

BEFORE THE
LAKE COUNTY SUPERINTENDENT OF SCHOOLS
LAKE COUNTY
STATE OF CALIFORNIA

In the Matter of:

NOLA MONTGOMERY,

Respondent.

OAH No. 2009030991

PROPOSED DECISION

This matter was heard before Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, in Lakeport, California on April 29 and 30, and May 4, 2009.

Joseph C. Kincaid, Attorney at Law, Lozano Smith, represented the Lake County Office of Education

James D. Allen, Attorney at Law, represented respondent Nola Montgomery, who was present.

The matter was submitted for decision on May 4, 2009.

SUMMARY

Respondent is a certificated employee of the Lake County Superintendent of Schools who holds a teaching position in the Community Day School. She has held four one-year contracts; the first two referred to her as a probationary employee; the last two referred to her as an Education Code section 1293 employee. The superintendent has determined not to re-employ respondent for the 2009-2010 school year. Out of abundance of caution, the superintendent followed and complied with the requirements of Education Code section 44948.5, including providing a full evidentiary hearing on whether there is cause to not re-employ her. At issue is whether the superintendent is required to go through the procedures of Education Code section 44948.5 in order to not re-employ respondent for the next school year.

FACTUAL FINDINGS

1. Respondent Nola Montgomery is a certificated employee of the Lake County Superintendent of Schools. Respondent has a Multiple Subject Credential, and is a teacher in

the Community Day School operated by the county superintendent. It is undisputed that respondent does not have permanent status with the county superintendent.

2. The average daily attendance of the school and programs maintained by the Lake County Superintendent of Schools is less than 250. In the 2008-2009 school year, the county superintendent provided services to approximately 80 pupils. In any given year, that number can vary by approximately ten to fifteen students.

3. Respondent has had four consecutive one-year employment contracts with the Lake County Superintendent of Schools. Her first contract was for the 2005-2006 school year. This contract stated that she was employed pursuant to Education Code section 44842¹, and classified her status as a probationary employee. Her assignment for this year was to Clearlake Community School. Respondent's second contract of employment was for the 2006-2007 school year. This contract also stated that respondent was employed pursuant to section 44842, and classified her as a probationary employee. This contract carried an assignment as a teacher at Clearlake Community School, Grades 4 through 8.

Respondent's third contract was for the 2007-2008 school year. This contract provided that her employment was pursuant to section 1293², and was for the position of teacher in the Community Day School program. The contract did not classify respondent's status with the Superintendent of Schools. Respondent's current contract for the 2008-2009 school year carries the same language.

4. Respondent did not notice that her contracts with the Superintendent of Schools for the last two years were pursuant to Education Code section 1293, and she did not notice that her contracts did not classify her as a probationary employee.

5. On March 12, 2009, Ed Skeen, Ed.D., Director of Human Resources for the Superintendent of Schools, gave written notice to respondent and the Lake County Superintendent of Schools, David Geck, of his recommendation that the Superintendent of Schools give notice to respondent, pursuant to Education Code section 44948.5, that her services would not be required for the 2009-2010 school year. The stated reasons for this recommendation was provided in an attached Statement of Charges.

The Statement of Charges asserted that respondent had committed conduct amounting to dishonesty, unprofessional conduct, or unsatisfactory performance, reasons which related

¹ All statutory references are to the Education Code, unless otherwise indicated. Section 44842 requires notification by the certificated employee to provide notice by June 30 regarding whether he or she will return for succeeding school year. If the employee fails to provide such notice, the employee may be deemed to have declined employment. (*Id.*, subd. (a).)

² Section 1293 provides: "A county superintendent of schools may enter into contracts of employment with persons employed by him in positions requiring certification qualifications for periods of not to exceed the end of the school year in which the term for which the county superintendent of schools was elected or appointed expires and in no event, for more than four years and six months."

“solely to the welfare of the schools and the pupils of the District.” The statement of charges advised respondent:

You are being recommended for non-reelection based on Education Section 44948.5 because you are employed by a County Office of Education with an average daily attendance of less than 250 pupils. Although your current contract indicates that you are employed pursuant to Education Code section 1293, your first years of employment incorrectly indicated you were employed pursuant to Education Code section 44842. Because of this error, I have determined it to be prudent to provide you an opportunity for a hearing pursuant to Section 44948.5. As you are aware, certificated employees of the Lake County Office of Education does not attain permanent status and continue to serve either in probationary status from year to year or under contract as provided pursuant to Section 1293.

6. On March 12, 2009, the Superintendent of Schools approved the Statement of Charges and directed Director of Human Resources Skeen or his designee give notice to respondent that her services would not be required for the 2009-2010 school year.

7. On March 12, 2009, respondent was given written notice that her services would not be required for the ensuing school year and the reasons therefore.

8. Respondent filed a request for hearing on March 16, 2009. On March 28, 2009, an accusation was filed. Respondent filed a timely notice of defense.

9. A full evidentiary hearing took place regarding the allegations contained in the accusation and Statement of Charges.

10. Respondent was afforded all the notices and rights set forth in section 44948.5, as set forth in Factual Findings 5 through 9. Notwithstanding this compliance with section 44948.5, the Superintendent of Schools argues that he is not required to comply with section 44948.5 and that he is entitled to release respondent without demonstrating cause. He argues that his authority to contract with certificated employees is limited to Education Code section 1293, and because he maintains schools with less than 250 pupils, he is not required to comply with the requirements of section 44948.5 in order to not re-employ respondent for the ensuing school year.

11. Respondent argues that she is entitled to the protections of section 44948.5, and that the county superintendent must show cause that is related to the welfare of the schools and its pupils in order to not re-employ her for the 2009-2010 school year. Alternatively, respondent argues that the doctrine of equitable estoppel should apply to require the county superintendent to comply with section 44948.5.

12. Respondent also argues that she relied on her status as a probationary employee in making an employment decision to remain a contract employee of the Superintendent of Schools. The evidence does not support this assertion. Respondent testified that she was offered a position with the Virtual Academy, an on-line school, but that she chose not to take that position because she preferred to work with students in person, and preferred to work with students in the Community Day School program from who she learned so much. Her decision to remain with the Superintendent of Schools for the current school year was not predicated on her status as a probationary employee.

LEGAL CONCLUSIONS

1. This proceeding was brought pursuant to section 44948.5. Under section 44948.5 the governing board of a school district with an average daily attendance of less than 250 pupils may elect not to reemploy a probationary employee for the following school year for cause only. A simple notice of non-reelection will not suffice. The employee is entitled to a hearing before an administrative law judge, but the due process protections afforded these probationary employees are not as great as those given permanent employees. Instead of vesting final authority in an independent commission pursuant to Education Code section 44939, the ultimate determination whether or not to reemploy a probationary employee remains with the board. The board is granted broad discretion in this area, subject only to the requirement that the cause for non-reemployment relate solely to the welfare of the schools and its pupils.

2. Respondent was afforded all the notices and rights set forth in section 44948.5, as set forth in Factual Findings 5 through 9. Notwithstanding his compliance with section 44948.5, the Superintendent of Schools argues that he was not required to so, and is entitled to release respondent without demonstrating cause. He argues that his authority to contract with certificated employees is limited to section 1293, and because he maintains schools with less than 250 pupils, he is not required to comply with the requirements of section 44948.5 in order to not re-employ respondent for the ensuing school year. This contention is persuasive.

The employment rights of a certificated employee of a county superintendent of school are governed by the Education Code provisions relating to county superintendent of schools (§ 1290 et seq.). The certificated employees are not governed by the Education Code provisions related to certificated employees of school districts or community colleges, unless the statutory provisions is incorporated by reference into the statutory scheme governing a county superintendent of schools.

Pursuant to section 1293, a county superintendent of schools is authorized to enter into contracts of employment with persons employed in positions requiring certification qualifications. Section 1293 limits the length of the contract to “periods not to exceed the end of the school year in which the term for which the county superintendent of schools was elected or appointment expires, and in no event for more than four years and six months.” In other words, section 1293 sets maximum limits on contracts of employment; it does not

confer status on such employees. (*Neumarkel v. Allard* (1985) 163 Cal.App.3d 457, 463-464.)

Pursuant to section 1294, employees of a county superintendent of schools that hold positions requiring certification qualifications and whose salaries are paid from the county school fund have “the same rights with respect to leaves of absence, sick leave, and bereavement leave as a person employed by a school district or a community college district in a position requiring certification qualifications.” Section 1294 further provides:

Sections 22724, 44845, 44922, 44949, 44955, 44962 to 44976, inclusive, 44977, 44978, 44979, 44983, 44984, 44985, 44987, 87413, 87414, 87740, 87743, 87763 to 87779, inclusive, 87780, 87781, 87782, 87786, 87787, and 87788 apply to persons so employed by a county superintendent of schools and so paid from the county school service fund. Whenever, in those provisions, a duty or power is imposed upon or granted to the governing board of a school district or community college district or an employee thereof, the power or duty shall, for the purposes of this section, be deemed to be granted to or imposed on the county superintendent of schools or his or her employee, respectively. When “district” is used in those provisions, it shall, for the purposes of this section, be deemed to mean “county superintendent of schools.”

Thus, in section 1294, the legislature has made a specific provision to incorporate certain provisions of the Education Code that apply to employees of school districts and community college districts into the statutory scheme governing certificated employees of a county superintendent of schools. Section 44948.5 is not one of the incorporated provisions.

Pursuant to section 1294.1, a county superintendent of schools is authorized to employ substitute or temporary employees in positions requiring certification qualifications for periods of less than one year to provide instructional and related educational services in county community schools and juvenile court schools.

Pursuant to section 1294.5, a county superintendent of schools is authorized to employ certificated employees in programs and projects to perform services conduct contract with public or private agencies or other categorically funded projects of indetermination duration.

Finally, where the average daily attendance of the schools and classes maintained by the county superintendent of schools is 250 or more students, section 1296 provides in subdivision (b), that:

[E]ach person who, after being employed for two completed consecutive school years, by the superintendent in a teaching

position in those schools or classes requiring certification qualifications and whose salary is paid from the county school service fund, is reelected for the next succeeding school year to such a position in those schools or classes, shall be classified as and become a permanent employee of the county superintendent of schools.

The county superintendent of schools shall notify the employee on or before March 15 of the employee's second complete consecutive year of employment by the superintendent in a teaching position in schools or classes maintained by the superintendent requiring certification qualifications, of the decision to reelect or non-reelect the employee for the succeeding school year to such a position in those schools. In the event the superintendent does not give notice pursuant to this section on or before March 15, the employee shall be deemed reelected for the next succeeding school year.

Such an employee shall have the same rights and duties as employees of school districts to which Section 44882 applies. Sections 44841, 44882, 44948.3 and 44948.5 are applicable to these employees.

This subdivision shall only apply to probationary employees whose probationary period commenced during the 1983-1984 school year or any fiscal year thereafter.

(Italics added.)

Thus, pursuant to section 1296, certificated employees who hold teaching positions with a county superintendent of schools who maintains schools and classes for 250 students or more may obtain permanent status. And as section 1296 makes section 44948.5 applicable to such county superintendents, the county superintendent must comply with the requirements of section 44948.5 in order to non-reelect a certificated employee in a teaching position who has completed two complete consecutive years of employment.

No one argues that section 1296 applies to Superintendent of Schools, as his schools and classes serve far less than 250 students.

There is no provision in the Education Code similar to section 1296 that applies to a county superintendent of schools who provides classes or schools for less than 250 students. There is no provision in the Education Code at all that makes section 44948.5 applicable to such a county superintendent of schools. Education Code provisions that bear on the same subject must be read and construed together. (*Certified Employees Council v. Monterey Peninsula Unified Sch. Dist.* (1974) 42 Cal.App.3d 328, 333.) The only construction that

harmonizes the provisions governing county superintendent of schools is to conclude that the Legislature did not intend to confer permanent status or any of the statutory rights or obligations incorporated by reference in section 1296, including section 44948.5, to certificated employees of a county superintendent whose schools and classes serve less than 250 students. This is not a strained interpretation of the statutory provisions, but is one that is consistent with the transitory functions of a county superintendent, as noted in *Neumarkel v. Allard*, *supra*, 163 Cal.App.3d 457, 466.

In *Neumarkel*, the court considered whether certificated employees who held nonteaching positions (administrative, supervisory or support staff positions) with a county superintendent of schools, with an average daily attendance of more than 250 students, were entitled to be reinstated because the superintendent had allegedly failed to comply with the layoff procedures set forth in sections 44949 and 44955. The county superintendent had classified the certificated employees as either probationary or permanent employees. After thoroughly reviewing the statutes governing the employment of certificated employees of a superintendent of schools, and the distinctions between employees of a school district and employees of a county superintendent, the *Neumarkel* court concluded that the certificated employees had been mistakenly classified as probationary or permanent employees, when in fact they were neither, and that therefore they were not entitled to the termination protections of sections 44949 and 44955. (*Neumarkel v. Allard*, *supra*, 163 Cal.App.3d at pp. 462-466.)

The court noted that a county superintendent's authority to employ persons with certification qualifications is set forth in section 1293, but that section does not confer permanent status to certificated employees, but only sets a maximum contract employment period. (At p. 464.)

The court considered whether section 1296 modified the limitations of section 1293 with respect to these employees and concluded that section 1296 did not apply because the employees did not hold a teaching position, a requirement for the application of section 1296. (*Neumarkel v. Allard*, *supra*, at pp. 464-466.) The court reasoned, "the Legislature must have known the obvious language differences and have chosen to retain the requirement that a county superintendent employee be employed in a 'teaching position' in order to acquire permanency." (At p. 465.) The court further commented in this regard:

Another distinction between employees of a school district and those of a county superintendent is that a school district employee in an administrative or supervisory position, or in both a teaching and administrative position, can acquire permanent status, while a similar county superintendent employee cannot. Section 44897, which provides for permanent status in school districts, is not made applicable to county superintendents by section 1294.

Also instructive to the case at hand, is the manner in which the *Neumarkel* court addressed the employees' argument regarding legislative intent. The court wrote:

Appellants contend there is no practical reason to conclude that the Legislature intended section 44987 to be applicable to all certificated school district employees and only to county superintendent certificated employees in teaching positions. This contention ignores the Legislature's recognition in section 1700 that the county superintendent is a separate legal entity performing a transitory function to meet the specific and limited needs of some school districts. (See also §§ 1741, 1752, 1761, 1771, subd. (b), and 1830, subd. (b).) It is reasonable to assume the Legislature's recognition of the county superintendents' transitory function caused it to recognize also their need to minimize the number of employees who enjoy tenure and tenure-related benefits. In any event, it is not the function of this court to rewrite the controlling statutory provisions to correct what *might* appear to have been intended.

(At p. 466 (italics in original).)

The reasoning of the *Neumarkel* decision supports the conclusion reached herein: Respondent, as a certificated employee of the Superintendent of Schools, is not entitled to the protections of section 44948.5 prior to her release from re-employment, and the Superintendent of Schools is not required to follow the procedures set forth in section 44948.5 in order to not employ respondent for the ensuing school year.

3. The analysis set forth in Legal Conclusion 2 does not change if respondent is a probationary employee of the county superintendent as she maintains. A probationary classification would not confer upon respondent the protections of section 44948.5 prior to her release from employment. It is therefore unnecessary to decide whether respondent is a contract employee or probationary employee of the county superintendent.

4. In light of the conclusions reached in Legal Conclusion 2, it is unnecessary to consider whether the Superintendent of Schools has established cause pursuant to section 44948.5 to not re-employ respondent for the 2009-2010 school year. (Accord, *Neumarkel v. Allard, supra*, 163 Cal.App.3d at p. 466 [“This conclusion makes it unnecessary to consider whether [appellants] actually received the benefits of [section 44949 and 44955].”].)

5. In light of the conclusion reached in Legal Conclusion 2, namely that the Superintendent of Schools is not required to comply with requirements of section 44948.5 in order to not re-employ respondent for the 2009-2010 school year, the appropriate result in this case is for the accusation to be dismissed and for the Statements of Charges against respondent to be withdrawn.

6. As set forth in Factual Findings 11 and 12, respondent makes two equitable estoppel arguments: (1) that the Superintendent of Schools should be equitably estopped to deny her status as a probationary employee; and (2) that he should equitably estopped to

deny her the application of the termination procedures set forth in section 44948.5. Both of these contentions are found to be without merit.

Equitable estoppel may be asserted against the government in some circumstances. (*Medina v. Board of Retirement* (2003) 112 Cal.App.3d 864, 868-869.) Under this doctrine 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, the party is not, in any litigation arising out of such statement or conduct, permitted to contradict it. The doctrine is defensive in nature only, and it operates to prevent one party from taking an unfair advantage of another. (*San Diego Mun. Credit Union v. Smith* (1986) 176 Cal.App.3d 919, 922-923; accord *Bailey v. Outdoor Media Group* (2007) 155 Cal.App.4th 778, 791.) Whether there is cause for application of the doctrine of equitable estoppel is chiefly a question of fact. There are five elements of the doctrine. There must be (1) a representation or concealment of material facts, (2) made with knowledge, actual or virtual, of the facts, (3) to a party ignorant, actually and permissibly, of the truth, (4) with the intent, actual or virtual, that the latter act upon it, and (5) the party must have been induced to act upon it. (*Ibid.*) “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 668, 692)

With respect to whether respondent is a probationary employee of the county superintendent, as set forth in Finding 12, it was not established that respondent relied on upon that classification to her detriment.

With respect to the application of section 44948.5 to respondent, there is no question that the county superintendent erroneously believed and led respondent to believe that he was required to show cause to not re-employ her for 2009-2010 school year. Notwithstanding this mistake and misrepresentation of law, the doctrine of equitable estoppel cannot be applied in a manner which would require a county superintendent to comply with termination procedures that Legislature has specifically made not made applicable to him.

ORDER

The accusation against respondent Nola Montgomery is dismissed; the Lake County Superintendent of Schools shall withdraw the Statement of Charges filed against her.

DATED: May 6, 2009

MELISSA G. CROWELL
Administrative Law Judge
Office of Administrative Hearings