondent Nadeau, through her lawyer, did not send the request for discovery to Complainant's lawyer.

More important at the hearing, Respondent Nadeau did not show the prejudice that was dealt her by reason of Complainant's failure to provide a response to respondent's request of discovery.

Complainant's Evidence

11. Mr. Ashley Halliday (Mr. Halliday), in his capacity as the District's Director of Human Resources, offered evidence at the hearing.

Mr. Halliday established that the prospective elimination of particular kinds of services for the 2008-2009 school year directly results from a prospective shortfall in money for the District's budget. In order to partially aid the District in crafting a reasonable budget for the ensuing school year, the District's Superintendent recommended that certain certificated positions be eliminated due to lack of funds. Also, the prospective elimination of particular kinds of service is due to the declining pupil census for the District's high school for the ensuing school year because the enrollment is anticipated to fall by about one hundred students.

12. Mr. Halliday further established that on learning that the District was required to initiate lay-off proceedings for teacher employees of the District, the Superintendent, with her staff, took steps to develop the District's seniority list for the District's teachers. The Superintendent identified the District's teachers who were properly designated as District teachers. She studied teachers' records and set forth on

the District's seniority list dates calculated as the hire dates or first date of paid service for each teacher of the District. On March 13, 2008, the Superintendent caused to be delivered to teachers who were affected by the Board's resolution, certain notices to affected certificated teachers, including Respondent Nadeau, that their services would not be needed by the District for the next school year.

13. During the immediate school year, the Board found that the District faces a prospective budget shortfall in that the amount of funding from the State of California may be markedly reduced for the upcoming school year. Hence, the Board has determined that sufficient money is not available to fund the same number of teacher positions and programs during the ensuing school year so that the District must prospectively reduce or eliminate a number of FTE of particular kinds of services, including the position held by Respondent Nadeau.

14. Under the proposed lay-off action 0.4 FTE of Respondent Nadeau's teacher position as a music teacher at five elementary schools of the District will be eliminated.

15. Mr. Halliday noted that for the ensuing year the District will retain Mr. Robert Gossett to teach music at elementary school classes, for which Respondent Nadeau is also qualified to teach. Mr. Gossett has a higher placement on the seniority list than Respondent Nadeau because he has a first date of paid service to the District of August 31, 1984. (Mr. Gossett has 17 years of seniority with the District when measured against Respondent Nadeau.)

As of the date of the issuance of the preliminary notice of lay-off that is germane to this matter, Mr. Gossett held a multiple subject credential with a "limited assignment Music TCC," which is set to expire on April 30, 2008.

The District's seniority list shows Mr. Gossett to occupy two distinct assignments. He holds a 0.8 FTE as an "iterant" (district-wide) elementary school classroom music teacher, as well as a 0.2 FTE in a position as a "teacher on special assignment," through which he has spent time as a liaison with a non-profit entity that assisted the District in raising money for the District's music programs.

16. Mr. Halliday described the limited-assignment-music TCC, as held by Mr. Gossett, is a form of credential issued by the County Office of Education. Yet, he noted that Mr. Gossett does not possess a music credential that is issued by the California Commission on Teacher Credentialing.

17. Mr. Robert Gossett (Mr. Gossett) did not appear at the hearing of this matter to provide evidence regarding his experience education in music, his record of teaching music or his progress in completing courses of instruction that will enable him to secure a teaching credential.

18. Mr. Halliday was not persuasive regarding the credential to teach music by Mr. Gossett. The Director of Human Resources for the District was not compelling in his testimony in the matter of Mr. Gossett's current authorization to teach music and his progress towards attaining a valid, single-subject credential in music was grounded in speculation or unreliable information. Mr. Halliday offered no documents or other corroborating data that by the beginning of the ensuing school year Mr. Gossett will have completed sufficient courses of instruction so that he will have gained a credential in music. Moreover, Mr. Halliday, who was not shown to be an expert witness on the matter of credentials, was not persuasive that Mr. Gossett's "limited assignment music TCC¹ [that expires on] 4/30/2008" has the weight of a credential, or even emergency permit, that issued by the California Commission on Teacher Credentialing.

