

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE OF
THE SANTA ANA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH Case No. 2009100118

FRANCISCO ARROYO,

Respondent.

**RULING AND ORDER
REGARDING
MOTION TO RECONVENE PANEL AND COMMENCE HEARING**

Daniel Juárez, Administrative Law Judge (ALJ), Office of Administrative Hearings, prepared to convene this matter on December 10, 2009, at Los Angeles, California.

Judy Berndt, Respondent's Panel member appointee was present. Matt Eeles, the Santa Ana Unified School District's Panel member appointee was not present. His absence is discussed further below in paragraph 7, note 1 of the Ruling.

Eric Bathen, Attorney at Law, represented the Santa Ana Unified School District (SAUSD or District).

Kent Morizawa, Attorney at Law, Reich, Adell & Cvitan, represented Francisco Arroyo (Respondent). Respondent was present.

Before going on the record, District counsel informed the ALJ that SAUSD intended to withdraw the Accusation against Respondent because, as set forth in the findings below, it asserted that due to the alleged expiration of his teaching credential, it could dismiss Respondent from employment without the instant hearing process, and Respondent was not entitled to such a hearing.

Respondent objected. As SAUSD had not informed Respondent of its intention to proceed in this manner until the morning of hearing, and upon Respondent's counsel's request, the ALJ provided Respondent an opportunity to present written argument against SAUSD's intended withdrawal and a motion to reconvene the Panel of the Commission on Professional Competence in this matter (by January 11, 2010). The ALJ provided the District with an opportunity to present a written reply (by January 25, 2010). The parties made timely submissions.

On December 10, 2009, the ALJ had informed the parties that he would allow telephonic oral argument. On January 27, 2010, the ALJ informed each party that, in his

estimation, the written arguments filed by the parties adequately set forth each party's argument; nevertheless, he would allow telephonic oral argument, upon either party's request. The parties submitted on the papers filed.

RULING

1. The Accusation sought the dismissal of Respondent. SAUSD hired Respondent as a teacher to teach in the 2004-2005 school year. The California Commission on Teacher Credentialing (CTC) issued Respondent a preliminary teaching credential on or about June 15, 2004. Pursuant to this preliminary credential, Respondent could (and did) teach at SAUSD. As Respondent's teaching credential was preliminary in nature, his authorization to teach was time limited. Within five years of the issuance of the preliminary credential, Respondent was to complete the requirements necessary to receive a CLEAR teaching credential.

2. Respondent did not take all of the necessary steps to obtain a CLEAR teaching credential. Consequently, Respondent's preliminary teaching credential expired on July 1, 2009.

3. SAUSD contends it may now dismiss Respondent without affording him the right to a hearing, as provided in Chapter 4 of Part 25 of the Education Code. It argues that, as Respondent no longer holds the credential necessary to teach, he is no longer a certificated employee and is therefore not entitled to a hearing on his proposed dismissal as certificated employees would be entitled, pursuant to Education Code sections 44932 and 44939.

4. In support of its position, SAUSD offered the case of *Stewart v. Acalanes Union High School District* (1989) 209 Cal.App.3d 1142. In *Stewart*, the Court of Appeal upheld a school district's suspension of a school nurse who had allowed her five-year preliminary health services credential to expire. The Court of Appeal in that case wrote, "[e]mployees such as Stewart who held [*sic*] no valid credential do not fall within the class of employees whose employment is governed by the provisions of chapter 4. Holding the necessary credential or certificate is a prerequisite to the enjoyment of the rights and benefits under chapter 4, including the right to notice and an opportunity to be heard prior to suspension or dismissal with limited exceptions." (*Stewart, supra*, 209 Cal.App.3d at 1146-1147; see also *Shields v. Poway Unified School District* (1998) 63 Cal.App.4th 955, 961, note 7.)

5. Respondent argued that *Stewart* is inapposite and/or distinguishable from Respondent's case because the school district in *Stewart* was suspending the nurse, not dismissing her. Respondent further argued that, as Respondent's case deals with employment termination, Respondent has a greater property interest at stake than the suspended nurse in *Stewart*, an interest that raises constitutional concerns.

6. Contrary to Respondent's argument, the ruling in *Stewart* does apply to Respondent's case. An employee must hold a valid credential or certificate to assert the right

to a hearing, as Chapter 4 of Part 25 of the Education Code is entitled, “Employment—Certificated Employees.” Furthermore, while *Stewart* dealt with the temporary suspension of a school nurse, in its ruling, the *Stewart* Court made clear that the due process rights enjoyed by credentialed or certificated employees involved both “suspension” and “dismissal” matters. (*Stewart, supra*, 209 Cal.App.3d at 1147.) Thus, pursuant to the holding in *Stewart*, Respondent is not entitled to the administrative hearing process set forth in the Education Code, and the District may withdraw its Accusation.

7. Respondent contended that SAUSD can not withdraw the Accusation without the District’s Governing Board first taking action. Respondent noted that, at the time Respondent filed his brief, the District’s Governing Board had taken no action to withdraw the Accusation, leaving it in effect. He argued that District counsel’s assertion on December 10, 2009 (when the hearing was to begin), that SAUSD intended to withdraw the Accusation, was therefore defective. Respondent further argued that, as it appeared to him that SAUSD did not intend to present its case-in-chief on December 10, 2009, it engaged in the litigation process in bad faith. Respondent further noted that District counsel had directed its Panel member Eeles not to appear at the hearing, and asserted that such direction was evidence of the bad faith alleged.¹

8. It is noted that on January 26, 2010, the SAUSD Superintendent filed a Withdrawal of Accusation, dated January 11, 2010, with the Office of Administrative Hearings. Such action cures any defect in the withdrawal, as argued by Respondent’s counsel. Separate of this, however, Respondent cited no law in support of its contention that the District’s Governing Board needed to act first to withdraw the Accusation and that failing to do so entitles Respondent to an administrative hearing. The ALJ understood District counsel to be submitting the question of whether SAUSD may withdraw its Accusation, together with whether this Panel of the Commission on Professional Competence has jurisdiction over this proceeding, given SAUSD’s intention to withdraw the Accusation. As such, it would have been appropriate for the District’s Governing Board to await the ALJ’s Ruling and Order before filing its withdrawal. Indeed, if the ALJ would have found contrary to the instant Order below, the ALJ would have ordered the Panel to reconvene and would not have given effect to the Withdrawal filed. However, in this instance, while District

¹ In SAUSD’s Reply, Respondent correctly recounted the events that led to Panel member Eeles’s absence. On the day set for hearing, December 10, 2009, District counsel asserted, and the ALJ accepted as true, that Eeles was not present due to a miscommunication. As the ALJ understood the District’s intention to withdraw the Accusation and Respondent’s objection to such action would require at least written argument, it became clear to the ALJ that the hearing on the Accusation would not go forward on the day set for the proceeding. Furthermore, as the ALJ would, in such proceedings as the instant one, exclude the Panel members from procedural law and motion matters of this kind, the ALJ concurred with Respondent’s counsel that Eeles’s presence was unnecessary on December 10, 2009. Respondent’s counsel concurred upon the ALJ’s inquiry. Therefore, Panel member Eeles’s absence on December 10, 2009, did not constitute an act of bad faith.

counsel's last minute intention to withdraw the Accusation should have been made sooner to inform Respondent and his counsel with reasonable time to prepare a response, it cannot be concluded that this procedural act constitutes the engagement in bad faith litigation. Furthermore, nothing under this argument by Respondent would entitle him to the administrative hearing process he seeks.

9. Lastly, Respondent contends that SAUSD may not summarily terminate him because he possesses a Clear Pupil Personnel Services Credential. That credential authorizes Respondent to provide services as a school guidance counselor. Respondent provided evidence that on September 23, 2009, the Commission on Teacher Credentialing issued Respondent such a credential. As such, Respondent argues that he is a certificated person, as defined in Education Code section 44006; and thus, he is entitled to a hearing as a certificated employee.

10. However, the District hired Respondent to provide his services as a teacher, not a guidance counselor. The District is now seeking to dismiss him as a teacher. As the District points out in its brief, despite having a counseling credential, Respondent is not licensed to engage in the service for which the District hired him. Support for this position is found in the *Stewart* Court's wording when it explained that the nurse's hearing right, in that case, required that she hold the "necessary" credential or certificate. (*Stewart, supra*, 209 Cal.App.3d at 1146.) Respondent's counseling credential is not the necessary credential, as it would not authorize him to provide the services for which the District hired him. As Respondent's preliminary teaching credential expired and he does not have a CLEAR teaching credential, he does not hold a valid or necessary credential or certificate that would entitle to him to an administrative hearing on the issue of his dismissal as a certificated teacher.

ORDER

Respondent's Motion to Reconvene the Panel and Commence the Hearing is denied. The Santa Ana Unified School District, through its Superintendent, may withdraw its Accusation. Respondent is not entitled to an administrative hearing pursuant to Education Code sections 44932 and 44939.

Date: January 29, 2010

Daniel Juárez,
Administrative Law Judge
Office of Administrative Hearings