

BEFORE THE SHASTA COUNTY
SUPERINTENDENT OF SCHOOLS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Joni Branstetter, Bill Dehart, Kathy George,
Sharon Goldsberry, Michael Kelly, Elizabeth
Hughes-Komar, Jennifer Levens, Karin
Lindsey, Elizabeth Maco, Marjorie McAleer,
Charlene Pearce, Eric Relph, Michael
Roscoe, Wendy Sanders, Judy Tofflemire,
Christopher Van Meier, Carie Webb, Cheryl
Wilke, Sara Winston,

OAH No. N2006030346

Respondents.

PROPOSED DECISION

Marilyn A. Woollard, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 25, 2006, at the Shasta County Office of Education in Redding, California.

Joseph Kinkade, Attorney at Law, School and College Legal Services, represented Shasta County Office of Education (SCOE).

Donald Selke, Jr., Attorney at Law, Wells, Small, & Selke, was present on behalf of the following respondents who did not personally appear: Joni Branstetter, Elizabeth Hughes-Komar, Charlene Pearce, and Judy Tofflemire.¹

The following respondents were present and represented themselves: Bill Dehart, Jennifer Levens, Karin Lindsey, and Marjorie McAleer.

At the conclusion of the hearing, SCOE and the respondents, individually, or through their attorney, had an opportunity to present closing argument. The record was then closed. On April 28, 2006, the record was reopened for the submission by SCOE of additional documents, admitted as Exhibit 12, establishing service of the Accusation on five respondents who did not file a Notice of Defense. The matter was submitted for decision on May 1, 2006.

¹ Mr. Selke also represented respondents Sharon Goldsberry and Sara Winston and timely filed a notice of defense on their behalf. As indicated in Finding 8, *infra*, their layoff notices were rescinded by SCOE.

FACTUAL FINDINGS

1. The Shasta County Office of Education provides educational services to students involved in the juvenile justice court system, as well as education and related designated instruction services to special education students who reside in school districts within its service area. In addition, SCOE provides education through its community schools and independent study programs to a wide variety of students who have not been successful in a comprehensive high school setting, including those who have been expelled, referred by probation or by the school attendance review board.²

2. Carolyn Whitmer is the Superintendent of the Shasta County Office of Education. The superintendent is an elected official who serves as the primary decision-maker for the County Office of Education. Pursuant to Education Code section 1294, for the purposes of teacher layoffs under Education Code Sections 44949 and 44955, the Superintendent performs any duty or power imposed by statute on the governing board of a school district.

3. Respondents are certificated employees of SCOE who are paid from the County School Service Fund.

4. *Preliminary Notice of Layoff:* On March 9, 2006, Superintendent Whitmer served a written notice on respondents that their services would not be required for the 2006 - 2007 school year.³ The Superintendent further informed respondents that their layoff was necessitated due to the reduction or discontinuance of the following particular kinds of services:

Reduction in Alternative Education Teaching Services	4.00 FTE
Reduction in Independent Study Services	1.00 FTE
Reduction in Special Education Programs	11.50 FTE
Teaching Services	4.00 FTE
Home & Hospital Services	1.00 FTE
Nursing Services	2.00 FTE
Psychological Services	1.50 FTE
Speech Pathology Services	1.50 FTE
Adaptive Physical Ed. Services	1.50 FTE

² Education Code section 1700 et seq., describes the variety of educational services that may be provided by county offices of education, funded through the county school service funds.

³ Because the determination to reduce particular kinds of services was made by the Superintendent rather than a school board, there is no board resolution that determined the need for this reduction.

Reduction in Teachers on Special Assignment Services 1.00 FTE

Total Reduction 17.50 FTE positions

Respondents were notified that they would not be reemployed by SCOE pursuant to Education Code sections 44949 and 44955, and that no probationary or permanent certificated employees with less seniority were being retained who would render services for which the respondents were currently certificated and competent to render. Respondents were further advised that they may request a hearing to determine whether there was cause for not reemploying them for the following year, and that any such request must be made by no later than March 21, 2006.

This Notice was served on respondents by both certified and regular mail, along with copies of Education Code sections 44949 and 44955, a Request for Hearing form, a Layoff Agreement signed by Ms. Whitmer with a signature block for the individual respondent, and a Notice of Acknowledgment and Receipt.

5. *Request for Hearing:* On March 21, 2006, attorney Donald A. Selke, Jr., filed a Request for Hearing on behalf of all 19 certificated SCOE employees who had received the above notice.

6. *Filing and Service of Accusation:* On March 31, 2006, SCOE's Assistant Superintendent for Educational Services, Kathy Thompson, made and filed the Accusation against the 19 certificated SCOE employees as respondents, in her official capacity. The Accusation identified the seniority date of each named respondent by providing the date of first paid service to SCOE, and the need to reduce 17.50 full time equivalent positions due to the reduction or elimination of the particular kinds of services previously identified in Finding 3.⁴

The Accusation was served on respondents with a Statement to Respondent, a blank Notice of Defense, a Notice of Hearing, and copies of pertinent Education and Government Code sections. The Statement to Respondent notified respondents that unless a written Request for a Hearing signed by or on behalf of the respondent was delivered or mailed to SCOE within five days after the Accusation was served, the hearing would proceed as a default, and that "failure to request a hearing to contest the charges by filing a Notice of Defense within the period specified above will constitute a waiver of your rights to contest the charges made in the Accusation...." Specifically,

⁴ The Accusation also alleged that written Layoff Agreements, that included waivers of a right to a hearing, were signed by Michael Kelly, Carrie Webb, Michael Roscoe, Bill Dehart, and Christopher Van Meier. The only Layoff Agreement SCOE submitted in evidence, however, was that signed by Mr. Dehart.

- a. On March 31, 2006, SCOE served the Accusations with accompanying documents and blank Notices of Defense on Mr. Selke on behalf of his clients.
- b. On April 3, 2006, SCOE served the Accusations with accompanying documents and blank Notices of Defense on following respondents by certified mail: Marjorie McAleer, Karin Lindsey, Jennifer Levens, Bill Dehart, Joni Branstetter, Michael Kelly, Eric Relph, Michael Roscoe, Wendy Sanders, and Carie Webb.⁵

7. *Notice of Defense:* Notices of Defense were thereafter filed with SCOE by the following respondents:

- a. On March 31, 2006, Notices of Defense were filed by respondents Bill Dehart, Jennifer Levens, Karin Lindsey, and Marjorie McAleer.
- b. On April 4, 2006, Mr. Selke timely filed a Notice of Defense on behalf of respondents Elizabeth Hughes-Komar, Charlene Pearce, and Judy Tofflemire.
- c. On April 5, 2006, Joni Branstetter filed her Notice of Defense. Thereafter, at the hearing, Mr. Selke represented Ms. Branstetter.

Status of Kathy George, Elizabeth Maco, Sharon Goldsbery, Sara Winston, Cheryl Wilke, and Christopher Van Meier

8. At the beginning of the hearing, SCOE confirmed that it had rescinded the layoff notices of Kathy George, Elizabeth Maco, Sharon Goldsbery, Sara Winston, Cheryl Wilke, and Christopher Van Meier. Accordingly, these individuals are no longer respondents to this matter.

Status of Michael Kelley, Eric Relph, Michael Roscoe, Wendy Sanders and Carrie Webb

9. Notices of Defense were not filed by the following certificated employees who were properly served with the Accusation and supporting documents: Michael Kelley, Eric Relph, Michael Roscoe, Wendy Sanders, and Carrie Webb.

⁵ At the hearing, SCOE asserted that Michael Kelly, Eric Relph, Michael Roscoe, Wendy Sanders, and Carie Webb had not filed a Notice of Defense and thereby waived their right to a hearing; however, SCOE did not provide proof that the Accusation and Statement to Respondent notifying employees of their right to a hearing by filing a Notice of Defense had been served on these respondents. These proofs of service were subsequently provided in Exhibit 12.

None of these individuals appeared at the hearing, either personally or through counsel. By failing to file a Notice of Defense after being appropriately served with the Accusation, Statement to Respondent, blank Notice of Defense, Notice of Hearing and related statutes, these five individuals waived their right to a hearing and are not parties to this matter.

Status of Bill Dehart

10. SCOE challenged Bill Dehart's participation in the hearing based upon a Layoff Agreement he signed on March 9, 2006. This Layoff Agreement, signed by Superintendent Whitmer, was mailed to all respondents with the preliminary notice of intent to layoff.

The two-page Layoff Agreement provided that Mr. Dehart and the Superintendent jointly agreed that there was cause under Education Code sections 44949 and 44955 to lay off Mr. Dehart effective June 30, 2006. The Agreement further specifically provided that Mr. Dehart would be offered reemployment as a half-time counselor for the 2006-2007 school year, and that his insurance benefits would continue through October 2006. Included among the 11 specific agreements in this document is the following:

The Employee waives and relinquishes his/her right to a hearing as provided by Education Code Sections 44949, et seq., 44955, et seq., and Government Code Sections 11500, et seq. No other notice of layoff or non reemployment is required to be issued to the employee under Education Code Sections 44955 or 44949 to complete layoff of the employee. This agreement constitutes notice of layoff and nonreemployment.

After signing the Layoff Agreement, on March 31, 2006, Mr. Dehart filed a Notice of Defense to the Accusation. At hearing, Mr. Dehart testified that he did not read the two-page Layoff Agreement before he signed it and believed he was signing to acknowledge his receipt of documents rather than waiving any of his rights. Mr. Dehart also testified that only one of his two hearing aides was functioning at the time his supervisor called him into his office and presented him with these documents. When Mr. Dehart later received a copy of the Accusation and Notice of Defense, he requested a hearing. Mr. Dehart's actions following receipt of the Accusation support his testimony that he did not read the Layoff Agreement before he signed it.

Nonetheless, SCOE argues persuasively that it is entitled to rely on Mr. Dehart's written consent to the Layoff Agreement, with its specific waiver of a right to a hearing. SCOE would clearly be prejudiced if Mr. Dehart were allowed to rescind this agreement because it relied on his agreement to make reductions and reassignments. Furthermore, a review of the two- page Layoff Agreement reveals that its terms are extremely specific and unambiguous regarding Mr. Dehart's waiver

of a right to a hearing upon consent to the agreement. Accordingly, Mr. Dehart waived his right to a hearing and is not a party to this action.

Status of Respondents Who Filed a Notice of Defense and Did Not Sign a Layoff Agreement

11. Of the 19 certificated employees named in the Accusation, the rights of seven respondents remain at issue in this hearing. These seven respondents, with their relative seniority dates and positions, are as follows:

<i>Employee</i>	<i>Seniority</i>	<i>Position</i>
Elizabeth Hughes-Komar	12/11/87	speech/lang. pathologist
Joni Branstetter	8/23/95	speech/lang. pathologist
Judy Tofflemire	8/22/02	speech/lang. pathologist
C. Pearce	8/13/03	nurse
Marjorie McAleer	8/19/05	teacher
Karin Lindsey	9/01/05	teacher
Jennifer Levens	9/02/05	teacher

12. SCOE's assistant superintendent Karen Thompson described the circumstances that led to the Superintendent's decision to reduce particular kinds of services to balance its budget for the welfare of students. Ms. Thompson made the initial reduction recommendation. Superintendent Whitmer confirmed that it was necessary to make the recommended reductions in particular kinds of services and began implementation of the layoff recommendation, by sending letters notifying the affected employees, based upon the following facts:

First, SCOE has historically provided special education and related services to special education students enrolled in various school districts in the county, at the request of the school districts. This year, the school districts advised SCOE that they would "take back" their preschool special education services and provide those services themselves with district employees. The districts further advised SCOE that they would take back school age special education and related services for individuals with moderate to severe disabilities for the 2006-2007 school year. The Special Education Local Plan Area (SELPA) voted to approve this transfer of special education services back to the districts, effective July 1, 2006. As a result of this take back, SCOE lost a special day class program that served kindergarten through twelfth grade students in nine classrooms, with 11.5 full time equivalent positions in the areas of teaching, nursing, counseling, psychology, and adaptive physical education.

Second, a reduction in certificated staff is required in SCOE's "at risk" programs that service students in its community schools due to the low enrollment in these programs at the outset of the school year. Ms. Thompson indicated that, historically, enrollment in SCOE's at risk programs at Oasis community school

increases over time. While SCOE's past practice and current intent is to rescind layoff notices as enrollment again increases, the decision to reduce this particular kind of service was based upon current enrollment figures.

13. The services identified in Superintendent Whitmer's March 9, 2006, letter and in the Accusation, as further described in Ms. Thompson's testimony, are particular kinds of services that can be reduced or discontinued under Education Code section 44955. No mandated services were reduced. SCOE's decision was not related to the competency and dedication of the certificated individuals whose services are proposed to be reduced or eliminated. Rather, its decisions were based on the welfare of SCOE and its pupils. The Superintendent's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of her discretion.

14. To identify the employees affected by the necessary reductions, Ms. Thompson reviewed the number of positions that were no longer needed, SCOE's Seniority List, and the respondents' assignments, locations, advanced degrees, credentials, and authorizations.

SCOE's Seniority List identifies employees' seniority dates based upon their first date of paid service. SCOE made the Seniority List available to its certificated employees. None of the affected respondents raised any questions regarding the accuracy of the Seniority List. Using the Seniority List, SCOE then determined in inverse order of seniority the names of the employees who would be affected. As discussed above, these individuals were then served with preliminary notice of intent to layoff, the Accusation, and all supporting documentation.

SCOE's Request to "Skip" Less Senior Teacher Respondents

15. In relation to certificated teachers being affected by the reduction in particular kinds of services, SCOE determined that three of the least senior teachers -- Marjorie McAleer, Jennifer Levens, and Karin Lindsay -- should be "skipped" in the layoff process because it needed their specialized skills for its independent study program, and because teachers with more seniority did not possess the specialized training and experience to perform these services.

Ms. Thompson testified that SCOE hired these three teachers in the fall of 2005, after the closure of Options for Youth Charter School, which had provided a unique independent study program for students in Shasta County whose educational needs were not being otherwise met. On closure of Options for Youth, SCOE determined to expand its independent studies program to add the Magnolia Program which is designed to ensure that this student population will be provided appropriate educational services. Ms. Thompson explained that the traditional independent studies program would not address the needs of these students. Rather, this independent studies program provides specialized year-round, measured curriculum

with advanced placement courses that are designed to prepare students for post secondary education. Options for Youth Charter School was accredited by the Western Association of Schools and Colleges (WASC). After its closure, its former students discovered that their WASC credits were not being accepted by area high schools. SCOE determined that these students would not return to its Oasis Community School and were at great risk of dropping out of school.

Each of these respondents had experience working with Options for Youth. Each has received specialized training from SCOE in attendance and accounting for independent studies programs, including how to provide high school credits and how to develop transcripts. This later course of study is critical to the success of independent studies program because students' credits are earned based upon work produced. Furthermore, Ms. Thompson provided a detailed description of the specific specialized training and experience possessed by Ms. McAleer, Ms. Levens, and Ms. Lindsay which was not shared by more senior teachers. For example, each of these three respondents has experience working with the WASC-certified independent study program, and each has achieved the "highly qualified" teacher status under the No Child Left Behind law (referred to as "NCLB compliant") in multiple core high school subjects, specifically tailored for delivery in the context of an independent study program. Ms. McAleer is NCLB compliant in English, math, social science, and science for independent study at the high school level. Ms. Lindsey is NCLB compliant in English, social science, and reading/language arts for independent study at the high school level. Jennifer Levens is NCLB compliant in English, and Social Sciences for independent study at the high school level. By contrast, none of the more senior teachers was compliant, or as compliant, at the high school level.

Ms. Thompson determined that if any more senior teachers were allowed to bump any of these three respondents it would place SCOE's independent studies program and its students at great risk for educational failure.

16. SCOE met its burden of demonstrating that it is appropriate to "skip" respondents McAleer, Levens, and Lindsay. First, the only certificated employees who would be adversely affected by this decision (Michael Roscoe, Carie Webb, Karin Morgan, Charles Hetzer, Eric Relph, and Mike Kelly)⁶ did not appear at the

⁶ SCOE's Seniority List establishes the following seniority order for these employees, each of which is more senior than those employees being skipped:

Charles Hetzer	9/27/02
Karin L. Morgan	10/25/02
Carie Webb	3/10/03
Michael Kelly	2/25/99
Erik Relph	8/19/02
Michael Roscoe	10/12/04

Mr. Hetzer has an emergency credential that will expire at the end of the 2005-2006 school year.

hearing and no evidence or argument was presented on their behalf. Rather, these individuals signed Layoff Agreements with SCOE, or were properly served with the Accusation and failed to file a Notice of Defense, or were never included in the class of employees potentially affected by the layoff. Second, SCOE's uncontradicted evidence established that it has a specific need for personnel to teach courses in a specialized independent study program and that Ms. McAleer, Ms. Levens, and Ms. Lindsay each possess specialized training and experience necessary to teach those courses which other teachers more senior than they do not possess.

17. SCOE identified the certificated employees providing the particular kinds of services that the Superintendent directed be reduced or discontinued. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

LEGAL CONCLUSIONS

1. County Offices of Education are subject to the same statutory requirements as school districts where they seek to layoff certificated teaching staff due to reductions in particular kinds of services. Education Code section 1294 provides that whenever any duty or power is imposed on the governing board of a school district pursuant to Education Code Sections 44949 and 44955, "the power or duty shall, for the purposes of this section, be deemed to be granted to or imposed on the county superintendent of schools or his or her employee, respectively. When 'district' is used in those provisions, it shall, for the purposes of this section, be deemed to mean 'county superintendent of schools.'"

2. As set forth in Factual Findings 4 through 7, all notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met.

3. Education Code Section 44955, subdivision (b), provides in pertinent part:

Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

4. Education Code Section 44955, subdivision (d), provides in pertinent part:

Notwithstanding subdivision (b), a school district may deviate

from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

5. A school district or a county office of education may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

6. As set forth in Factual Findings 4 through 7 and 12 through 14, cause exists to reduce the number of certificated employees of SCOE due to the reduction and discontinuation of particular kinds of services. The testimony of assistant superintendent Ms. Thompson established that SCOE's cause for the reduction or discontinuation of services relates solely to the welfare of SCOE's schools and pupils within the meaning of Education Code section 44949.

7. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469). A school district may move upward from the bottom of the seniority list, "skipping" over and retaining junior employees who are certificated and competent to render services which more senior employees are not. (See, *Alexander v. Board of Trustees* (1983) 139 Cal.App. 3d 567, 571.) Thus, junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399, 405.)

8. As set forth in Factual Finding 15 and 16, SCOE met its burden of establishing that respondents Marjorie McAleer, Karin Lindsey, and Jennifer Levens are properly "skipped" and given retention priority over more senior teaching employees.

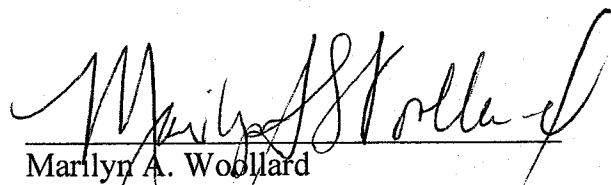
9. No employee with less seniority than any respondent is being retained

to render a service which any respondent is certificated and competent to render. Accordingly, cause exists to give notice to respondents Elizabeth Hughes-Komar, Joni Branstetter, Judy Tofflemire, and Charlene Pearce that their services will not be required, or will be reduced, for the 2006-2007 school year.

ORDER

Notice shall be given to employees occupying full-time equivalent certificated positions that their services will not be required for the 2006-2007 school year due to the reduction and discontinuance of particular kinds of services. Notice shall be given in inverse order of seniority, but shall skip respondents Marjorie McAleer, Karin Lindsay, and Jennifer Levens.

Dated: May 1, 2006


Marilyn A. Woodard
Administrative Law Judge
Office of Administrative Hearings