Mr. Halliday engaged in conjecture when he proclaimed at the hearing that even though the temporary county certificate (TCC) as issued to Mr. Gossett will expire on April 30, 2008, the "limited assignment" designation for Mr. Gossett will expire in November 2008. (Mr. Gossett's knowledge rests solely upon the representations of Mr. Gossett as made during a meeting on the day before the date of the hearing in this matter.)

At the hearing, Complainant, through Mr. Halliday, did not offer any document to demonstrate that Mr. Gossett has such music teaching certificate that will expire in November 2008 when the District's seniority list show the temporary county certificate expires on April 30, 2008. Nor did Complainant show that Mr. Gossett is assured to have a credential to teach music by the date (May 15, 2008) that the District is compelled to give a final lay-off notice. Rather, Mr. Halliday conveyed that only by his "understanding" that Mr. Gossett is enrolled in a course of study that may provide him with a single subject credential to teach music.

19. Absent evidence from Mr. Gossett or a supervisory at the elementary school level, evidence is lacking the Mr. Gossett has equal competency as Respondent Nadeau to teach music. Mr. Halliday speculated that Mr. Gossett may have taught music for the District for three school years. But the evidence did show that Mr. Gossett has a multiple subject credential, that he has more than a decade and one half tenure with the District and that he has taught music to the District elementary school students for a few years.

District's Bases to Proceed against Respondent Nadeau

20. During the immediate past school year, the Board has found that the District faces a prospective budget shortfall in that the amount of funding from the State of California may be markedly reduced for the upcoming school year. Hence, the Board has determined that sufficient money is not available to operate the same number of

¹ "TCC" connotes "temporary county certificate."

teacher positions and programs during the ensuing school year so that the District must prospectively reduce or eliminate a number of FTE of particular kinds of services, including the position held by Respondent Nadeau.

21. The District's proposed elimination or discontinuation of a number of FTE positions, for the ensuing school year is related to the welfare of the District and its overall student population.

Respondent Nadeau's Contentions and Arguments

22. Respondent Nadeau contends the District's action is procedurally defective and improper insofar as the prospective layoff of the subject credentialed employee does not fully account for her possession of a "single subject music Life" credential coupled with her extensive teaching experience in music in light of the District's retention of teacher, Mr. Gossett, who although holding a higher position on the seniority list lacks a credential issued by the California Commission on Teacher Credentialing (CTC) for the provision of teacher services in music.

The contentions and arguments by Respondent Nadeau are not persuasive. The weight of evidence establishes that the Superintendent has met her burden of proof so as to sustain the Accusation against Respondent Nadeau because Mr. Gossett has a first date of paid service to the District that is nearly two decades longer Respondent's Nadeau's position on the District's seniority list. Also, Mr. Gossett has taught music for a few years and he holds a county issued temporary certificate to teach music.

Evidence on Behalf of Individual Respondent Nadeau

23. Respondent Nadeau offered credible and persuasive evidence at the hearing of this matter. By her demeanor, the consistency of her manner and presentation and her attitude towards the proceeding, Respondent Nadeau established that she was a credible² and reliable witness.

Respondent Nadeau has a first date of paid service with the District as a probationary teacher as of August 29, 2001. Currently, Respondent occupies a 0.8 FTE position as music teacher for the District.

Respondent Nadeau holds a life, single-subject credential in music. Also she hold an Orff-Schulwerk certificate, which connotes that she has training in a particular method teaching music in a classroom setting that entails a balance of singing, reading music, dancing, engaging in some drama functions, and playing musical instruments, particularly xylophones. (She proclaims her understanding that no other teacher employed by the District possesses the Orff-Schulwerk certificate.)

²

Government Code section 11425.50, subdivision (b), third sentence.

