

BEFORE THE
SIERRA COUNTY SUPERINTENDENT OF SCHOOLS
SIERRA COUNTY OFFICE OF EDUCATION

In The Matter Of The Accusation Against:

BARBARA DOUVILLE,

Respondent.

OAH No. N2005040079

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 20, 2005, in Sierraville, California.

Cynthia M. Smith, Attorney at Law, represented the Sierra County Superintendent of Schools.

Carolyn Langenkamp, Attorney at Law, represented respondent.

Evidence was received and the matter was submitted on April 20, 2005.

FACTUAL FINDINGS

1. Mary Genasci, is the Sierra 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 August 25, 1997.
3. On or about February 8, 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 two (2.0) full time equivalent (FTE) positions by reducing Special Day Class/Resource Specialist services and .5 FTE High Risk Counselor

services. Although not required, the Governing Board of the Sierra County Board approved the Superintendent's recommendation.

4. The Resolution approved by the Governing Board recites that the order of termination as between employees who first rendered paid service on the same date is the order "listed on the seniority list dated 2/2/2005." The seniority list lists respondent one line above Marlene Mongolo, who has the same date of first paid probationary service as respondent. However, the order of placement of the two names was not based upon the application of tie-breaking criteria by the Superintendent which occurred later. The language implying otherwise in the resolution was inadvertent.

5. On March 10, 2005, respondent was given notice by the Superintendent that her services would not be required for the ensuing school year. Nowhere in the notice was respondent apprised of her right to a hearing. Superintendent believed, based in part upon advice of legal counsel, that respondent was not entitled to a hearing.

6. On March 18, 2005, respondent signed a Request for a Hearing, which was received by the Superintendent on March 21, 2005. Superintendent acknowledged the request in an e-mail sent to respondent on March 24, 2005, and told respondent in the e-mail that she would apprise respondent of the date as soon as the hearing had been set. On April 7, 2005, the Superintendent filed the Accusation in this matter and served it and related documents on respondent. Included was a Notice of Hearing.

7. In 2001, Superintendent's predecessor negotiated with the bargaining unit for certificated employees of the Office of Education, criteria for tie-breaking between and among certificated employees with the same date of first paid probationary service. The criteria are found in Article 17 of the Memorandum of Understanding (MOU). The most recent version of the MOU, applicable to this proceeding, contains the same language.

8. Section 17.2 of the MOU reads:

As Between Unit Members who first rendered paid service on the same date, as set forth in Section 17.1, the specific criteria to be used in determining their relative order of seniority are the following:

A. Professional Preparation

1. Each valid credential held for service _____ 3 points
2. Each subject area of teaching competency
by the Unit Member's major _____ 3 points
3. Each subject area of teaching competency
established by the Unit Members minor _____ 1 point
4. Each credential authorization beyond the
Unit Member's major/minor _____ 1 point
5. Each master's degree held _____ 1 point

B. Experience

1. Each year of previous in-District experience as a certificated employee which reflects in years of service other than that determined by the established hire date. (A certificated employee who may have resigned and been rehired at a later date) _____ 1 point
2. Each year out-of-District experience up to seven (7) years as a certificated employee _____ 1 point¹

C. Lottery

1. If any two or more certificated employees who first rendered paid service on the same date still have the same number of points after application of points provided above, the ranking of such employees shall be determined by a lottery conducted by the appropriate Superintendent or his/her designee.

9. The Superintendent applied the criteria to resolve the tie between respondent and Marlene Mongolo. She awarded respondent 19 points and Mongolo 25 points. More specifically, each teacher was awarded three points for holding a Professional Clear Multiple-Subject Teaching Credential. Respondent was awarded an additional point for Supplemental Authorization: Teach General Science. Each teacher was awarded three points for holding a Clear Specialist Credential in Special Education, Authorized Field: Learning Handicapped. Mongolo was awarded an additional three points for holding a Clear Crosscultural, Language and Academic Development Certificate (CLAD). Each teacher was awarded three points for holding Clear Resource Specialist Certificate of Competence. These teaching authorizations were all issued by the California Commission on Teacher Credentialing. Respondent received seven points for in-District experience, plus two points for out-of-District experience. Mongolo received seven points for in-District experience. Thus, had the Superintendent awarded additional points to either teacher, the teachers would each have had 19 points and the Superintendent would have had to break the tie by lottery pursuant to section 17.2, subdivision C, of the MOU.

10. The Superintendent awarded six additional points to Mongolo for having taken and passed three state approved competency examinations. The Superintendent's rationale for awarding the additional points was her interpretation of section 17.2, subdivision A, recited above. Superintendent was familiar with the federal No Child Left Behind Act (NCLB) and its provisions which generally impose additional competency requirements on teachers beyond a college degree in the appropriate field and a teaching credential. She was aware that one of two ways to establish competency was to pass a state approved standard compe-

¹ Section 17.3 expressly states that the criteria in 17.2 shall be utilized for any "reductions in force that may occur pursuant to provisions of the California Education Code."

tency exam. She concluded, therefore, that "competency" as it is used in 17.2, subsection A 2, should be redefined to coincide with NCLB requirements. Superintendent did not explain why she awarded two points for each of the standard examinations passed by Mongolo. Superintendent awarded no points to either teacher for their respective majors, reasoning that every teacher has a major, so no points are appropriate.

LEGAL CONCLUSIONS

ISSUES PRESENTED BY RESPONDENT

Respondent raised the following contentions at hearing:

1. The Superintendent's failure to apprise respondent of her right to a hearing in the preliminary notice was a fatal jurisdictional defect which was not cured by the filing of an accusation and provision of a hearing.
2. Superintendent is estopped from denying respondent's relative seniority over Mongolo based on the statement in the Superintendent's resolution coupled with the attached seniority list which placed respondent senior to Mongolo.
3. Superintendent misapplied the tie-breaking criteria in at least two respects: (1) Superintendent awarded points for teaching authorizations which were not "credentials"; and, (2) Superintendent awarded points to Mongolo for having passed state competency exams, a factor which was not included among the agreed-upon tie-breaking criteria.

APPLICABLE LAW

1. Education Code section 44949² 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 therefor.

Until the employee has requested a hearing as provided in subdivision

² As respondent points out, this section and 44955 cited below apply to certificated employees employed by the Superintendent of a county office of education, pursuant to Education Code section 1294.

(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:

(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 interdistrict 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 re-

tained to render a service which said permanent employee is certificated and competent to render.

In computing a decline in average daily attendance for purposes of this section for a newly formed or reorganized school district, each school of the district shall be deemed to have been a school of the newly formed or reorganized district for both of the two previous school years.

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement. (Emphasis added.)

3. Education code section 44002 reads:

A 'credential' includes a credential, certificate, life document, life diploma, permit, certificate of clearance, or waiver issued by the commission.

4. Education code section 44004 defines "credential," when used as a noun, as: "the document issued by a county board of education to license the holder to perform the service specified in the certificate."³

5. Education Code section 44330, dealing with the filing of credentials and certificates with the county's Office of Education, reads:

Except where such service is provided by a school district pursuant to Section 44332.5, each county or city and county board of education may provide for the registration of any valid certification or other document authorizing the holder thereof to serve in a position requiring certification qualifications as an employee of the county superintendent of schools of such county or city and county or of a school district under the jurisdiction of such county superintendent of schools.

³ This definition clearly deals with a different situation than the issuance of teaching authorizations by the

Such registration shall authorize the service of the holder as an employee of the county superintendent of schools or of any school district under his jurisdiction in the capacity in which and for the period of time for which the certification or other document is valid.

6. Education Code section 44006 reads:

The term "certificated person" refers to a person who holds one or more documents such as a certificate, a credential, or a life diploma, which singly or in combination license the holder to engage in the school service designated in the document or documents.

APPLICATION OF LAW TO FACTUAL FINDINGS

7. Superintendent failed to apprise respondent of her right to a hearing in the March 10, 2005, communication. However, such failure was a nonsubstantive procedural omission which did not prejudice respondent. Respondent did request a hearing on March 21, 2005, and the Accusation was filed on April 7, 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. Respondent contends that the preliminary notice required by section 44949 is a jurisdictional requirement and failure to comply is a fatal error which cannot be cured by demonstrating lack of prejudice. In this matter, however, respondent was provided notice that her services would not be required in the ensuing school year and that notice was provided before the March 15, 2005, deadline. Thus, the "substance" of the notice requirement was met. The failure to include respondent's right to a hearing was a procedural error which led to no demonstrable prejudice in this matter.

8. The Superintendent is not estopped from denying that respondent's seniority is higher than Mongolo's, as reflected in the seniority list. The elements of estoppel against a public agency are included in Evidence Code section 623 which provides: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it. To establish a claim or defense based on equitable estoppel, the party asserting the defense must prove: (1) a representation or concealment of material facts (2) made with knowledge, actual or virtual, of the facts (3) to a party ignorant of the truth (4) with the intention that the latter act upon it and (5) the party must have been induced to act upon it. Where one of these elements is missing there can be no estoppel. (*California School Employees Assn. v. Jefferson Elementary School District* (1975) 45 Cal. App. 3d 683, 692.)

9. In this matter, the representation of respondent's seniority to Mongolo on the seniority list was arguably material, and it was made with true knowledge of the fact that the required tie-breaking criteria had not yet been applied. This was not known to respondent.

However, there was no intention that respondent act upon the misrepresentation. To the contrary, respondent was given the preliminary notice that she would not be employed in the next school year. She took no action in reliance upon her seniority date to her detriment. In summary, the elements of estoppel were not established.

10. Superintendent did not misapply the tie-breaking criteria by awarding points to each teacher for certificates issued by the Commission on Teacher Credentialing. The use of the phrase "credential held for service" in the tie-breaking criteria is somewhat ambiguous. The Commission does designate teaching authorizations such as the CLAD and Clear Resource Specialist as a "certificate" rather than a "credential." The tie-breaking criteria, a consensus product included in the MOU, does not include a separate category for teaching authorizations other than credentials, at least suggesting that certificates are to be included in the meaning of the disputed phrases. The provisions of the Education Code dealing with the issuance of credentials and certificates by the Commission on Teacher Credentialing and the filing of such documents with the county appear to treat both credentials and certificates as different forms of state authorization to teach in the areas specified. Under these circumstances, it was not unreasonable for the Superintendent to treat them the same in awarding points under section 17.2, subsection A 1.

11. Superintendent's decision to award two points to Mongolo for each of the three standardized tests that she passed did constitute a misapplication of the tie-breaking criteria. Neither the professional preparation nor the experience category included credit for passing such examinations. Superintendent interpreted section 17.2, subsection A 2, to include passing standard exams, but the plain language of that subsection provides credit for "teaching competency established by the Unit Member's major." Both teachers had a single major and were entitled to three points each for this criterion. However, the word "competency" cannot reasonably be taken out of the context of the quoted phrase and interpreted to mean compliance with the federal NCLB. Certainly, Superintendent could have negotiated a separate criterion for compliance with the NCLB and the number of points to be awarded. Even if such a criterion were adopted, it would make little sense to award two points for each of the qualifying examinations passed and the criterion would, in fairness, have to award the same number of points for compliance by the alternative experience route available to "not new" teachers like respondent.

12. The tie-breaking criteria, properly applied, would have resulted in a tie between respondent and Mongolo. The MOU provides that under such circumstances, a lottery is to be conducted by the Superintendent to determine the teacher's respective seniority. The Superintendent may conduct the lottery to determine which teacher is the more senior if the process is completed before May 15, 2005.

LEGAL CAUSE FOR NOTICE

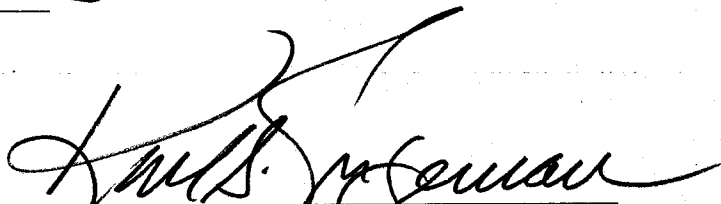
13. Cause does not presently exist under Education Code sections 44949 and 44955 to provide notice to respondent Barbara Douville that her services as a Special Day Class/Resource Specialist will not be required in the ensuing school year.

14. Superintendent may conduct the lottery contemplated by the tie-breaking criteria within the MOU. If respondent "loses" the lottery, cause will exist under Education Code sections 44949 and 44955 to provide notice to Barbara Douville that her services as a Special Day Class/Resource Specialist will not be required for the ensuing school year.

ORDER

If Superintendent conducts the tie-breaking lottery pursuant to section 17.2, subsection C, of the MOU, and respondent is deemed junior to Marlene Mongolo, notice shall be given to respondent that her services as a Special Day Class/Resource Specialist will not be required for the 2005-2006 School Year because of the reduction in particular kinds of services. If the lottery is not conducted before May 15, 2005, respondent shall not be given notice that her services as a Special Day Class/Resource Specialist will not be required for the 2005-2006 School Year.

Dated: May 4, 2005



KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings