

BEFORE THE GOVERNING BOARD OF THE  
PETALUMA CITY SCHOOL DISTRICT  
SONOMA COUNTY  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

SOUTHEY LEWY, MELISSA McGARRY,  
RANDALL PLUMBTREE, ELIZABETH  
ROBERTSON, JOHN RUSTAN, AND  
CHELSEA WILSON,

Respondents.

OAH No. 2009040127

**PROPOSED DECISION**

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter in Petaluma, California, on April 21, 2009.

Margaret M. Merchat, Attorney at Law, represented complainant Greta Viguie, Superintendent, Petaluma City School District.

Stewart Weinberg, Attorney at Law, represented all respondents. Respondents Southey Lewy and Randall Plumbtree appeared at hearing.

The matter was submitted for decision on April 21, 2009.

**FACTUAL FINDINGS**

1. Greta Viguie made and filed the Accusation in her official capacity as Superintendent of the Petaluma City School District.
2. Respondents Southey Lewy, Melissa McGarry, Randall Plumbtree, Elizabeth Robertson, John Rustan, and Chelsea Wilson, are certificated employees of the district.
3. On March 10, 2009, the district's Board of Trustees adopted Resolution No. 0809-25 reducing particular kinds of services and directing the superintendent or her designee to give appropriate notices to certificated employees whose positions will be affected by the action.
4. On March 12, 2009, Assistant Superintendent Sandra L. Hill gave written notice to certificated employees, including respondents, of the recommendation that their

services will not be required for the 2009-10 school year. Each notice set forth the reasons for the recommendation.

5. Twenty-seven teachers filed a timely request for hearing to determine if there is cause for terminating their services for the 2009-10 school year. A number of those teachers withdrew their request for hearing.

6. An accusation was served on respondents Southey Lewy, Melissa McGarry, Elizabeth Robertson, John Rustin, and Chelsea Wilson by certified mail, return receipt requested. They each filed a notice of defense. All prehearing jurisdictional requirements were met as to each of these five respondents.

7. It is not disputed that an accusation packet was sent to respondent Plumbtree in the same manner as all other respondents. His packet, however, was returned to the district by the United States Post Office as undeliverable on April 20, 2009, the day before the hearing. A notice of defense and a request for discovery signed by respondent Plumbtree were received by the district on March 31, 2009. Respondent Plumbtree appeared at the hearing and presented testimony.

The district had served the March 15th layoff notice and related materials to respondent Plumbtree in the same manner and to the same address. For these materials, respondent Plumbtree received a notice from the post office and he retrieved the materials there. Respondent does not remember receiving a similar notice regarding the accusation package.

Respondent Plumbtree argues that the failure of the district to serve him with the accusation package is a jurisdictional defect that invalidates the district's action to lay him off. The contention is without merit.

While service of the March 15th notice in accordance with the requirements of the Education Code is a jurisdictional requirement for laying off a teacher (*Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, 361-364) service of the accusation packet in accordance with the requirement of the Administrative Procedure Act is not. Subdivision (d)(3) of section 44949 provides that "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." Respondent Plumbtree has not demonstrated any prejudice to him by the lack of receipt of the accusation packet. He was afforded the rights to appear, testify and present a defense at hearing. Respondent's lack of receipt of the accusation package does not constitute cause to dismiss the accusation against him.

8. In its resolution, the board took action to reduce or eliminate the following particular kinds of services for the 2009-10 school year:

<u>Services</u>	<u>FTE<sup>1</sup> Reduction</u>
Elementary Classroom	6.0
Elementary P.E.	0.8
Agricultural Science	0.2
Agricultural Mechanics Trade	0.2
Agricultural Power Mechanics	0.2
Agricultural Welding	0.2
Art	2.6
Auto Shop	0.4
Biology	1.4
Business Applications	0.2
Chemistry	0.4
Computers	1.0
Construction Application	0.2
Counseling	2.6
Culinary Arts	0.2
Drafting	0.6
Drama	0.2
ELD Release Grant	0.2
English	2.6
Event Planning	0.2
Film Making	0.2
Human Interactions	0.2
Home Economics	0.4
Introduction to Business	0.2
Leadership	0.2
Math	3.0
Media Studies	0.2
Music	1.2
Metals	0.2
PE	2.4
Social Sciences	1.4
Spanish	0.6
Wildlife Museum	0.4
Total:	31.00

9. Assistant Superintendent Hill described that her recommendation and the board resolution were required by the district's budget situation and projected decrease in enrollment. The district will be able to provide all mandatory services notwithstanding the reduction in services.

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<sup>1</sup> Full-time equivalent positions.

10. In determining which employee would receive a layoff notice, the district applied tie-breaking criteria for employees with the same first date of paid service. The district determined which senior employees were entitled to bump into positions held by junior teachers. And the district determined which teachers would be skipped by reason of special competencies for BCLAD, CLAD, SDAIE, EDS or English Language Learners. A lack of this competency affected respondent Plumbtree, a high school Physical Education teacher with a seniority date of September 15, 1999. Although he holds a single subject Physical Education credential, he lacks a current authorization of any kind for working with English Language Learners. It was not demonstrated that the district erred in issuing a layoff notice to respondent Plumbtree due to a reduction in Physical Education services.

11. Respondent Lewy is a probationary elementary school teacher with the district. She holds a Preliminary Multiple Subject Credential with an embedded English Language Learner authorization. The seniority list shows respondent Lewy as having a first date of paid service of August 15, 2008. She received a layoff notice as did other elementary school teachers that shared the same first date of paid service.

It is undisputed that Lewy was employed by the district in a certificated position during the 2007-2008 school under a temporary contract. She commenced working on July 15, 2007, as her position was in a year-round program. Although the position was only half time, she worked each day of the school year.

Pursuant to Education Code section 44918, subdivision (a), a probationary teacher is entitled to have one year of prior service under a temporary contract counted as one year of probationary service if the teacher worked at least 75 percent of the regular days of the school year in a certificated position. This provision provides:

Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days of the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee, if employed as a probationary employee for the following school year.

Respondent Lewy meets all the requirements of Education Code section 44918, subdivision (a), and she is entitled to have her prior year of service under the temporary contract counted as one year of probationary service. This correspondingly affects her seniority date with the district, which should be July 15, 2007, not August 15, 2008.

The district did not learn of the claim of error regarding respondent Lewy's first date of paid service on the seniority list until the hearing, despite its diligent and good faith efforts to have errors in the seniority list brought to their attention before the layoff process started. Nevertheless, this does not preclude respondent Lewy from asserting the error regarding her

first date of paid service with the district in this proceeding. (See Ed. Code, § 44924 [rights under the Education Code cannot be waived].)

In light of conclusion that respondent Lewy is entitled to an earlier seniority date, the district must undertake the determination of whether it has retained any probationary employee junior to respondent Lewy for a service that she is credentialed and competent to render. If it has retained an employee with less seniority to perform a service she is credentialed and competent to render, the district may not lay her off. (Ed. Code, § 44949, subd. (b).) The district will be required to make this determination before it issues the May 15th final notices.

12. All contentions made by respondents not specifically addressed above are found to be without merit and are rejected.

13. No permanent or probationary employee with less seniority is being retained to render a service for which respondents McGarry, Robertson, Plumbtree, Rustan, or Wilson are certificated and competent to render.

14. The cause for the layoff relates to the welfare of the schools and their pupils.

#### 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. As set forth in Finding 11, the district must change the seniority date of respondent Lewy to July 16, 2007, and reconsider her status in the layoff on the basis of that date. Pursuant to Education Code section 44955, subdivision (b), the district may not layoff respondent Lewy if it retaining for the 2009-10 school year an employee with less seniority to her to render a service for which she is credentialed and competent to render.

3. Cause exists because of the reduction of particular kinds of services pursuant to Education Code section 44955 to give notice to Melissa McGarry, Randall Plumbtree, Elizabeth Robertson, John Rustin, and Chelsea Wilson, that their services will not be required for the 2009-10 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

#### ORDER

1. Petaluma City School District shall change the seniority date of respondent Lewy to July 16, 2007, and reconsider her seniority based on that date. Prior to issuing the final layoff notices to certificated employees, the district shall determine whether it is retaining anyone for the 2009-10 school year with less seniority than respondent Lewy to render a service that she is credentialed and competent to render. If an employee with less

seniority has been retained, the district may not layoff Lewy for the 2009-10 school year. The district may lay her off if no certificated employee with less seniority is being retained.

2. Notice may be given to respondents, Melissa McGarry, Randall Plumbtree, Elizabeth Robertson, John Rustan, and Chelsea Wilson, that their services will not be required for the 2009-10 school year because of the reduction of particular kinds of services.

DATED: May 4, 2009

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MELISSA G. CROWELL  
Administrative Law Judge  
Office of Administrative Hearings