Respondent Nadeau has taught music since 1982. She has taught music from the pre-school level, elementary school level, high school level and college level. During her career Respondent Nadeau has taught voice and choral music as well as instrumental music.

Currently the District employs Respondent Nadeau as a music teacher at the elementary school level. As a "district-wide employee," Respondent Nadeau teaches music at five elementary schools, namely: Presswood School, Sassarini School, El Verano School, Flowery School, and Dunbar School.

Ultimate Findings

24. As to Respondent Nadeau, the recommendation of the Superintendent and the Board's decision to eliminate or discontinue the 0.4 FTE position teacher in music was not arbitrary or capricious. The Superintendent's recommendation and the Board's decision were within the proper exercise of the District's discretion insofar as the elimination of 0.4 FTE position to teach music by Respondent Nadeau.

25. The District's layoff action against Respondent Nadeau was not erroneous and may be sustained.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955.

2. The District provided all notices and other requirements of Education Code sections 44949 and 44955. This conclusion of law is made by reason of the matters set forth in Factual Findings 1 through 9, inclusive.

3. Education Code section 44955, subdivision (b), establishes that no certificated employee of a school district may be laid off if another employee with less seniority is retained to render a service that the noticed employee is "certificated and competent to render."

The District's Superintendent believes discretion could be exercised to issue the preliminary determination to give Respondent Nadeau notice that her teaching services would not be retained for the ensuing school year.

Although the law has long recognized that where competency is not demonstrated by a senior employee, a junior employee, who has the ability to service the needs of a program, may be retained by a school district even though such action may result with the senior employee, who lacks such a valid credential, being terminated. (*King v. Berkeley Unified School District* (1979) 98 Cal.App.3d 1016, 1023; *Moreland v. Kurze*

(1980) 109 Cal.App.3d 648, 655; *Brough v. Governing Board of El Segundo Unified School District* (1981) 118 Cal.App.3d 702.) The paramount rule is that no person may be terminated while someone junior to that person is to be retained by a school district to perform a service that the senior employee is certificated and competent to render. (Ed. Code § 44955.) But in this matter, a teacher, with many years of service to the District, has taught music albeit with a county issued certificate as opposed to possessing a credential issued by the Commission on Teacher Credentialing.

Respondent Nadeau is not unduly burdened by the Superintendent's recommendation to retain a teacher who possesses only a county issued certificate to teach music at the elementary school level. Such recommendation does not discount Respondent Nadeau's high qualifications and competency or the fact that currently she possesses of a valid, life single-subject credential in music. Rather, the decision to retain Mr. Gossett rests solely upon his position on the District's seniority list.

4. Cause exists pursuant to Education Code sections 44949 and 44955 to give Respondent Nadeau notice of the discontinuation of full-time equivalent position in the particular kinds of services (music) as rendered by Respondent Nadeau, by reason of the matters set out in Factual Findings 11 through 15 inclusive 19, 20, 24 and 25.

5. Respondent made a motion to dismiss the Accusation on the ground that Complainant had failed to meet Respondent Nadeau's request for discovery, under the provisions of Government Code section 11507.6.

Respondent offered inadequate evidence that her due process rights were impaired by reason of Complainant's non response to Respondent's discovery request. More importantly, Respondent did not serve the request for discovery upon lawyers for Complainant even though Respondent's attorney had conversed with Complainant's attorney of record. And, Respondent did not subpoena any witness for the Superintendent's office to elicit evidence regarding the office system for handling important mail or regarding the specific disposition, if any, of Respondent's request for discovery.

ORDER

1. The Accusation is sustained.

2. Final notice may be given to Respondent Nadeau that her services will not be required for the 2008-2009 school year because of the reduction or discontinuance of the particular kinds of services as offered by Respondent Nadeau for students of the District during the current year.

DATED: May 6, 2008

A handwritten signature in dark ink, appearing to read "Perry O. Johnson", written over a horizontal line.

PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings