

BEFORE THE
GOVERNING BOARD OF
THE LAKEPORT UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against:

SANDRA CORNELL, STACY HOLLAND
and TARA MARTZ

OAH No. N 2005020727

Respondents.

PROPOSED DECISION

On April 22, 2005, in Lakeport, California, within the Board Room of the Administrative Office of the Lakeport Unified School District at 2508 Howard Street, Lakeport, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter.

Chesley D. Quaide, Attorney at Law, of Atkinson, Andelson, Loya, Ruud and Romo, 5776 Stoneridge Mall Road, Pleasanton, California 94588, represented Superintendent Elizabeth Robinson, Ph.D.

James D. Allen, Attorney at Law, 726 College Avenue, Santa Rosa , California 95404, represented respondents Sandra Cornell, Stacy Holland and Tara Martz.

On April 22, 2005, the parties submitted the matter and the record closed.

FACTUAL FINDINGS

1. On March 21, 2005, in her official capacity, Elizabeth Robinson, Superintendent (the Superintendent), Lakeport Unified School District (the District), made and filed the Accusation regarding respondents Sandra Cornell, Stacy Holland and Tara Martz (respondents).

2. Respondents Sandra Cornell and Tara Martz are fully credentialed and certificated employees of the District. The District extends classification to each of those respondents as either permanent or probationary teachers.

Respondent Stacy Holland began the school year under an emergency credential and consequently held status with the District as a probationary zero certificated employee.

3. On or before March 10, 2005, the Superintendent presented the District's Governing Board a recommendation that the District give notice that particular kinds of services ("PKS"), then offered through the District, be reduced or eliminated by the District for the ensuing school year (2005-2006).

4. On March 10, 2005, the District's Governing Board unanimously adopted Resolution number 03-05-01.

The resolution recites that, pursuant to Education Code section 44955, it has become necessary for the District to reduce and/or to discontinue, no later than the beginning of the 2005-2006 school year, particular kinds of services in the form of 5.0 full time equivalent ("FTE") certificated positions as follows:

- 3.0 FTE Kindergarten to 6th Grade Elementary Teaching positions;
- 1.0 FTE Independent Study (Multiple Subject) Teaching Position; and
- 1.0 FTE Director of Instructional Support Services

5. By individual letters, dated March 11, 2005, the District's Superintendent dispatched preliminary notices¹ to a number of FTE position holders, including each respondent, that the District's Governing Board had an intention to reduce or to discontinue the particular service provided by each person who received the notice. Hence, due to the prospective elimination or reduction of the particular kind of service now rendered to the District, each of the respondents learned the District would not reemploy the named individuals in the certificated positions each had worked over the past school year.

Also the letter, dated March 11, 2005, which had attached to it the Board's resolution and other pertinent documents, conveyed to each respondent that no certificated employee of the District having less seniority than each respective respondent would be retained for the 2005-2006 school year to render a service that each respondent, as of March 15, 2005, was credentialed and competent to render to students under the District's competency criteria.

6. The written preliminary notice to respondents from the Superintendent and the District's resolution set out legally sufficient reasons of the District's Board's intent to eliminate the course as taught by respondents.

7. Respondents each timely requested in writing a hearing to determine whether or not cause exists for not reemploying each respondent for the ensuing school year.

8. The Superintendent timely served upon each respondent the Accusation, dated March 21, 2005, and related documents. Each respondent filed timely notices of defense.

9. All pre-hearing jurisdictional requirements were met.

¹ "Notice of Recommendation that Services Shall Be Reduced or Discontinued."

10. Dr. Elizabeth Robinson, in her capacity as the Superintendent, appeared at the hearing. She provided credible and persuasive evidence.

The prospective elimination of particular kinds of services for the 2005-2006 school year directly results from a prospective shortfall in money for the District's budget. Also, the prospective elimination of particular kinds of service is due to the declining pupil census for the district for the ensuing school year. In order to partially aid the District in crafting a reasonable budget for the ensuing school year, the District's Superintendent recommended that certain certificated positions be eliminated due to lack of funds as well as lack of teachers' work within District schools.

The Superintendent established that neither the District's governing board nor the senior executives of the District as directed by the Superintendent directed teachers to attend in August 2004 a seminar on techniques to teach reading to elementary pupils or to attend a retreat before commencement of the school year. Rather, individual school site principals recommended that teachers attend such programs, and the decision to pay stipends to attend the program fell within the discretion and authority of local school site administrators, who organized the several days of training. The Superintendent showed that attendance by teachers on the dates of the training seminar and the retreat for teacher planning before the commencement of the official school years could not be deemed as a first day of paid service on behalf of the District.

Moreover, the Superintendent showed that staff development days or "buy-back days," as used for a retreat for teacher planning, were set or established through consultation between school site administrators and the majority of teachers at particular school sites.

And, the Superintendent established that Terrace Heights Elementary School and Terrace Middle School are separate and distinct schools. Although the schools share the same building on property in the City of Lakeport, and pupils of each school use the same library and cafeteria, the schools are distinct entities. Each school has a respective principal and site administrators. Each school principal interviews and recommends for employment of a separate corps of teachers. Each school, through negotiations between site administrators and the majority of teachers, agree upon the first day instructional service shall begin for the school year relative to the required 180 days that pupils are on a school site for instruction. Each school site determines the dates for use of the three (3) buy-back or staff development days teachers are to use during the employment contract term of 185 days in the school year. Also, each site sets the two dates for teacher meetings/work days for respective teachers at a school site.

The Terrace Heights Elementary School, which consists of kindergarten through sixth grade, began the 2004-2005 school year on September 7, 2004.

Terrace Middle School, which is made up of grades six through eight, began the 2004-2005 school year on September 8, 2004, which was one day after work began for

teachers at Terrace Heights Elementary School so as to give the elementary school teachers a first day of paid service to the District on September 7, 2004.

11. The Superintendent further established that on learning that the District was required to initiate lay-off proceedings for teacher employees of the District, the Superintendent, with her staff, effected reasonable and lawful steps to develop the District's seniority list for the District's teachers.

The Superintendent accurately attended to identifying the District's teachers who were properly designated as provisional employees and temporary teachers. She studied and set forth on the District's seniority list dates calculated as the hire dates or first date of paid service for each teacher of the District.

On March 11, 2005, the Superintendent caused to be personally placed in the mail all notices to affected permanent and probationary teachers that their services would not be needed by the District for the next school year.

12. The Superintendent showed that the District had three teachers – Kerry Lopez, Karen Maki and Carissa Smith – who were hired to work at Terrace Heights Elementary School and each of those elementary school teachers acquired a first day of paid service to the District on September 7, 2004. Accordingly, those three teachers had seniority by one day as measured against respondents.

Respondents' Contentions

13. Respondents contend the District's action is procedurally defective and improper insofar as the prospective layoff of the subject credentialed employees does not fully account for seniority of those persons in light of the District's retention of credentialed employees who are junior in time, or equal in time, in service to respondents. Respondents aver that the District incorrectly applied seniority dates for each respondent by failing to account for the dates in August 2004 that each respondent attended (i) the McDougall-Little teachers' seminar on teaching reading to pupils, and (ii) a teacher retreat for planning of the school year.

Also, respondents contend that because the Governing Board's resolution did not specify that the proposed teacher layoff was due, in part, to declining attendance by pupils and because testimony from the Superintendent did indicate that the PKS lay-off proceeding was due to, in part, to declining enrollment of pupils, that respondents were not afforded proper notice of such basis for the layoff. Hence, respondents aver sufficient notice was not afforded them to develop a defense to the superintendent's testimony regarding declining pupil enrollment so that the entire layoff proceeding should be dismissed.

Respondents further contend that Respondent Stacy Holland, who began the school year as a teacher under an emergency credential, but later during the school year, yet after the dispatch of the March 15 preliminary lay-off notice, she was able to have registered with the

County Office of Education a clear credential, should have greater status on the seniority list. Hence, respondents assert, the District erred when it did not provide Respondent Stacy Holland with an earlier seniority date that correspond with her first date of paid service to the District as provisional or emergency credentialed teacher.

Respondents' contentions are without merit and are rejected.

Individual Respondents

14. Respondent Sandra Cornell ("Respondent Cornell") holds a clear, multiple subject credential. She is a sixth grade teacher at Terrace Middle School. She has a first date of paid service to the District on September 8, 2004. Respondent Cornell holds status as a probationary-one teacher-employee to the District.

Respondent Cornell was not persuasive that the date in June 2004 when she signed a contract of employment was determinative as to setting a date on the District's seniority list.

Respondent Cornell provides no competent evidence that the District has retained any teacher junior to her for which Ms Cornell possesses a credential and is currently competent to teach.

15. Respondent Tara Martz ("Respondent Martz ") has a first date of paid service as a probationary-one teacher as of September 8, 2004. She now holds a clear, multiple subject credential. Respondent Martz worked during the past school year at Terrace Middle School as a sixth grade teacher.

Respondent Martz provides no competent evidence that the District has retained any teacher junior to her for which Ms Martz possesses a credential and is currently competent to teach.

16. As of March 15, 2004, Respondent Stacy Holland ("Respondent Holland") was a probationary-zero employee with a first date of paid service to the District on September 8, 2004. During the past school year, she worked as a sixth grade teacher at Terrace Middle School. She worked under an emergency credential for most of the past school year.

When the governing board authorized dispatch of the teacher lay-off notices, Respondent Holland was waiting for receipt of a preliminary multiple subject credential. On April 12, 2005, the Lake County Office of Education was first able to register the California Commission of Teacher Credentialing-approved credential for Respondent Holland.

Respondent is not persuasive when she contends that she believed that a letter issued by her college acted as a form of credential that warranted the District to designate her as a probationary-one teacher as of her first date of paid service to the District on September 8, 2004.

Respondent Holland provides no competent evidence that the District has retained any teacher junior to her for which Ms Holland possesses a credential and is competent to teach.

Respondents generally

17. From August 2 to August 6, 2004, at the recommendation of the principal of the Terrace Middle School, each respondent attended in Chico, California, a seminar on the McDougall-Littel reading skills program for teaching elementary school pupils. The school site paid each teacher a stipend of \$100 for each day at the seminar, and reimbursed each teacher the costs of hotel accommodations and meals. Respondent unpersuasively argued that by attending the seminar in August 2004, each respondent acquired a first date of paid service to the District as of August 2, 2004.

Respondents further argue that by attending a retreat in Upper Lake over three days in August to plan for the then ensuing school year that each teacher gained a first day of paid service to the District before September 7, 2004, which was the date three other teachers began work at Terrace Heights Elementary School. Each teacher acknowledged that the Terrace Middle School principal recommended attendance at the program and that each teacher was paid a stipend of \$100 for each day of the retreat.

But, the District's Superintendent is clear that the reading seminar was not a part of the regular school year, and that teachers were not required by the District as a term of the contract of employment to attend the seminar/training program. Also, those teachers who attended the course in August 2004, were paid a special stipend, rather than being compensated the regular wage because the time of the seminar was not part of teachers' respective salaries under the District's employment contract. And, as to the three-day retreat, those teacher planning days were selected by the school principal and were neither directed nor required by the District's governing board or Superintendent as mandatory days for participation by respondent-teachers.

District's Reasonable Basis to Proceed

18. During the immediate past school year, the Board has found that the District faces a prospective budget shortfall in that the amount of funding from the State of California may be markedly reduced for the upcoming school year. Hence, the Board has determined that sufficient money is not available to operate the same number of teacher and administrator positions and programs during the ensuing school year so that the District must prospectively reduce or eliminate a number of FTE of particular kinds of services, including the positions held by respondents.

19. No competent and credible evidence establishes that as a result of the proposed elimination of the full time equivalent positions respectively held by respondents, the District will retain any teacher who is junior to respondents to perform services for which

respondents have been certificated or found to be competent to teach in such FTE positions for the next school year.

20. The recommendation of the Superintendent and the Board's decision to eliminate or discontinue a total of 5.0 FTE positions, including the positions held by each respondent, were neither arbitrary nor capricious. Rather, the Superintendent's recommendation and the Board's decision were within the proper exercise of the District's discretion.

21. The District's proposed elimination or discontinuation of a number of FTE positions, including the positions respectively held by respondents, for the ensuing school year is related to the welfare of the District and its overall student population.

22. The Board determined that it will be necessary, due to the elimination of particular kinds of services, to decrease the number of teachers before the beginning of the next academic year. The Board lawfully directed the notification to respondents of the elimination of the certificated positions held by each respondent.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955.

2. The District provided all notices and other requirements of Education Code sections 44949 and 44955. This conclusion of law is made by reason of the matters set forth in Factual Findings 1 through 9, inclusive.

3. Evidence Code section 664 establishes a presumption that the action or official duties of a public entity, such as the District and its governing board, have been regularly performed. Respondents offer no evidence to rebut the presumption that the District has properly performed actions related to the procedures that seek the non reemployment of respondents.

4. Education Code section 44955 establishes, in part, that the order of teacher layoff must occur "in inverse of the order in which [the employee teachers] were employed, as determined by the board in accordance with the provisions of [Education Code section] ... 44845...." And, Education Code section 44845, in part, states: "Every probationary or permanent employee employed ... shall be deemed to have been employed on the date upon which [s]he first rendered paid service *in a probationary position.*" [Emphasis added.]

Also, Education Code section 44911 sets out: "Service by *a person under a provisional credential shall not be included* in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district." [Emphasis added.]

Summerfield v. Windsor Unified School District (2002) 95 Cal.App.4th 1026, reflects the underpinning of the law with "the numerous provisions of the Education Code [that express] *the legislative preference for fully credentialed teachers* and the goal of reducing the number of teachers employed under temporary or emergency credentials." *Summerfield* shows that an emergency credential does not accrue time in service for the attainment by such a classified teacher of permanent status. *Summerfield* cites Education Code section 45023.1, subdivision (a)(1) (which limits salary increases to credentialed teachers but not such increases for those holding emergency credentials), and Education Code section 44225.7, subdivision (c) (which directs assignment of interns to classrooms so as to diminish a District's reliance on teachers on emergency permits).

It is important to note that Education Code section 44300 requires school districts to certify that the affected district is unable to recruit a sufficient number of credentialed teachers or interns before employing teachers on emergency credentials. And, Education Code section 44225.7 demands that "state policy directs the assignment of fully prepared teachers to California classrooms...."

The scheme devised by the California Legislature would be violated, and grave wrongs would be visited upon credentialed teachers with a later hire date than the subject provisional or emergency credentialed teachers, under the arrangement sought by respondent Holland who gained fully credentialed status in the midst of the school year. Probationary status is not retroactively conferred to the beginning of employment of a teacher who secures a clear credential during the school year after an initial contract is executed by the teacher in a status other than probationary.

Respondent Stacy Holland had not acquired status as a probationary-one teacher until after March 15, 2005. The credential as approved by the California Commission on Teacher Credentialing was not registered with the District or the County Board of Education until well after the District's personnel mailed teacher lay-off notices to respondents in this matter.

5. Respondents correctly argue that *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, does establish that "(f)or seniority purposes, certificated employees who [work as teachers in a particular program] are deemed to have first been employed by the district on the date that they first rendered paid service in a probationary position in [the particular instructional program.]" But, respondents offered no competent evidence that the District paid wages to teachers who attended a training program on a specialized reading program or participated in a three day retreat for planning of the then ensuing school year. Rather each teacher was paid a stipend of \$100 for each day and that money was paid through the authority and discretion of a school site principal. No evidence established that attendance by respondents at either the reading seminar in August 2004 or the retreat in August 2004 was required by the District. However, competent evidence does show that each respondent had as the first day of paid service to the District the date of September 8, 2004.

6. Board Resolution 03-05-01, as adopted on March 10, 2005, stated that it was the Board's determination that it was necessary to reduce or eliminate particular kinds of services for the 2005-2006 school year. A decline in average daily attendance was not cited as a basis for eliminating five full time equivalent certificated positions in the District's corps of teachers and single administrative position.

The preliminary layoff notice, dated March 10, 2005, stated that the reason for the notice was due to a decision "to reduce particular kinds of services in the District beginning not later than at the commencement of the 2005-2006 school year. In the opinion of the Governing Board, it therefore will be necessary to decrease the number of full-time equivalent (FTE) certificated employees in the District." The preliminary notice did not mention a decline in average daily attendance.

Education Code section 44955, subdivision (b) authorizes a district's governing board to terminate the services of not more than a corresponding percentage of employees whenever in any school year the average daily attendance for all schools in the first six months has declined below the corresponding period of either of the previous school year or whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year.

Education Code section 44949, subdivision (a) requires that no later than March 15 and before an employee is given notice that his or her services will not be required for the ensuing year, the governing board and the employee will be given notice by the superintendent that it has been recommended that preliminary notices be given to employees and the reason for that recommendation.

The preliminary notice is intended to insure that affected employees are informed of the facts upon which they can reasonably assess the probability that they will not be reemployed. The preliminary notice must state the reasons for the recommendation. (*Karbach v. Bd. of Education* (1974) 39 Cal.App.3d 355)

A notice that specifies both grounds, that is PKS reduction/elimination and declining average daily attendance, is suspect. (See, *Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App. 3d 648.) And, where a notice specifies one of the two statutory reasons for a teacher layoff, a governing board may not later attempt to justify dismissal on the other ground. (*Karbach v. Bd. of Education, supra*, 39 Cal.App.3d 355².)

² In *Karbach*, the governing board gave notice to probationary teachers that such employees would not be reemployed for the ensuing school year on the ground of a decline in average daily attendance. But, at the administrative adjudication hearing, the presiding officer allowed the board to present evidence justifying the decision to eliminate positions of the affected probationary teachers on the new theory of reduction in particular services. The Court of Appeal held that the governing board had no authority to terminate the teachers for any reason not specified in the original preliminary notice and that the proposed terminations on the ground of reduction in services were not valid.

A governing board's decision to reduce or eliminate particular kinds of services need not be tied to any statistical computation, such as a projected decline in the number of students in the affected district. The number of terminations by a PKS reduction of certificated employees depends entirely on the district's governing board's decision regarding how many, or which, services to reduce or to eliminate. It is wholly within the Board's discretion to determine the numbers by which the District will reduce a particular service. (*San Jose Teachers Assn. v. Allen, supra*, 144 Cal.App.3d 627.)

The procedural defect or error in *Karbach* may be distinguished from the facts pertaining to this matter. Unlike *Karbach*, the Lakeport Unified School District's Governing Board did not propose layoffs for any reason not specified in the preliminary notice as sent to certificated employees. The projection of declining pupil attendance or enrollment, as offered in evidence by the superintendent, was one of a few reasons for consideration by that professional education administrator offered as the ground for teacher lay-off to the subject governing board for its decision to eliminate particular kinds of services. In this matter, the reduction of particular kinds of services was not a fraudulent, arbitrary or capricious action. (*Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796.)

The Lakeport Governing Board's decision to eliminate five (5.0) F.T.E. positions for the 2005-2006 school (which may have been based in some measure on a projected decline in enrollment of pupils for the 2005-2006 school year) was a discretionary decision that constituted a valid basis for reduction in particular kinds of service under the Education Code.

7. Respondents and the Superintendent cite as supposed persuasive authority proposed decisions from past years by administrative law judges, as adopted by other school districts as a decision of such other districts. But, such proposed decisions from past years have no precedential³ effect on the Lakeport Unified School District in reaching determinations or an order in this matter.

8. Pursuant to Education Code sections 44949 and 44955 cause exists to give respondents notice of the discontinuation of full-time equivalent positions in the particular kinds of services rendered by respondents, by reason of the matters set out in Factual Findings 10 to 12 inclusive, 14 to 20 inclusive and 22.

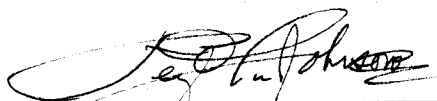
9. The discontinuation of the subject particular kinds of service provided by each respondent relates solely to the welfare of the District and its students within the meaning of Education Code sections 44949 and 44955, by reason of the matters in Factual Finding 21.

³ Government Code section 11425.60 establishes the authority for the adoption of a system for precedent decisions.

ORDER

1. The Accusation served on each respondent is sustained.
2. Final notice may be given to Respondents Sandra Cornell, Stacy Holland and Tara Martz that their respective services will not be required for the 2005-2006 school year because of the reduction or discontinuance of the particular kinds of services by the District.

DATED: May 4, 2005



PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings