

BEFORE THE
KINGS COUNTY SUPERINTENDENT OF SCHOOLS
KINGS COUNTY OFFICE OF EDUCATION
KINGS COUNTY, CALIFORNIA

In the Matter of the Accusation Against :

LUPE ARAUJO,

Respondent.

OAH No. 2013030850

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Hanford, California, on April 30, 2013.

Dwaine L. Chambers, Attorney at Law, School Law Consultants, represented the Kings County Superintendent Tim Bowers.

Joshua F. Richtel, Attorney at Law, Tuttle & McCloskey, represented respondent Lupe Araujo.

The parties entered into a stipulation that the hearing in this matter would commence on April 1, 2013, for jurisdictional purposes only and would reconvene on April 30, 2013, to be completed. As part of the stipulation, respondent waived her right to have the hearing completed on or before May 7, 2013, to receive a copy of the Proposed Decision on or before May 7, 2013, and to receive the Superintendent's final notice that her services would not be required in the ensuing school year on or before May 15, 2013. Following the receipt of evidence on April 30, 2013, the parties were afforded the opportunity to submit written closing argument. On May 13, 2013, Mr. Chambers filed his post-hearing brief which was marked exhibit 14, and made a part of the record. Thereafter, the Office of Administrative Hearings staff contacted Mr. Richtel to determine if he was going to file a post-hearing brief and he responded that he would not. The matter was submitted on May 13, 2013.

FACTUAL FINDINGS

1. Barbara Zaino, Assistant Superintendent, Human Resources, Kings County Office of Education, Kings County, California (KCOE), filed the Accusation in her official capacity.

2. On February 15, 2013, and later amended on March 4, 2013, the KCOE Superintendent Board adopted Orders Number 021513 and 030413, respectively, that reduced and/or discontinued particular kinds of certificated services (PKS) no later than the beginning of the 2013-2014 school year.

3. Prior to March 15, 2013, respondent was given notice by personal service that it had been recommended that notice be given her, in accordance with Education Code sections 44949 and 44955¹, that her services would not be required for the ensuing 2013-2014 school year and stating the reasons therefor.

4. A Request for Hearing was timely filed by respondent to determine if there is cause for not reemploying her for the ensuing school year.

5. Respondent is a certificated permanent employee of KCOE, and she teaches at the alternative Kings Community School. The Superintendent's February 15, 2013 Order reducing services included the elimination of three full time equivalent (FTE) certificated teachers at Kings Community School and one FTE certificated teacher at J.C. Montgomery school, a "boot camp" school affiliated with the Kings County juvenile probation department. The total number of reductions was 10.0 FTE, although the resolution recited 9.2 FTE reductions. The reductions were ordered because of an anticipated drop in average daily attendance and the likely return of facilities loaned to KCOE by the Kings County juvenile probation department which will result in a loss of classrooms. Respondent is the second least senior alternative education teacher with a date of hire of July 1, 2002. The least senior alternative education teacher is Tracy Brown, and Mr. Brown has a date of hire of August 14, 2013. He was also given a preliminary notice of the Superintendent's intent not to reemploy him for the ensuing school year.

6. The amended KCOE Superintendent's Order adopted on March 4, 2013, change the reduction of services to two FTE certificated teachers at Kings Community School, along with the one alternative education position at J.C. Montgomery. The amended Order added: "4. Reassign One (1) Full-Time Equivalency (F.T.E.) Certificated Teacher, Kings Community School."² During her testimony, Assistant Superintendent Zaino identified the teacher to be reassigned as Tracy Brown. Thus, Mr. Brown's preliminary notice may be regarded as "precautionary."

7. The reassignment of Mr. Brown is to a newly created position for school year 2013-2014. For approximately one year, KCOE has considered the establishment of an e-learning program using a combination of conventional classroom instruction and teacher-

¹ All future references to statutory sections are to the Education Code unless otherwise specified.

