

BEFORE THE
GOVERNING BOARD
OF THE
LA MESA-SPRING VALLEY SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2009020345

Respondents listed in Appendix A.

PROPOSED DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in La Mesa, California on April 29, 2009.

Kelly R. Minnehan, Fagen Friedman & Fulfroost LLP, represented the La Mesa-Spring Valley School District.

Fern M. Steiner, Tosdol, Smith, Steiner & Wax, represented the respondents listed in Appendix A, except for those listed below.

Conrad Ohlson, California Teachers Association, represented respondents Tammy Bailey, Tracie Fernandes-Perez, Edward Gigliotti III, Ivana Lovasz, Nora LaSalle, and Amanda Miller.

Clifton E. Smith, C.E. Smith Law Firm, represented respondent Christine Brock.

John Allan Baird represented Kirsten Baird.

No appearance was made by or on behalf of respondent James Villegas.

The matter was submitted on April 29, 2009.¹

¹ Counsel for one group of respondents submitted two hearing briefs at the outset of the hearing. During closing argument, counsel asserted the continuing relevance of one of those briefs, which after the conclusion of the hearing was received, for purposes of argument only and not for evidentiary purposes, as Exhibit E.

FACTUAL FINDINGS

1. Claudia Bender, Assistant Superintendent, Human Resources of the La Mesa-Spring Valley School District, made and filed the accusation dated March 20, 2009 in her official capacity.

2. Respondents² are certificated district employees.

3. On March 3, 2009, in accordance with Education Code sections 44949 and 44955, district Superintendent Brian E. Marshall, through Claudia Bender, Assistant Superintendent, Human Resources, notified the Governing Board of the La Mesa-Spring Valley School District in writing of his recommendation to reduce or discontinue particular kinds of services for the upcoming school year. The Superintendent stated the reasons for the recommendation. The recommendation that respondents be terminated from employment was not related to their competency as teachers.

4. On March 3, 2009, the board adopted Resolution No. 08-09-28, determining that it would be necessary to reduce or discontinue particular kinds of services at the end of the current school year. The board determined that the particular kinds of services that must be reduced for the 2009-2010 school year were the following full time equivalent (FTE) positions:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Adult Bilingual Resource Teaching Services	1.0
Assessment Resource Support Services	.5
Beginning Teacher Support Assistance (BTSA) Support Providers	2.0
Counseling Services	11.0
Elementary Deaf and Hard of Hearing Teaching Services	4.0
Elementary Teaching Services - Class Size Reduction	44.0
English Learner Resource Teaching Services	6.0
Middle School Dean of Students/Teacher on Special Assignment	2.0
Middle School Industrial Technology Teaching Services	1.0
Middle School Music Teaching Services - Chorus	2.0
Middle School Social Studies Teaching Services	2.0
Physical Education PETIP Teaching Services	4.0
Supplemental Reading Program Teaching Services	6.0
Technology Resource Support Services	.5
Visual and Performing Arts Resource Teaching Services	2.0

² The District initially identified 69 certificated employees as respondents. The District subsequently rescinded the lay-off notices as to 15 employees, and four others did not request a hearing. Accordingly, 50 respondents remain in this proceeding and are listed in Appendix A.

The proposed reductions totaled 88 FTE positions.

5. The board further determined in Resolution No. 08-09-28 that it would be necessary to retain certificated employees who possess special training and competency that other certificated employees with more seniority might not possess, to wit:

a. Possession of both a Multiple Subjects and a BCLAD credential issued by the California Commission on Teacher Credentialing, together with teaching experience in a Spanish Alternative Primary Language program during at least two (2) of the past five (5) school years.

b. Possession of a credential issued by the California Commission on Teacher Credentialing, including single subject or supplemental authorization, which authorizes teaching of departmentalized math.

6. The board directed the Superintendent to determine which employees' services would not be required for the 2009-2010 school year as a result of the reduction of the foregoing particular kinds of services and to send appropriate notices to all certificated employees of the district who would be laid off as a result of the reduction of these particular kinds of services.

7. On or before March 15, 2009, the district timely served on respondents a written notice that the Superintendent had recommended that their services would not be required for the upcoming school year. The notice set forth the reasons for the recommendation. The notice advised respondents of their right to a hearing, that each respondent had to deliver a request for a hearing in writing to the person sending the notice by the date specified in the notice, a date which in each case was more than seven days after the notice was served, and that the failure to request a hearing would constitute a waiver of the right to a hearing.

The recommendation that respondents be terminated from employment was not related to their competency as teachers.

8. Respondents timely filed written requests for hearing to determine if there was cause for not reemploying them for the upcoming school year. The accusation, along with required accompanying documents, was thereafter timely served on respondents. Respondents timely filed a notice of defense. All pre-hearing jurisdictional requirements were met.

9. Respondents are probationary or permanent certificated employees of the district.

10. The services the board addressed in Resolution No. 08-09-28 were "particular kinds of services" that could be reduced or discontinued within the meaning of Education Code section 44955. The board's decision to reduce or discontinue these particular kinds of

services was not arbitrary or capricious and constituted a proper exercise of discretion. No particular kinds of services were lowered to levels less than those levels mandated by state or federal law.

11. The reduction or discontinuation of particular kinds of services related to the welfare of the district and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the district as determined by the board.

12. The board considered attrition, including resignations, retirements and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees. No evidence was presented that any known positively assured attrition was not considered.

School Counselors

13 Respondents Tammy Bailey, Kirstein Baird, Tracie Fernandes-Perez, Edward Gigliotti III, Nora LaSalle, and Amanda Miller, all of whom are school counselors, contended that they were improperly laid off³ while school counselors Nelly Arrese-Bickel, Cinthy Woempner, and Nancy Wong were all retained.

Respondents Baird, LaSalle, and Miller are all middle school counselors. Respondents Fernandes-Perez and Gigliotti appear to be supervisory or supervising counselors,⁴ also at the middle school level. Respondent Bailey is a middle school counselor/social worker. All six of these respondents serve in a full-time (1.0 FTE) capacity.

Arrese-Bickel, Woempner, and Wong are all elementary school counselors, and are all employed on a part-time basis.⁵ All three have greater seniority than the six middle

³ The persons representing these respondents, who were not attorneys, claimed that their clients were improperly bumped by Arrese-Bickel, Woempner and Wong, and, apparently, by other unidentified individuals. However, the uncontroverted evidence (contained in the district's bump chart) established that none of these six respondents were bumped. Instead, they were the school counselors with the least seniority among district counselors. However, the administrative law judge considers it appropriate, under the circumstances, to consider whether these six respondents may have been improperly laid off under some other theory than that advanced by their representatives.

⁴ Like Baird, Miller, and LaSalle, Fernandes-Perez and Gigliotti both have "PPS: school counseling" credentials. The district's seniority list identifies their assignment as "Sup. Couns." No testimony was offered as to the meaning of this abbreviation.

⁵ Testimony was offered with regard to the precise present extent of their part-time counseling duties in contrast to what the district claims their tenure "entitles" them to. For example, the district asserted that Wong, though in a 0.8 FTE position, is only entitled, by tenure, to a 0.6 FTE position. In contrast, though Woempner is presently in a 0.6 FTE position, she is entitled to a full-time (1.0 FTE) position. The district's position was related to its understanding of the significance of leave of absence requests. There was substantial difference of opinion among the parties as to whether the district's view is correct. However, in light of the finding below that the district did not improperly cause part-time counselors to bump full-time counselors, a full recitation of the parties' positions and a determination as to the precise fraction (if any) of a full-time position which should, for purposes of this layoff proceeding, be assigned to the three elementary counselors need not be made.

school counselor respondents identified immediately above. The six identified counselor respondents are the six least senior counselors in the district.⁶

a. It was asserted that the district should have identified middle school and elementary school counselors as distinct and separate particular kinds of service. In support of this assertion, Nora LaSalle and Kirsten Baird, two middle school counselors, testified as to what they felt were substantial distinctions between the duties of middle school counselors and those of elementary school counselors. They stated, for example, that middle school counselors are trained to and must deal with such matters as drug and alcohol problems, gang-related issues, pregnancy, suicidal ideation and self cutting. They also work closely with probation officers concerning attendance issues, make home visits, and provide special intervention for students with a grade point average of 2.0 or below. Middle school counselors were also of the view that it would be very difficult quickly to train elementary school counselors in the duties of middle school counselors, e.g., in the area of class scheduling. Finally, it was noted that middle school counselors are paid based on a different salary schedule and have a different work schedule (i.e., they work more days per year) than elementary school counselors.

On the other hand, there is a single job description for elementary and middle school counselors.⁷ Further, elementary and middle school counselors have the same credential. In addition, based on the evidence as a whole, the distinction in job duties between the two counseling groups appears more one of degree than of kind. For example, Assistant Superintendent Bender testified that elementary school counselors are also called upon to address self-cutting issues. Elementary school counselors also keep track of attendance, via the School Attendance Review Team (SART).

Based on the evidence as a whole, the district's inclusion of all counselors in one PKS category was neither arbitrary nor capricious, and constituted a proper exercise of its discretion.

b. It was asserted, based on *Hildebrandt v. St. Helena Unified School District* (2009) 334 Cal.App.4th 334, that Arrese-Bickel, Woempner, and Wong, who are each employed as counselors on a part-time basis, may not bump the full-time counselor respondents. However, *Hildebrandt* does not stand for that proposition, but instead held that a district may not be *compelled* to split a full-time position to accommodate two more senior part-time employees who wish to bump into that full-time position. Further, it was not

⁶ The one exception is part-time (0.8 FTE) elementary counselor Lisa Russell, with a seniority date of August 13, 2007. The district inadvertently but erroneously assigned an earlier seniority date to Bennett and failed to issue a preliminary lay-off notice to her. Accordingly, Russell cannot be laid off. The district thereafter rescinded the lay-off notice issued to Courtney Feige, the next most senior counselor designated for lay off.

⁷ The counselor-social worker has a separate job description, however.

established that any of the full-time counselor respondents are in fact being bumped—they were simply the least senior counselors in the district.⁸

c. Middle school counselor Nora LaSalle testified that she is district’s only bilingual middle school counselor. The Hispanic population of her school is about 61 per cent. She spends more than of her work day speaking Spanish. She assists other counselors who have students (or their parents) who speak Spanish. LaSalle is the only counselor trained in crisis intervention in Spanish. She has a vast knowledge as to how to work with delicate situations relating to Hispanic culture. She conducts bimonthly meetings with Spanish-speaking parents, at which she educates them concerning the American school system. LaSalle expressed concern that if she is not retained, the unique services she provides to Spanish-speaking students and parents will not be provided. She elaborated that effective, confidential communication is hindered when an English-speaking counselor uses an interpreter to communicate with Spanish-speaking students and parents.

LaSalle testified in a sincere manner and appears to be a highly-skilled, conscientious, dedicated middle school counselor, who does in fact provide an important service to Spanish-speaking students and parents in the district. However, it was neither contended nor established that the district would not be able to provide for the counseling needs of Spanish-speaking students and their parents if LaSalle is laid off, or that her lay off would result in a reduction of any particular kinds of service to levels lower to those mandated by state or federal law. Accordingly, based on the evidence as a whole, the district’s designation of LaSalle for lay off was not improper.

DHH Services

14. Pursuant to Resolution 08-09-28, four elementary DHH (deaf and hard of hearing) Services positions will be eliminated. The four employees designated for lay off are Christine Brock, Laura McClellan, Sharon Bair, and Linda Halcott. The San Diego County Office of Education has advised the district that the county planned to offer employment to three of the four DHH Services employees designated for lay off.⁹

15. Respondent Christine Brock has requested that the administrative law judge issue a ruling as to whether Brock will retain her seniority and reemployment rights with the district if she accepts employment with the County. Brock’s concern is entirely

⁸ The idea that the district’s layoff proposal presently involves part-time elementary school counselors bumping full-time middle school counselors seems to be based implicitly on the contention, rejected below, that elementary and middle school counselors should be identified as separate PKS categories. The contention that bumping has already taken place may also be based on the fact that more elementary school counselor positions are being eliminated than middle school positions, so that the district will have to make some reassignment of its remaining counselors from the elementary to the middle school level. Exactly how these reassignments will be achieved is not yet known. Reassignment of staff is, however, distinct from bumping in the present context. For the time being, no bumping is taking place; whether any bumping that might occur in the future would or would not be proper is not before the administrative law judge at this time.

⁹ The County does not plan to offer a position to the fourth DHH Services employee, Sharon Bair, who is presently on a leave of absence.

understandable and appropriate. However, the evidence presented at the hearing is insufficient to permit the administrative law judge to make a definitive determination in this regard. Further, since the requested determination would not affect the propriety of Brock's lay off, the administrative law judge lacks the authority under the Education Code provisions that govern this proceeding to make such a determination.

16 No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. 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.)

3. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior 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.)

4. A preponderance of the evidence sustained the charges set forth in the accusation. Cause exists under Education Code sections 44949 and 44955 for the district to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. Cause exists to reduce the number of certificated employees of the district due to the reduction and discontinuation of particular kinds of services. The district identified the certificated employees providing the particular kinds of services that the Board be directed be reduced or discontinued. It is recommended that the board give respondents notice before May 15, 2009, that their services are no longer required by the district.

ADVISORY DETERMINATION

The following advisory determination is made:

The accusations served on respondents are sustained. Notice shall be given to respondents before May 15, 2009, that their services will not be required because of the reduction or discontinuation of particular services as indicated.

DATED: _____

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings

Appendix A

1. Allmann, Donna
2. Bailey, Tammy
3. Bair, Sharon
4. Baird, Kirsten
5. Batchelder, Elizabeth
6. Beasley, Judy
7. Bottomley, Sarah
8. Brock, Christine
9. Castillo, Krystal
10. Celedon, Guadalupe
11. Curtis, Donna
12. DiGalbo, Dianne
13. Duncan, Nicole
14. Fernandes-Perez, Tracie
15. Fleming, Emily
16. Gaspar, Cathy
17. Gigliotti III, Edward
18. Gonzales, James
19. Juarez, Marsha
20. Keller, Erin
21. Korbel, Adrienne
22. Larsen, Kristine
23. LaSalle, Nora
24. Lovasz, Ivana
25. Lyon, Christina
26. McClellan, Laura
27. Medina, Melissa
28. Miller, Amanda
29. Mills, Kellie
30. Nava, Oscar
31. Neill , Margaret
32. Nunez Demuth, Nicole
33. Pehau, Allyson
34. Ponce-Wing, Michelle
35. Rabasco, Kelley
36. Rice, Meaghan
37. Saucier, James
38. Schneeberger, Brenda
39. Shaddox, Yasmin
40. Shellman, Nicole
41. Shuruk, Francesca
42. Smith, Scott
43. Spafford, Sara
44. Tavalazzi, Nicole
45. VanWulven, Karen

46. Villegas, James
47. Wardell, Katharine
48. Wilson, Angela
49. Zamudio, Marianela
50. Zarzan, Cary