

BEFORE THE  
GOVERNING BOARD OF  
LASSEN COMMUNITY COLLEGE DISTRICT

In The Matter Of The Accusations Against:

NANCY BENGGOA-BETERBIDE

and

KAM VENTO

OAH No. N2005030461

Respondents.

**PROPOSED DECISION**

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 12 and 26, 2005, in Susanville, California.

Rex Randall Erickson, Attorney at Law, represented the Governing Board of the Lassen Community College District.

Donald A. Selke, Jr., Attorney at Law, represented respondents.

Evidence was received and the record left open for the submission of post-hearing letter briefs from the parties. Briefs were received from the District and respondents, marked exhibits ZZ and 3, respectively, and made a part of the record. The matter was submitted on May 2, 2005, with receipt of the briefs.

**FACTUAL FINDINGS**

1. Dr. Homer Cissel, is the President/Superintendent (Superintendent) of Lassen Community College District. He made the Accusations in his official capacity.
2. Respondents are employed by the Superintendent by written contract as certificated employees.

3. On or about March 8, 2005,<sup>1</sup> the Superintendent gave notice to the Governing Board of the Lassen Community College District pursuant to Education Code sections 87740 and 87743 of his recommendation that the following particular kinds of services be reduced or discontinued for the 2005-06 school year: Business, 2.0 FTE<sup>2</sup>; Counseling, 1.5 FTE; and Journalism, 1 FTE. The Superintendent also recommended that the Governing Board authorize service of the notice required by Education Code sections 87740 and 87743 on affected employees that their services will not be required for the ensuing school year. The Governing Board adopted the recommendations on March 8, 2005.

4. On March 11, 2005, respondents were given notice by the Superintendent that their services would not be required for the ensuing school year and stating the reasons therefore. More specifically, respondent Bengoa-Beterbide was informed that the reason for the notice to her was the discontinuation of 1.5 FTE Counseling in school year 2005-2006 and respondent Bento was informed that the reason for notice to him was discontinuation of 2.0 FTE Business in school year 2005-2006.

5. Respondents requested a hearing and the Accusations were filed on March 21, 2005. The Accusation served upon respondent Bengoa-Beterbide incorrectly identified, as the basis for not employing her in the ensuing school year, the discontinuation of the following particular kinds of service (PKS): "Business 2.0 FTE Positions." Over objection by respondent Bengoa-Beterbide, the Administrative Law Judge permitted Superintendent to amend the Accusation pursuant to Government Code section 11507 to reflect the correct PKS discontinuation as "Counseling 1.5 FTE Positions." Respondent declined the Administrative Law Judge's offer to continue the matter to respond to the amendment.

6. On the first day of hearing, it was revealed that Superintendent had not prepared tentative course offerings for the ensuing school year, including tentative teaching assignments for those probationary or permanent instructors junior to respondent with shared faculty service areas (FSAs). Over respondents' objections, the Administrative Law Judge provided Superintendent approximately two hours to make such assignments and convey them to respondents. This was completed before the hearing resumed after the lunch recess and a chart which includes six junior instructors and their tentative class assignments for the fall semester of 2005-2006 was received in evidence.

7. Superintendent has not determined which courses will be offered in the Business and Counseling areas in school year 2005-2006. This will depend, in part, on the preference of instructors. At this point, it cannot be determined which courses among those currently offered, will not be offered next year. Thus, presently, the only policy decision made by the Superintendent is to reduce, in some fashion, the courses offered in the business and counseling by 2.0 FTE and 1.5 FTE, respectively. The reductions are based on the economic

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<sup>1</sup> The Bengoa-Beterbide Accusation incorrectly recites the dates on which notice of the Superintendent's recommendation was given to her and the Governing Board, the adoption of the recommendation by the Governing Board, and service of the preliminary notice on her. The actual documents, received in evidence without objection, include the dates recited herein. Thus, there was no prejudice to respondent by reason of the obvious typographical errors.

<sup>2</sup> This is the acronym for a full time equivalent teaching position.

situation of the college district which is in a continuing deficit position, owing to reduced enrollment and anticipated loss of revenue resulting from an ongoing audit by the Chancellor of the community college system. After the District's obligatory termination of the services of temporary instructors, respondents are the least senior instructors in the affected areas.

## LEGAL CONCLUSIONS

### *ISSUES PRESENTED BY RESPONDENT*

1. Respondent raised the following contentions at hearing:
  - A. The amendment of the Accusation against respondent Bengoa-Beterbide to correct the alleged legal basis for not reemploying her in the ensuing school year violated her right to due process.
  - B. Superintendent's failure to make tentative assignments for instructors junior to respondents with shared FSAs before the hearing deprived respondents of their ability to assert "bumping" rights against such instructors.
  - C. Superintendent has not established the requisite discontinuation or reduction of PKS in the absence of evidence reflecting a reduction in courses in 2005-2006 as compared with the current school year.

### *APPLICABLE STATUTORY PROVISIONS*

2. Education Code section 87740 reads:
  - (a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

If a contract employee has been in the employ of the district for less than 45 days on March 15, the giving of the notice may be deferred until the 45th day of employment and all time periods and deadline dates prescribed in this subdivision shall be coextensively extended.

Until the employee has requested a hearing as provided in subdivision (b) or has waived his or her right to a hearing, the notice and the reasons therefor shall be confidential and shall not be divulged by any per-

son, except as may be necessary in the performance of duties. However, the violation of this requirement of confidentiality, in and of itself, shall not in any manner be construed as affecting the validity of any hearing conducted pursuant to this section.

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. A request for a hearing shall be in writing and shall be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified in that subdivision, which shall not be less than seven days after the date on which the notice is served upon the employee. If an employee fails to request a hearing on or before the date specified, this failure to do so shall constitute waiver of his or her right to a hearing. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency in that chapter, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing the accusation.

(2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefor within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the colleges and the students thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board or on any court in future litigation. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the

proceeding is commenced. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds.

The board may adopt, from time to time, rules and procedures not inconsistent with this section that may be necessary to effectuate this section.

(d) The governing board's determination not to reemploy a contract employee for the ensuing college year shall be for cause only. The determination of the governing board as to the sufficiency of the cause pursuant to this section shall be conclusive, but the cause shall relate solely to the welfare of the colleges and the students thereof and provided that cause shall include termination of services for the reasons specified in Section 87743. The decision made after the hearing shall be effective on May 15 of the year the proceeding is commenced.

(e) Notice to the contract employee by the governing board that the employee's service will not be required for the ensuing year shall be given no later than May 15.

(f) If a governing board notifies a contract employee that his or her services will not be required for the ensuing year, the board, within 10 days after delivery to it of the employee's written request, shall provide him or her with a statement of its reasons for not reemploying him or her for the ensuing college year.

(g) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee.

(h) If the governing board does not give notice provided for in subdivision (e) on or before May 15, the employee shall be deemed reemployed for the ensuing school year.

(i) If, after request for hearing pursuant to subdivision (b), any continuance is granted pursuant to Section 11524 of the Government Code, the dates prescribed in subdivisions (c), (d), (e) and (h) that occur on or after the date of granting the continuance shall be extended for a period of time equal to the continuance. (Emphasis added.)

3. Education Code section 87743 reads:

No tenured employee shall be deprived of his or her position for causes other than those specified in Sections 87453, 87467, and 87484, and Sections 87732 to 87739, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Section 87740 except in accordance with the provisions of Section 87463 and Sections 87743 to 87762, inclusive.

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, or whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, and when in the opinion of the governing board of the district it shall have become necessary by reason of either of these conditions to decrease the number of tenured employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the employees of the district, tenured as well as probationary, at the close of the school year. However, the services of no tenured employee may be terminated under this section while any probationary employee, or any other employee with less seniority, is retained to render a service in a faculty service area in which the records of the district maintained pursuant to Section 87743.4 reflect that the tenured employee possesses the minimum qualifications prescribed by the board of governors and is competent to serve under district competency criteria.

Notice of the termination of services either for a reduction in attendance or reduction or discontinuance of a particular kind of service to take effect not later than the beginning of the following school year, shall be given before the 15th of May in the manner prescribed in Section 87740 and services of the employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with Sections 87413 and 87414. In the event that a tenured or probationary employee is not given the notices and a right to a hearing as provided for in Section 87740, he or she shall be deemed reemployed for the ensuing school year.

The board shall make assignments and reassignments in a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. (Emphasis added.)

4. Government Code section 11507 reads:

At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified thereof. If the amended or supplemental accusation presents new charges the agency shall afford respondent a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record. (Emphasis added.)

#### APPLICATION OF LAW TO FACTUAL FINDINGS

5. The allowed amendment to the Bengoa-Beterbide Accusation was authorized by applicable law and did not violate due process. This issue was addressed by the Administrative Law Judge on the record at the hearing in the context of denying respondent's objection to the amendment to the Bengoa-Beterbide Accusation. If a hearing is requested by an employee following the preliminary notice, the matter enters the hearing stage and, except where the Education Code provides an exception, the process is governed by the Administrative Procedure Act. (Ed. Code § 87740, subd. (c) and *Karbach v Bd. of Educ. of the Lawn-dale Sch. Dist.* (1974) 39 Cal.App.3d 355, 363.) The preliminary notice was served upon respondent Bengoa-Beterbide on or about March 11, 2005, and correctly recited the basis for providing notice to her that she would not be employed in the ensuing school year. The error in the Accusation was inadvertent. She filed a Notice of Defense and appeared, through counsel, at the administrative hearing. The amendment was granted in accordance with Government Code section 11507 which permits such amendments at any time before the submission of the matter. Although the amendment did not really present a "new" charge because of the fairly obvious error, respondent was offered a continuance which she, through counsel, declined. For other reasons, the matter was continued for approximately two weeks so respondent had ample time to respond to the change. Respondent demonstrated no prejudice in her ability to defend against the amended cause for notice to her.<sup>3</sup>

6. Respondents were not disadvantaged by the Administrative Law Judge's decision to permit the Superintendent to make tentative teaching assignments in school year 2005-2006 for those instructors junior to respondent with shared FSAs. The assignments were communicated to respondents before the administrative hearing commenced in the afternoon. The Superintendent testified and established that neither respondent was competent by his or her FSA to "bump" into courses being assigned the junior instructors. He was cross

<sup>3</sup> Respondent's related estoppel argument is not separately addressed, given the absence of the required element of prejudice. (Evid. Code § 623 and *California School Employees Assn. v. Jefferson Elementary School District* (1975) 45 Cal. App. 3d 683, 692.)

examined on this topic. Moreover, any temporary disadvantage from the mid-hearing assignments was cured with the continuation of the hearing for approximately two weeks for presentation of respondents' case in chief. Respondents demonstrated no prejudice in their ability to defend by reason of the late notice of the teaching assignments for junior instructors.

7. Superintendent was sufficiently specific in his identification of the discontinuation or reduction of PKS which led to notice to respondents that their services would not be required in the ensuing school year. It was not necessary to identify affected course offerings by reason of the staff reductions. Services may be reduced either by determining that a certain type of service to students shall not be performed or by reducing providing fewer employees to provide the service. (*Rutherford v. Bd. of Trustees of the Bellflower Unif. Sch. Dist.* (1976) 64 Cal.App.3d 167, 178-179; *Degener v. Governing Bd.* (1977) 67 Cal.App.3d 689, 695; *Campbell Elem. Teachers Assn., Inc., v. Gordon, et al* (1978) 76 Cal.App.3d 796, 810-811.)<sup>4</sup> In PKS cases, the determination of the level by which services are to be discontinued or reduced is reflected in the number of positions to be eliminated. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 636; *Zalac v. Gov. Bd. of the Ferndale Unif.Sch.Dist.* (2002) 98 Cal.App.4th 838, 854; *C.T.A. v. Bd. of Trustees of the Goleta Union Sch. Dist.* (1982) 132 Cal.App.3d 32, 36.)

#### LEGAL CAUSE FOR NOTICE

8. Cause exists under Education Code sections 87740 and 87743 to provide notice to respondents Nancy Bengoa-Beterbide and Kam Vento that their services will not be required in the ensuing school year.

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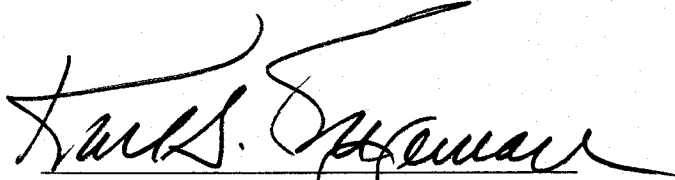
<sup>4</sup> These cases all deal with the application of statutory provisions relating to the lay off of teachers in grades K through 12. However, prior to 1997, those provisions also governed layoffs of community college instructors. Thus, the cases interpreting the provisions are relevant in both settings. (*Duax v. Kern Community College Dist.* (1987) 196 Cal.App. 3d 555, 563, fn.2.)



ORDER

Respondents Nancy Bengoa-Beterbide and Kam Vento shall be given notice that their services will not be required for the 2005-2006 School Year.

Dated: May 6, 2005

  
KARL S. ENGEMAN  
Administrative Law Judge  
Office of Administrative Hearings