² As explained below, the reassignment is not a reduction or elimination of an alternative education teaching position, but the change in reductions of such services from four to three did not affect the rights of respondent.

student electronic interface. This concept is to provide a “last resort” opportunity for continuation school students who have been expelled from the regular high school and are at high risk for dropping out of the educational program altogether. KCOE administrators were impressed with the success enjoyed by the San Diego County Office of Education with such a program and visited them to learn best practices in the area. Based on the recommendation of the San Diego Office of Education, KCOE determined to enroll two alternative education teachers in the six to eight weeks long Leading Edge certification program: Online & Blended Teacher. Sometime in late 2012, alternative education teachers Tracy Brown and Joseph Sansinena were asked to volunteer and they did so. Mr. Sansinena is senior to respondent and Mr. Brown. At the time of the administrative hearing, Mr. Brown had reportedly completed all of the course work and was waiting for his final grades before receiving his certification.

8. The blending e-learning class contemplated by KCOE is, according to Assistant Superintendent Barnhart who spearheaded the research into the effort and drafted the course description, a completely different method of teaching. The teacher’s classroom will have expanded broadband capability and added informational technology support. The teacher will use the electronic format to try and generate self-initiative and motivation among the 10 to 20 students enrolled in the pilot program class. The curriculum will depart from standard text books and standards that are used even in the independent study programs now overseen by the Kings Community School teachers.

9. Assistant Superintendent Barnhart’s job description for the class entitled “Teacher, Alternative Schools Physical Education and E-Learning Programs,” includes as required qualifications the expected expertise in dealing with high-risk students, but also familiarity with national and international (iNAOL) standards for online teaching. The skills requirements include the ability to effectively maintain an e-learning environment, implement and deliver high quality online and computer-based curriculum and blended learning instructional models to support student needs, the creation and facilitation of a Learning Management System, and evaluation of student success using online or blending formats. Experience in e-learning at the high school level is “highly desirable.” The certification requirements include “Certification in eLearning as an online and blended teacher.” The job description was created without consideration of any future reduction of services and before KCOE learned that the probation department was likely to demand the return of classroom facilities.

10. The Superintendent contends that respondent, while properly certificated, is not “competent” to bump into the newly created position to be occupied by Tracy Brown. The Superintendent has not established any criteria to define “competence” as the word is used in section 44955, subdivision (b). Assistant Superintendents Zaino and Barnhart both testified that respondent, while properly credentialed to teach an alternative education high school course, including physical education, is not competent to teach the newly created eLearning course. Ms. Zaino’s opinion was, however, greatly influenced by her concerns about respondent’s performance as a teacher in her current assignment and she candidly acknowledged her difficulty in objectively assessing respondent’s ability to teach the newly

created course. Ms. Barnhart focused on the need to have someone specially trained in this novel format, based on her research and discussions with the San Diego Office of Education about their implementation of the program. She emphasized the very different method of teaching this format entails and the need to have a teacher who understands and meets accepted standards established by the educational community. Mr. Brown has such training and respondent does not.

11. Respondent asserted that she is competent to bump into the newly created position to be occupied by junior teacher Tracy Brown. She was unaware of the course offered to Mr. Brown and Mr. Sansinena until the administrative hearing. She would consent to teach the class in the alternative education program. Respondent has considerable experience in eLearning. She was the first KCOE teacher to use a Smart Board (interactive white board). She has used Testmoz for the creation of examinations and grading. She is familiar with and has used School Notes 2.0, Weebly (a class website creation tool), I-Boss, Dropbox (that can facilitate student collaboration on documents), Quick Topic (for questions posed to students and answered by them), Chat, and video conferencing.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. The Superintendent's legal theories in this matter have evolved over time. The Superintendent began with the assertion that as the e-learning position does not now exist, it should not be considered in the context of respondent's right to bump. As the evidence made clear that the Superintendent intends the class to be part of the curriculum in the ensuing school year and Tracy Brown is the teacher to be reassigned to the class, the Superintendent focused on respondent's perceived lack of competence to bump junior teacher Mr. Brown.³ Later, in the hearing, both sides addressed whether the newly created position is a unique course requiring special skills that Mr. Brown possesses and respondent does not which would permit Mr. Brown to be "skipped." Both counsel addressed the latter two contentions in their closing oral arguments and counsel for the Superintendent addressed them again in his post hearing written brief.

3. Section 44955 reads, in pertinent part:

(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no

³ It should also be noted that the Administrative Law Judge informed the parties that he intended to allow respondent to assert her bumping rights, because to wait until the actual creation of the class would deprive respondent of her right to timely raise her right to occupy the position in the ensuing school year as contemplated by the statutory layoff process.

probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. 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.

In computing a decline in average daily attendance for purposes of this section for a newly formed or reorganized school district, each school of the district shall be deemed to have been a school of the newly formed or reorganized district for both of the two previous school years.

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of

termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) 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.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

(Emphasis added)

4. Respondent asserts that she is properly certificated and competent to bump junior employee Tracy Brown who will otherwise occupy the e-learning position. There is no dispute that respondent is properly credentialed to do so. The issue is her competence to render the services required for the new course. The term "competent" relates to specific skills or qualifications, not prior on-the-job performance of the laid-off permanent employee. (*Forker v. Board of Trustees of Whittier Union High School Dist.* (1984) 160 Cal.App.3d 13,

19.) In *Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, the California Supreme Court considered the “certificated and competent” standard. The Court stated that such determinations involve discretionary decisions which are within the “special competence” of the school districts. (*Id.* at p. 299.) Insofar as skills and qualifications are concerned, respondent has been teaching the same type of high risk students who will fill the newly created class for more than a decade and currently teaches in the same continuation high school where the class will likely be offered. Respondent is accustomed to dealing with independent study students and the coordination of in-class instruction or monitoring with a student’s work at home. She pioneered the use of smart boards in KCOE classrooms and uses a variety of e-learning software programs with her students. There remains the question, however, whether she possesses the skills or qualifications to teach in the blended e-learning environment contemplated by Superintendent. No such class currently exists in KCOE, so skills and qualifications must have been acquired elsewhere as a teacher in a comparable class or as a result of formal instruction of the type undertaken by Tracy Brown. The Superintendent’s staff researched the e-learning programs available, reviewed national and international standards for such programs and consulted with at least one other California county office of education to learn about actual experience with such programs and recommended best practices. In summary, Superintendent’s determination that the newly created class requires very specialized skills and qualifications that respondent does not possess was a reasonable exercise of his discretion.

5. Superintendent established that there is a specific need to provide a “last resort” e-learning course in an effort to keep high risk students in school. The course requires special training and experience as explained in Legal Conclusion 4. Superintendent further established that Tracy Brown has acquired such special training and experience as evidenced by his completion of the internationally recognized Leading Edge certification program for an “Online & Blended Teacher.” Respondent, while familiar with many e-learning software programs, has not acquired the special training and experience necessary to teach the course. Superintendent has thus fulfilled each of the required elements for appropriate skipping of a junior certificated employee in accordance with subdivision (d)(1) of Section 44955. (*Bledsoe v. Biggs Unified School District* (2009) 170 Cal. App.4th 127, 138.)

6. Superintendent has established that respondent is not competent to bump Tracy Brown from his reassigned position as instructor in the new e-learning class at Kings Community School. Superintendent has also demonstrated a specific need for personnel to teach the new e-learning course and that Tracy Brown has special training and experience necessary to teach the course, which respondent does not possess.

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ORDER

1. The Accusation against respondent is sustained and District may issue a final termination notice to respondent for the particular kind of services identified and the one FTE.

2. Respondent Lupe Araujo shall receive final notice that she will be laid off 1.0 FTE (Certificated Teacher at Kings Community School).

Dated: May 23, 2013

KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings