

BEFORE THE
OFFICE OF THE SANTA CLARA COUNTY SUPERINTENDENT OF SCHOOLS
COUNTY OF SANTA CLARA
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JOHN OLIVER, LISA POLITEO, PAUL
YURI SAMER and CRAIG TOOMAY,

Respondents.

OAH No. 2006030534

PROPOSED DECISION

Administrative Law Judge Nancy L. Rasmussen, Office of Administrative Hearings, State of California, heard this matter on April 21, 2006, in San Jose, California.

Adam J. Fiss, Esq., of Littler Mendelson, represented the Santa Clara County Superintendent of Schools.

Christopher Schumb, Esq., represented respondents Paul Yuri Samer and Craig Toomay. Respondents John Oliver and Lisa Politeo were not present or represented.

The matter was submitted for decision on April 21, 2006.

FACTUAL FINDINGS

Background

1. Laura Kidwiler made and filed the accusation in her official capacity as the Assistant Superintendent for Human Resources (Assistant Superintendent) at the Office of the Santa Clara County Superintendent of Schools (County Office).

2. Respondents John Oliver, Lisa Politeo, Paul Yuri Samer and Craig Toomay, are certificated employees of the County Office.

Reduction or Discontinuation of Services

3. On March 2, 2006, Santa Clara County Superintendent of Schools Colleen B. Wilcox, Ph.D., (County Superintendent) adopted a resolution reducing or discontinuing particular kinds of services no later than June 30, 2006, and directing the Assistant

Superintendent to send appropriate notices to certificated employees whose employment would be reduced as a result of the reduction or discontinuation of services.

4. On or before March 15, 2006, the Assistant Superintendent gave written notice to respondents and other certificated employees that their services would be terminated no later than June 30, 2006.

5. Each respondent filed a timely request for hearing to determine if there is cause for terminating his or her services. An accusation was served on respondents, each of whom filed a timely notice of defense. All prehearing jurisdictional requirements have been met.

6. Before the hearing, the County Superintendent rescinded the layoff notices to respondents John Oliver and Lisa Politeo.

7. The County Superintendent took action to reduce or discontinue the following services no later than June 30, 2006:

Alternative Schools Resource Teacher	1.0 FTE (Full-Time Equivalent)
Alternative Schools Teacher	<u>6.0 FTE</u>
Total	7.0 FTE

Respondent Paul Yuri Samer

8. Respondent Paul Yuri Samer holds an Oregon teaching credential. Last year, when he lived in Eugene, Oregon, Samer was looking for a teaching job. During an on-line search, he came across the County Office's job listing for an alternative school teacher. After he "clicked on" the listing to indicate his interest, the County Office contacted him to arrange for an interview. During a telephone interview, representatives of the County Office expressed confidence that, based on his Oregon credential, Samer would be able to obtain a California teaching credential.

9. In early October 2005, the County Office offered Samer a job as a teacher in one of its alternative schools, with a starting date of November 2, 2005. Samer was told that he was being hired for a permanent position, but that he would be working under a temporary county certificate (TCC) until he received his California credential. The County Office completed an Authorization for Employment form, which bears signatures dated October 3 through 13, and a Certificated New Employee Orientation Check List, which Samer signed on October 14. The Authorization for Employment form contains the notation, "offer contingent upon applying for cred." The form contains two boxes following "Status in this assignment will be" – the first box indicating "Permanent" and the second one indicating "Non-permanent reassignment of regular employee." There is a check mark in the first box. In the same section of the form, there are three boxes following "Employee being hired & assigned solely on this basis." These boxes indicate "Temporary," "Limited-Term" and "Provisional." None of these boxes is checked on Samer's form. The Certificated New

Employee Orientation Check List form has three boxes under "Employee Status" – for "Regular," "Provisional" and "Temporary." The box for "Regular" is checked on Samer's form. On October 21, 2005, Samer applied for a credential from the California Commission on Teacher Credentialing (CTC). At the end of October, Samer moved from Oregon to California to start his job with the County Office. On November 2, he started teaching at Calero School. Samer has not received his California teaching credential. When he recently contacted CTC, he was told that his credential application was still being processed.

10. The County Office considers Samer to be a provisional employee, since he does not yet have a California credential. As a provisional employee, Samer is not accruing seniority. Director of Human Resources Mary Mulholland testified that the "Permanent" box on the Authorization for Employment form was checked in error – the "Provisional" box in the same section should have been checked. Similarly, on the Certificated New Employee Orientation Check List form, the "Regular" box was erroneously checked instead of the correct box indicating "Provisional." The erroneous classification apparently persisted until very recently, since the certificated seniority list prepared on March 16, 2006, shows Samer having an employee status code of 11, the code for "Prob 1." This was corrected in the updated list prepared on April 19, 2006, which reflects an employee status code of 23, for provisional. Mulholland stated that Samer is a provisional employee in a permanent position.

11. Samer claims that during the hiring process, no one from the County Office told him he would be a provisional employee. He apparently thought he would be accruing seniority as of November 2, 2005, the date he started teaching. It is unknown whether knowing that he would be a provisional employee without seniority rights would have made any difference to Samer when he was deciding whether to take the job.

12. Counsel for Samer contends that the County Office should be equitably estopped from denying Samer a seniority date of November 2, 2005. His theory is that County Office personnel represented that Samer would be a regular employee and led him to believe that he would accrue seniority, and in reliance on this information Samer moved from Oregon to California to take the job. Further, since Samer's California credential will be issued retroactive to at least November 2, 2005, the County Office can and should give him seniority retroactive to that date.

13. The contentions on Samer's behalf are without merit. Aside from the doubtful nature of Samer's estoppel claim, principles of estoppel cannot be invoked to contravene statutes and constitutional provisions that define an agency's powers. (*Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 886, 893.) Under Education Code section 44911, service under a provisional credential (such as a TCC) may not be included in computing service toward tenure. And even if CTC had issued a retroactively-effective credential to Samer and he had registered it with the County Office, the County Office would not be required to retroactively reclassify Samer or accord him seniority or credit toward tenure. (*Fine v. Los Angeles Unified School Dist.* (2004) 116 Cal.App.4th 1070, 1078.)

14. Furthermore, even if Samer were granted a seniority date of November 2, 2005, he would still be subject to layoff. The County Office is not retaining any certificated employee with a later seniority date to perform services that Samer is certificated and competent to render.

Respondent Craig Toomay

15. Respondent Craig Toomay first worked for the County Office in 1997 or 1998 as a substitute teacher. He was hired as a provisional employee in September 1998, teaching first under a TCC and later under an emergency long term multiple subject teaching permit issued by CTC. Each year after that through the 2002-03 school year, Toomay worked in a teaching assignment under an emergency permit. During the 2003-04 school year, until April 2004, Toomay worked as a day-to-day substitute under his last emergency permit. Because he was not eligible for further emergency permits, Toomay applied for an individual intern credential and he was issued a TCC. Toomay worked as a substitute during the first half of the 2004-05 school year.

16. It took Toomay six years to finish the course work for his teaching credential. On or about December 15, 2004, San José State University (SJSU) issued a letter confirming that Toomay had completed the credentialing requirements and that an application for a credential had been submitted to CTC. On or about January 3, 2005, Toomay brought this letter to the County Office, where he was issued a TCC. The TCC document states:

This certificate is valid for service in the schools of Santa Clara County for one calendar year from 12/15/04 or until the credential/permit/certificate applied for is granted, denied or delayed by the Commission on Teacher Credentialing; or the application is withdrawn by the applicant. This Temporary County Certificate is not renewable.

17. In February 2005, Toomay was hired as a temporary teacher until the end of the school year. For the 2005-06 school year, he was offered a position as a provisional teacher. Toomay is currently teaching in this position.

18. Having heard that it can take six months to one year for CTC to process a credential application, Toomay was not concerned about the long wait to receive his credential. At some point fairly recently, Toomay called CTC to find out the status of his application. He was informed that his credential had been issued and sent to SJSU. When Toomay contacted SJSU, he was told that SJSU had mailed the credential to him. Toomay never received the credential. (It is unknown whether SJSU mailed the document to Toomay's current address.) Toomay has requested a duplicate of his credential from CTC, but he has not received it. Information available at the CTC website indicates that Toomay holds a preliminary multiple subject teaching credential with an issuance date of December 15, 2004. Toomay is aware of the requirement that he register his credential document with the County Office once he receives it.

19. The County Office has a credentials office that counsels employees on how to get permits and credentials. Over the years, someone from that office generally called Toomay and told him when he needed to come in and apply for a permit or certificate. Since December 2005, no one from the credentials office has called Toomay to tell him he needed to apply for another TCC. This is because the County Office considers the December 15, 2004, TCC to be valid until Toomay receives the credential applied for on that date and registers it. The County Office does not recognize a credential for purposes of employee classification, seniority or tenure until the employee registers the credential with the County Office. On an unknown date, Mary Mulholland called Toomay and asked him if he had a credential. When he replied that he did, she asked him to bring it in and register it for a seniority date. That was when Toomay told Mulholland that he had not received the credential document. (He did not tell her the story of how the credential had been mailed to various places.)

20. Counsel for Toomay contends that the County Office should grant Toomay a seniority date of December 15, 2004, the effective date of his preliminary credential. He asserts that, by its terms, Toomay's TCC became invalid upon CTC granting him a credential, so Toomay is now teaching under that credential. The County Office knows that a preliminary credential has been issued, and it is through no fault of his own that Toomay has not received and registered the credential document. Under these circumstances, counsel argues that it is unfair for the County Office not to recognize Toomay's credential and give him a seniority date. The County Office could have helped Toomay to obtain his credential document, and it should be equitably estopped from denying him a seniority date. Upon recognition of Toomay's credential, the County Office should exercise its discretion to give him seniority retroactive to December 15, 2004.

21. Although Toomay's situation is unfortunate, the legal arguments on his behalf are not persuasive. The County Office is not required to recognize a teacher's credential until the credential document has been registered. (*Fine v. Los Angeles Unified School Dist.*, *supra*, 116 Cal.App.4th 1070, 1078; Ed. Code, § 44330.) And even if Toomay had received and registered his credential, the County Office would not be required to retroactively reclassify him or accord him seniority or credit toward tenure. (*Ibid.*) Toomay's claim of estoppel is tenuous, at best; and, as noted above, principles of estoppel cannot be invoked to contravene statutes and constitutional provisions that define an agency's powers. (*Fleice v. Chualar Union Elementary School Dist.*, *supra*, 206 Cal.App.3d 886, 893.) Under Education Code section 44911, service under a provisional credential (such as a TCC) may not be included in computing service toward tenure. Toomay cannot be serving "under" his preliminary credential until he has received and registered that credential. (*Fine v. Los Angeles Unified School Dist.*, *supra*, 116 Cal.App.4th 1070, 1078.)

22. As with respondent Samer, even if Toomay were granted a seniority date of December 15, 2004, he would still be subject to layoff. The County Office is not retaining any certificated employee with a later seniority date to perform services that Toomay is certificated and competent to render.


LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955, and all notices and other requirements of those sections have been provided as required.
2. Cause exists to dismiss the accusations against respondents John Oliver and Lisa Politeo.
3. Cause exists because of the reduction or discontinuation of particular kinds of services pursuant to section Education Code 44955 to give notice to respondents Paul Yuri Samer and Craig Toomay that their services will be terminated no later than June 30, 2006. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

ORDER

1. Notice may be given to respondents Paul Yuri Samer and Craig Toomay that their services will be terminated no later than June 30, 2006, because of the reduction or discontinuation of particular kinds of services.
2. The accusations against respondents John Oliver and Lisa Politeo are dismissed.

DATED: April 28, 2006



NANCY L. RASMUSSEN
Administrative Law Judge
Office of Administrative Hearings