

BEFORE THE  
ALPINE COUNTY SUPERINTENDENT OF SCHOOLS

In The Matter Of The Accusation Against:

RITA LOVELL,

Respondent.

OAH No. N2005040064

**PROPOSED DECISION**

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 11, 2005, in Woodfords, California.

Allen R. Vinson, Attorney at Law, represented the Alpine County Superintendent of Schools.

Lesley Beth Curtis, Attorney at Law, represented respondent.

Evidence was received and the matter was submitted on April 11, 2004.

**FACTUAL FINDINGS**

1. James W. Parsons, Ed.D, is the Alpine County Superintendent (Superintendent) of Schools. He made the Accusation in his official capacity.
2. Respondent is employed by the Superintendent as a probationary certificated employee and first rendered paid service for the Superintendent on January 25, 2001.
3. On or about March 1, 2005, the Superintendent recommended that notice be given respondent, pursuant to Education Code sections 44949 and 44955 that her services would not be required for the ensuing school year and stating the reasons therefore. The Superintendent determined to discontinue one (1.0) full time equivalent (FTE) position by

eliminating the Library Media Coordinator position in school year 2005-2006. Notice of the decision was sent to the Alpine County Board of Education on the same day.

4. On March 10, 2005, respondent was given notice by the Superintendent that her services would not be required for the ensuing school year by reason of the Superintendent's elimination of the Library Media Coordinator position in school year 2005-2006. Respondent is the only Library Media Coordinator employed by the Superintendent. The stated reason for the elimination of the position was "the lack of support funding for the program." In the notice, respondent was invited to address questions about the layoff to the Superintendent. Nowhere in the notice was respondent apprised of her right to a hearing.

5. On a date not established by the evidence, but somewhere between March 10, 2005, and April 1, 2005, respondent learned that certificated teachers for the Alpine County Unified School District who had been noticed for layoff were entitled to a hearing. She conferred with representatives for her collective bargaining unit who contacted legal counsel. On April 1, 2005, Ms. Curtis presented Mr. Vinson with a Notice of Defense and Request for Discovery on behalf of respondent. On the same day, the Superintendent served the Accusation and related documents on respondent. A Notice of Hearing was included.

6. The Superintendent is also the Superintendent for the Alpine County Unified School District. There is one Governing Board for both the County Office of Education and the school district. For at least the last five years, the Superintendent has provided library media services to the school district for a "charge back" of approximately \$65,000. Faced with the District's inability to fund such services for the ensuing school year, the Superintendent decided to return to the previous arrangement whereby Alpine County provided library services to the school district and the Superintendent supplied one or more non-certificated library aides to perform oversight and routine library services in school libraries. These duties will include checking books in and out, shelving library books and maintaining order in the libraries. When this arrangement was last used, the cost to the school district was approximately \$7,500 annually.

7. Respondent now performs the usual duties of a school librarian. She is based at Diamond Valley Elementary School. She conducts weekly library classes for each of the classes in grades K through 5. She supervises the students during these classes while their classroom teachers are generally occupied elsewhere. She provides one-on-one help to students in grades 6 through 8 when they use the library during their free time. She orders books, catalogs them, and otherwise maintains library resources. While she rarely visits the other schools in the district, she does compile books and other resources for research projects upon demand and sends the materials to the other school sites. Respondent is also responsible for maintaining media equipment such as videotaping devices and the distribution of such equipment for use in the county's public schools.

8. Approximately six months after her first date of paid service, respondent was asked to team teach a computer course with the Office of Education's technology coordinator. She agreed to do so and has been teaching the course for one hour each school day. The

course is provided to students in grades 6 through 8 and includes keyboarding, word processing, data bases, spreadsheets, and Power Point. The classes are not required by the school district but are offered to accommodate students who will attend high school in nearby Douglas County, Nevada. Nevada requires incoming high school students to demonstrate competency in the listed computer software programs. The classes are conducted in a computer lab. The skills required to teach the courses are unrelated to respondent's usual library and media coordinator duties and the duties of librarians generally.<sup>1</sup> Respondent was asked to team teach the course because a certificated teacher is required and the technology coordinator does not have a credential. Respondent's work day is from 7:30 a.m. to 3:30 p.m. The school day extends from 8:00 to 3:00 p.m. While the evidence did not establish the number of classroom hours in the school district's normal day, official notice<sup>2</sup> is taken of the generally accepted fact within the Superintendent's special field that a conventional school day is six or seven periods long. Thus, respondent's position for the last approximately two and one-half years has included either approximately .167 (assuming a six course day) or .148 (assuming a seven course school day) of computer instruction.<sup>3</sup> Superintendent did not specify any reduction or discontinuation of the particular kind of service (PKS) relating to computer software instruction and at least implied that the courses would be continued in the ensuing school year.

9. Respondent called as a witness the Superintendent's business manager who also serves as the business manager for the unified school district. This was an attempt to establish that the school district budget projections for the ensuing school year include sufficient funds to avoid elimination of respondent's position by the County Office of Education. The testimony of the business manager did establish considerable projected budget "reserves" but most of these funds are allocated for anticipated future expenses including cafeteria expenses, deferred maintenance, and capital outlay. There is a category entitled "economic uncertainty" which more accurately reflects the true reserve required by the California Department of Education. However, the school district is in the last year of special outside funding designated Forestry Revenues, which will reduce revenue by approximately \$411,000 in the ensuing school year. With this reduction and considering the school district's true reserves, the school district is projected to be in a deficit position in the next school year. Moreover, this Accusation involves the elimination of a County Office of Education position based on the school district's disinclination to fund the Library Media Coordinator position. The school district is not required to fund such services nor is the County Office of Education required to provide them.

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<sup>1</sup> In this regard, see California Code of Regulations, title 5, section 16040 defining "School library services" and other related terms.

<sup>2</sup> Government Code section 11515.

<sup>3</sup> The percentage could be higher if time is allocated for teacher preparation or other functions which would relate to either of respondent's duties. The Order directs the Superintendent's office to calculate a more precise percentage based on amount of time allocable to computer classes relative to respondent's actual teaching and librarianship responsibilities.

## LEGAL CONCLUSIONS

### *APPLICABLE LAW*

1. Education Code section 44949 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 for the reasons specified in Section 44955, 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 therefore.

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 person, 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, his or her failure to do so shall constitute his or her 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 therein, 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 in 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 schools and the pupils 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. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. 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 such rules and procedures not inconsistent with provisions of this section as may be necessary to effectuate this section.

(d) 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.

(e) 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 subdivision (c) which occur on or after the date of granting the continuance and the date prescribed in subdivision (c) of Section 44955 which occurs after the date of granting the continuance shall be extended for a period of time equal to the continuance. (Emphasis added.)

2. Education Code section 44955 subdivision (b), reads, in pertinent part:

(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 inter-district 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. (Emphasis added.)

3. Education code section 18139 reads:

With the consent of the county board of education, in those counties in which the county superintendent of schools performs library services for the school library of any district, the governing board of the school district may agree with the proper authorities of the county to terminate the affiliation of the district with the county superintendent of schools with respect to library services. The proceedings shall be terminated<sup>4</sup> prior to the first day of February of the school year in which begun and may provide for either of the following:

(a) The complete withdrawal of affiliation effective on the first day of July next succeeding.

(b) A gradual withdrawal over a period of not to exceed five years beginning on the first day of July next succeeding the termination of proceedings.

The county board of education shall adopt rules and regulations governing a gradual withdrawal, including the period to be covered, not to exceed five years, the amount of payment for each year, and the

<sup>4</sup> Another section, Education Code section 18138, makes it clear that "proceedings" in the underlined phrase refers to the negotiations between the school district and the county superintendent of schools to end their relationship and the time table for the withdrawal of affiliation.

amount of service to be rendered. The terms of the gradual withdrawal shall comply with the rules and regulations. (Emphasis added.)

#### *APPLICATION OF LAW TO FACTUAL FINDINGS*

4. Respondent raises three legal contentions. First, respondent contends that the March 10, 2005, letter did not contain any language apprising respondent of her right to a hearing. This, according to respondent, is a jurisdictional defect which cannot be cured by the issuance of an accusation and timely provision of a hearing. Second, respondent contends, in essence, that the reasons for the elimination of respondent's position are specious, given the economic condition of the school district. Third, respondent contends that the portion of respondent's duties which involve teaching a computer course require a separate reduction of discontinuation of a PKS as the duties fall outside those of a library and media coordinator.

5. Superintendent did fail to apprise respondent of her right to a hearing in the March 10, 2005, communication. He conceded the oversight in his testimony. However, respondent learned of her right to a hearing and, through counsel, requested a hearing by filing a Notice of Defense and Discovery Request in anticipation of the filing of an Accusation. The Accusation was filed on April 1, 2005, and served on respondent along with a Notice of Hearing. Respondent appeared with counsel at the hearing and demonstrated no prejudice resulting from the omission in the March 10, 2005, letter. In summary, the omission was a nonsubstantive procedural error which caused no prejudice to respondent. The case of *Balen v. Peralta Junior College District* (1974) 11 Cal.3d 821, cited by respondent, is readily distinguishable. In that case, the Court held that the district could not assert as an affirmative defense in the judicial review action that Balen did not request an administrative hearing within the time allowed by statute when the district had failed to apprise Balen of that right.

6. Education Code section 18139 does not preclude the Superintendent from eliminating the position of Library and Media Coordinator. As the Superintendent correctly points out, the affiliation with the district is not being terminated. The Superintendent will supply one or more library aides and other librarian services will be provided by contract with Alpine County.

7. The third issue presented by respondent is the most troublesome. The classroom instruction provided by respondent in computer technology is clearly outside her normal duties as a librarian and media coordinator. Respondent was asked to team teach the class because she has the requisite credential which the technology coordinator does not possess. There was no indication that the Superintendent intends in the ensuing school year to either reduce or eliminate the computer classes which are required for the students attending school in Nevada. For approximately two and one-half years, respondent's assignment has been split between her duties as the Library and Media Coordinator and teaching a computer software course. Although the computer course occupied just one hour of respondent's workday, the Administrative Law Judge is unaware of any provision of law which sets out a

minimum teaching assignment required to trigger the statutory obligation to demonstrate a PKS change as legal cause for a layoff notice. Therefore, respondent is entitled to retain whatever percentage of her assignment is allocable to her computer course work.

#### *LEGAL CAUSE FOR NOTICE*

12. Cause exists under sections 44949 and 44955 to provide notice to respondent Rita Lovell that her services as the Library and Media Coordinator will not be required in the ensuing school year. The cause relates solely to the welfare of the District and the pupils thereof.

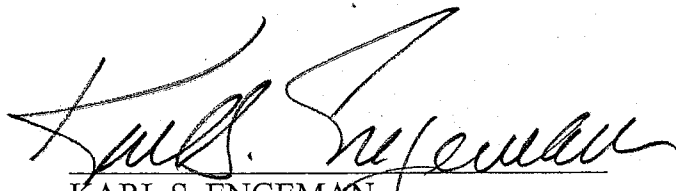
13. Cause does not exist under sections 44949 and 44955 to provide notice to respondent Rita Lovell that her services as a computer software program teacher will not be required in the ensuing school year.

#### *ORDER*

1. Notice shall be given to respondent that her services as the Library and Media Coordinator will not be required for the 2005-2006 School Year because of the discontinuance of particular kinds of services.

2. Notice shall not be given respondent for her services as a computer class instructor. The Superintendent, or his designee, shall determine the percentage of respondent's 1.0 FTE allocable to each function.

Dated: April 25, 2005

  
KARL S. ENGEMAN  
Administrative Law Judge  
Office of Administrative Hearings