

BEFORE THE
GOVERNING BOARD OF THE
TAFT CITY SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation against:

Gwen Schroeder,

Respondent.

OAH Case No. 2009030812

PROPOSED DECISION

Administrative Law Judge Susan L. Formaker of the Office of Administrative Hearings heard this matter on April 20, 2009, in Bakersfield, California.

Peter C. Carton of Schools Legal Service represented Mike Brusa (Brusa), Superintendent of the Taft City School District (District).

Paul A. Welchans of Chain Cohn Stiles represented Respondent Gwen Schroeder. No other certificated employees affected by the layoff appeared or were represented by counsel at the hearing.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision on April 20, 2009.

FACTUAL FINDINGS

1. Brusa, acting in his official capacity with the District, caused all pleadings, notices and other papers to be filed and served upon Respondent pursuant to the provisions of Education Code sections 44949 and 44955.¹

2. Gwen Schroeder (Respondent) is a certificated employee of the District.

3. On March 4, 2009, the Governing Board of the District (Governing Board) adopted Resolution No. 6-2008-09, reducing 16 full-time equivalent (FTE) positions in self-contained classroom instruction for Grades K-3 for the 2009-2010 school year, as set forth in Exhibit A to Resolution No. 6-2008-09.

¹ All statutory references are to the Education Code.

4. Subsequent to adoption of the Board's Resolution, the District identified vacancies for the 2009-10 school year due to positive assured attrition (confirmed retirements or resignations).

5. Brusa thereafter determined which certificated employees' services would not be required for the 2009-2010 school year due to the reduction of particular kinds of services.

6. On March 9, 11, and 12, 2009, the District provided notice to affected certificated employees that their services will not be required for the 2009-2010 school year due to the reduction of particular kinds of services. A total of 13 certificated employees were served with preliminary notices of layoff. Respondent, who was served with her preliminary notice of layoff on March 9, 2009, filed a timely request for hearing.

7. On or about March 30, 2009, the District filed and served the Accusation on Respondent. All prehearing jurisdictional requirements have been met.

8. The services set forth in Finding 3 are particular kinds of services which may be reduced or discontinued within the meaning of section 44955.

9. The reduction of services set forth in Finding 3 is related to the welfare of the District and its pupils. The Governing Board took action to reduce the services set forth in Finding 3 primarily because of a reduction in state funding and resulting budgetary concerns. The decision to reduce the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

10. The District maintains a seniority list (Exhibit 6) which contains employees' seniority dates (first date of paid service), indications as to whether employees are probationary or tenured, and current assignments, credentials, and authorizations. Prior assignments and other certifications are also listed. Respondent was classified as a permanent employee on the seniority list, with a listed first date of paid service of September 22, 2008. The parties agree that September 22, 2008, is the proper first date of paid service to be used for determining Respondent's seniority ranking.

11. The District used the seniority list to designate who was proposed to be laid off. In making its designation, the District counted the number of reductions not covered by the known vacancies and positive assured attrition, and determined the impact on current staff in inverse order of seniority. Because Respondent had the most recent first date of paid service on the seniority list and teaches in a self-contained kindergarten classroom, the District served a preliminary notice of layoff on Respondent. At least five teachers listed as probationary on the seniority list, but with earlier first dates of paid service than Respondent's, were not provided with preliminary notices of layoff and will be retained for the 2009-2010 school year. All of these employees, like Respondent, currently teach

elementary school classes and hold multiple-subject credentials. Respondent is certificated and competent to teach the classes these employees teach. However, the District contends Respondent properly should have been classified as probationary on the seniority list and thus did not have “bumping” rights as against these other employees with earlier first dates of paid service who are also probationary teachers. The District additionally asserts that these other employees will be permanent as of July 1, 2009, and would be senior to Respondent regardless of her status. However, the status of all employees for seniority purposes must be considered as of the date of the preliminary layoff notices, not as of some later date.

12. Respondent was first employed by the District on January 27, 1997. She became tenured with the District. When Respondent was required to relocate, she resigned her position. By letter dated May 12, 2005 (Exhibit 12B), Respondent submitted her resignation, stating that her “last day of employment will be June 10, 2005.” Respondent designated that date based upon her conversations with District personnel, who indicated that was the proper date to be designated. Janice Dillingham, Executive Assistant to Brusa and, before him, to the prior Superintendent, testified the June 10, 2005, date was chosen to take account of an extra one-half day of work after the last day of student teaching. The Governing Board accepted Respondent's resignation effective June 10, 2005. Respondent testified that she continued to perform services for the District for three to four weeks after the last date of student teaching in the 2004-2005 school year. She was not paid extra for providing such services and was not required to perform such services. The services Respondent performed after June 10, 2005, included packing her belongings and getting her classroom ready for the teacher who would succeed her. District personnel were aware Respondent was coming in to her classroom during this period and allowed her to do so. Respondent's last paycheck for the 2004-2005 school year was dated June 30, 2005, which was the last day of the 2004-2005 school year for the District. Respondent contends that because she completed the 2004-2005 school year, was paid on the last date of that school year, and continued performing services through the end of that school year, she was an employee of the District through June 30, 2005.

13. Respondent was reemployed by the District on September 22, 2008. Because more than 39 months passed between June 10, 2005, and September 22, 2008, the District contends Respondent lost her tenured status. Respondent contends that because less than 39 months passed between June 30, 2005, and September 22, 2005, she retained her status as a permanent employee.

14. When Respondent was reemployed by the District in 2008, she and the District signed a “Contract for Employment as a Probationary Certificated Employee” (Exhibit 12D). There was no form of contract specifically for permanent employees. The only other titles used by the District for contracts with employees referred to “interns” or “temporary” employees. Recital B of the contract reflected Respondent's status as “Permanent.” The

Superintendent of the District specifically directed this language to be typed in to the contract to reflect Respondent's status as a permanent employee. Respondent testified that retaining her status as a permanent employee was part of her negotiations with the District. She relied on the representation that she was a permanent employee before she moved back to the geographic area to accept employment with the District. Respondent indicated that had the District not made these representations, Respondent would not have returned to the area. Respondent's designated pay took account of 12 years' experience teaching. In paragraph number 2 of the contract, the term of employment was reflected as ending on the earliest of events which included the date of June 30, 2009, resignation or abandonment of the position, termination of the position by layoff, termination of probationary employment due to non-re-election, retirement, and various other events. However, the District does not require employees to sign new contracts each year. The terms of Respondent's compensation and her designation as a permanent employee were agreed upon after Brusa conferred with counsel for the District. The contract was not effective until approved by the Governing Board. Neither the District nor Respondent introduced specific evidence of the approval of the contract by the Governing Board. The fact that Respondent has been employed during the 2008-2009 school year pursuant to the contract reflects that it was approved by the Governing Board.

15. Although Respondent drafted and signed a letter stating that her resignation with the District was effective as of June 10, 2005, Respondent reasonably understood that her actual employment with the District lasted until the end of the 2004-2005 school year by reason of the facts set forth in Finding 12. By reason of the facts set forth in Finding 14, Respondent reasonably understood that her reemployment in 2008 was within 39 months of her resignation in 2005 and that her status was as a permanent employee. In reasonable reliance upon the District's representations that she was being reemployed as a permanent employee, Respondent accepted the position and moved to the area. The District is estopped from now claiming that Respondent is a probationary employee, not only because of Respondent's reasonable reliance, to her potential detriment, on the District's representations, but also because the District actually consulted with counsel before it made those representations. Respondent is a permanent employee of the District.

16. The District is improperly seeking to retain probationary employees in positions which Respondent, who is a permanent employee, is certificated and competent to perform.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of Findings 1 through 3 and 5 through 7.
2. The services listed in Finding 3 are determined to be particular kinds of services

within the meaning of section 44955, by reason of Findings 3 and 8.

3. Cause exists under sections 44949 and 44955 for the District to reduce or discontinue the particular kinds of services set forth in Finding 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of Findings 1 through 9. A District may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

4. The doctrine of equitable estoppel is available in certain circumstances to those who detrimentally rely on representations made by another. In order for equitable estoppel to apply, the following requirements must be met: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true facts; and (4) he must rely upon the conduct to his injury." (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 399, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489; see also *Ortega v. Pajaro Valley Unified School District* (1998) 64 Cal.App.4th 1023, 1044.) Although the doctrine should be applied against the government "where justice and right require it," the doctrine cannot be applied against the government where to do so would effectively nullify a "strong rule of policy, adopted for the benefit of the public . . ." (*City of Long Beach v. Mansell, supra*, 3 Cal.3d at p. 493.) Nor can estoppel be applied where to do so would enlarge the power of a governmental agency or expand the authority of a public official. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28.)

5. Respondent has established the elements of estoppel identified in Legal Conclusion 4, as set forth in Findings 12 through 15. Requiring the District to abide by the designation it agreed applied to Respondent neither nullifies a strong public policy nor expands an agency's authority because it is within the District's power to fix the time a resignation takes effect under section 44930. Tender and acceptance of an offer of resignation is a matter of contract, except as limited by section 44930. (*American Federation of Teachers v. Board of Education* (1980) 107 Cal.App.3d 829, 837 (at fn. 8).) Under section 44930, the District could have set the effective date of Respondent's resignation as June 30, 2005, so it was not beyond the District's power in 2008 impliedly to amend the date of Respondent's 2005 resignation by contract. The holding in *Fleice v. Chualar School District* (1988) 206 Cal.App.3d 886, cited by the District, does not change this result. In *Fleice*, the Chualar School District mistakenly classified a probationary employee as a permanent employee, and the employee thereafter asserted equitable estoppel to attempt to obtain tenure. The Court of Appeal held that the school district could not grant tenure by estoppel because the school district had no statutory power to award early tenure. In contrast, the instant case involves a teacher who had already been tenured and the effect of a resignation, the date of which was within the power of the

District to set. Respondent is properly considered a permanent employee.

6. Section 44955 provides that “the services of no permanent employee may be terminated . . . while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.” The law in California consistently has been that no permanent employee may be terminated before a probationary employee when they both are competent and certificated for the position. (See *Krausen, supra*, 42 Cal.App.3d at 405 [interpreting a predecessor to section 44955]; *Davis v. Gray* (1938) 29 Cal.App.2d 403, 406 [same].) Junior teachers may be given retention priority over senior teachers if the junior teachers possess special credentials or needed skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.) However, in the absence of a showing of such special credentials or needed skills or capabilities, seniority prevails.

7. Cause does not exist under section 44955 to lay off Respondent. While Respondent's seniority date was junior to that of some of the probationary teachers retained, that did not make her junior to them for layoff purposes. To rule otherwise would render the concept of tenure meaningless. The District's citations to Education Code section 44848 and *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, are inapposite. Education Code section 44848 only establishes that Respondent's seniority date among permanent employees is the date she first rendered paid services to the District after her reemployment, rather than her first date of paid probationary service. Respondent did not contest this point. Moreover, *San Jose Teachers Association* did not hold that probationary teachers could be retained ahead of permanent teachers when they are both competent and certificated for the position. *California Teachers Association v. Vallejo* (2007) 149 Cal.App.4th 135, 145, held that “[l]ayoffs proceed down the classification scheme, in accordance with seniority,” and no probationary employee, or any other employee with less seniority, may be retained in a position a permanent employee is certificated and competent to render. Accordingly, and as set forth in Findings 12 through 16 and Legal Conclusions 1 through 6, Respondent is entitled to retain her elementary teaching position.

ORDER

The Accusation is dismissed as against Respondent, and the District must retain her to teach during the 2009-2010 school year.

Dated: May 7, 2009

SUSAN L. FORMAKER

Administrative Law Judge
Office of Administrative Hearings