

BEFORE THE
GOVERNING BOARD
OF THE
SAN MARCOS UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2009020716

THE REDUCTION IN FORCE OF CERTAIN
CERTIFICATED EMPLOYEES OF THE SAN
MARCOS UNIFIED SCHOOL DISTRICT
FOR THE 2009-2010 SCHOOL YEAR,

Respondents.

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Marcos, California, on April 8, 2009.

Kerrie Taylor, Attorney at Law, represented the San Marcos Unified School District.

Fern Steiner, Attorney at Law, represented the certificated employees of the San Marcos Unified School District who received a preliminary layoff notice for the 2009-2010 school year and requested a hearing.

The matter was submitted on April 8, 2008.

FACTUAL FINDINGS

The San Marcos Unified School District

1. The San Marcos Unified School District (SMUSD or the district) provides educational services to approximately 18,000 students living within the district's boundaries in North San Diego County. SMUSD employs a staff which includes approximately 925 individuals with teaching credentials and/or other certificates who provide instruction and educational services. The district operates 11 elementary schools, three middle schools, two comprehensive high schools, one continuation high school, one independent study high school, and one charter school.

The district is fully No Child Left Behind (NCLB) compliant and is fully English Learner compliant. Each teacher holds a CLAD authorization or permit or a BCLAD authorization. The district enjoys an academic partnership with California State University, San Marcos, known as PACE Promise, which was created to focus students on college at an early stage, to prepare them for the rigors of college work, and to provide opportunities for all to pursue higher education, regardless of background or financial means. Admission to California State University, San Marcos is guaranteed under this program if all other admission prerequisites are met.

2. SMUSD is governed by an elected, five-member Board of Trustees (the governing board). The governing board's Chief Executive Officer is Kevin D. Holt, Ed.D. (Dr. Holt), the Superintendent of Schools. The Superintendent's Office oversees all operations within the district, including Business Services, Instructional Services, and Human Resources and Development. Len Judd, Assistant Superintendent, Human Resources & Development, is responsible for hiring, the provision of benefits, contracts, workers' compensation insurance and for a variety of other personnel matters including reductions in force. Rita Lott, who has been employed by SMUSD for more than 25 years, is a certificated personnel technician who assists Assistant Superintendent Judd in creating seniority lists, confirming credentials and authorizations, and other matters.

The Fiscal Crisis – Economic Layoffs

3. Proposition 13 limited the imposition of local property taxes and reduced a major source of assured revenue for funding public education in California. Since the passage of Proposition 13, public schools have looked primarily to the State of California and to other governmental entities for necessary funding.

A school district cannot determine the level of state funding it will receive until the state budget is chaptered, an event usually occurring in late June although, as this past year demonstrated, that event may take much longer. Before then, a school district's governing board must take steps to make certain that ends meet if a worst-case financial scenario develops. The usual budgetary problems have been compounded as a result of California's current fiscal crisis.

A school board's obligation to balance its budget often requires that some teachers, administrators and/or other certificated employees be given preliminary layoff notices, warning that their services will not be required for the next school year. Under Education Code section 44949, these preliminary layoff notices must be given no later than March 15.

The economic layoff statutes found in the Education Code generally require the retention of senior employees over more junior employees and the retention of permanent employees over probationary employees and other employees with less seniority.

A school district may deviate from the general rule requiring termination in reverse order of seniority only if it can demonstrate that identifiable junior employees possess a

credential, special training or other unique experience necessary to teach a course of study or to provide other services which more senior employees do not possess.

The District's Response to the Budget Crisis

4. The SMUSD has an annual budget totaling approximately \$140 million. About 87 percent of the district's budget pays for services rendered by employees and related employee benefits. In early 2009, the district's governing board and administration (as well as the governing boards and administrations of other school districts) became acutely aware of the State of California's massive budget crisis. As a result of the budget crisis, the district projected a budget deficit of about \$3 million for the 2008-2009 school year, which would be carried over to the 2009-2010 school year, as well as the possible loss of other funding resulting in an even greater budget deficit. The district looked into ways to trim its budget. Assistant Superintendent Judd and Ms. Lott played a key role in reviewing the particular kinds of services the district was providing, the competency required to provide those services, and how the reduction or elimination of particular kinds of services might impact the district and its students.

In addition to a reduction in force of the certificated employees, a decision was made to eliminate certain non-certificated employees and several programs. Class sizes were increased at the elementary, middle, and high school levels.

5. On March 9, 2009, Dr. Holt notified the governing board of his recommendation that notice be given to certain certificated employees that their services with the district would be terminated at the conclusion of the school year. The recommendation specifically provided:

“The Superintendent recommends that the Governing Board adopt a resolution to reduce the programs and services for 2009-2010 school year as follows:

<u>Services</u>	<u>Number of Full-Time Equivalent Positions</u>
Elementary Teaching	50.0 FTE
English	11.0 FTE
Life Science	4.0 FTE
Math	5.0 FTE
Social Science	4.0 FTE
Art	1.0 FTE
Physical Education	1.0 FTE
French	.5 FTE

Total Full Time Equivalent Reduction: 76.5 FTE”

The aforementioned recommendation became “Exhibit A” to the governing board's Resolution 32-08/09.

6. In accordance with Dr. Holt's recommendation, Resolution 32-08/09 was passed unanimously by the governing board. The resolution provided:

"INTENTION TO DISMISS CERTIFICATED EMPLOYEES
(Particular Kinds of Services)

On a motion by member Horacek and seconded by member Walton, it is hereby resolved to adopt the following resolution:

WHEREAS, the Governing Board of the San Marcos Unified School District has determined that it shall be necessary to reduce or discontinue the particular kinds of services of the District as itemized in "Exhibit A" at the close of the current school year; and

WHEREAS, it shall be necessary to terminate at the end of the 2008-2009 school year, the employment of certain certificated employees of the District as a result of this reduction or discontinuance in particular kinds of service;

THEREFORE, BE IT RESOLVED that the Superintendent is directed to send appropriate notices to all employees whose services shall be terminated by virtue of this action. Nothing herein shall be deemed to confer any status or rights upon temporary or categorically funded project certificated employees in addition to those specifically granted to them by statute.

PASSED AND ADOPTED at the meeting of the Board of Education held on March 9, 2009."

7. The governing board also established tie-breaking criteria for 2009-2010. It provided:

"DETERMINATION OF TIE-BREAKING CRITERIA FOR 2009-2010

Pursuant to provisions of Education Code section 44955, the Board of Education is required to determine the District needs should it become necessary to determine the order of termination for employees who first rendered paid service to the District on the same day.

For the 2009-2010 school year only, to meet the requirements of section 44955, the Board of Education determines the needs of the District and the students by establishing the following tie-breaking criteria:

- A. 1 point for each current, valid credential authorization held
- B. 1 point for each NCLB (CORE) subject compliant supplementary/subject matter authorizations
- C. 1 point for each elective subject supplementary/subject matter authorizations
- D. 2 points for BCLAD Certification
- E. 2 points for each earned degree beyond BA/BS
- F. 1 point for each year of service in the district
- G. 1 point for Certificate of Eligibility of Administrative Services Credential

- H. 1 point for each District approved extra/co-curricular stipend assignment (as listed on the Extra Duty Assignment Listing as of 2/26/2009) held during the 2008-2009 school year.
- I. 1 point for current 2008-2009 GLAD Trainers

TIE-BREAKING PROCEDURE

In the event that common day hires have equal qualifications based on application of the above criteria, the District will then break ties by utilizing a lottery. As between tied employees, low lottery numbers will indicate low seniority for that hire date. For example, an individual with a lottery number of “1” would be laid off before an individual with a lottery number of “10.”

PASSED AND ADOPTED this 9th day of March 2009. . . .”

8. On March 10, 2009, 49 preliminary layoff notices were served on affected certificated employees, 25 of whom filed a request for a hearing and are respondents in this proceeding.

Following service of the preliminary layoff notices, Assistant Superintendent Judd sent a memo to the governing board setting forth the names of respondents to this proceeding who requested a hearing, their probationary status, the school site where they provided services, and the kinds of instructional services they provided which included:

1	Altieri, Malia	Prob	AD	ELEM
2	Bejarano, Charlotte	Prob	CAR	ELEM
3	Bescak, Amanda	Prob	LCM	ELEM
4	Bordonaro, Kirsten	Prob	SEE	ELEM
5	Butler, Michael	Prob	MHHS	LIFE SCIENCE
6	Collier, Jamie	Prob	JAL	ELEM
7	Contreras, Alyssa	Prob	LCM	ELEM
8	Duke, Gina	Prob	CAR	ELEM
9	Faulkner, Dean	Prob	SEE	ELEM
10	Fodor, Delaney	Prob	SMMS	ELEM
11	Foster, Scott	Prob	SMHS	SOCIAL SCIENCE
12	Glatt, Kevin	Prob	MHHS	LIFE SCIENCE
13	Gutierrez, Jennifer	Prob	SMHS	ENGLISH
14	Hogan, Shawn	Prob	SEE	ELEM
15	Kaiser, Christina	Prob	SEE	ELEM
16	Long, Christi	Prob	SEE	ELEM
17	McLeod, Mara	Prob	SEE	ELEM
18	Mecucci, Shannon	Prob	LCM	ELEM
19	Medina, Kelly	Prob	SEMS	ELEM
20	Noriega, Olivia	Prob	RL	ELEM
21	Rance, Kristin	Prob	JAL	ELEM
22	Shuda, Aarika	Prob	LCM	ELEM
23	Walsh, Meghan	Prob	TOES	ELEM

24	Ward, Therese	Prob	KH	ELEM
25	White, Kimberly	Prob	SMMS	LIFE SCIENCE

As a result of positive attrition, the district withdrew the preliminary layoff notices and accusations served on Michael Butler and Kevin Glatt, and they were no longer respondents in this proceeding.

9. Under Assistant Superintendent Judd’s and Ms. Lott’s direction, a preliminary seniority list was prepared from information contained in the district’s files. The preliminary seniority list contained employee names, a seniority date, the employee’s credentials and other information related to the layoff proceeding. The seniority list was sent to every SMUSD certificated with the request that the employee notify the district if there was any incorrect information or additional information. No specific information accompanied the list advising what constituted a seniority date. Once the review period concluded, changes were made to the seniority list and a final seniority list (Exh. 8) was prepared.

Those junior employees who were found competent to render instruction in areas which were not being reduced were “bumped” into vacant spots. For example, Rebecca Dunn, a probationary employee with whose seniority date was August 9, 2007, and who had been teaching elementary school, was permitted to move into a vacant position to teach Spanish as a result of being “highly qualified” in Spanish under the No Child Left Behind (NCLB) criteria.

10. For employees who received preliminary layoff notices with the same hire date who taught in a particular kind of service that was being reduced, points were awarded in accordance with the governing board’s tie-breaking criteria. A chart was prepared which included each respondent’s name and a breakdown of the points that respondent received under the tie-breaking criteria. For respondents holding the same position with the same date of hire and equal tie-breaking points, the district conducted a lottery at which representatives from the teachers’ union were present. The names of all teachers with the same number of tie-breaking points were put into a hat and names were then drawn. The first name that was drawn was deemed the least senior employee for layoff purposes, and that procedure was followed for all other respondents in that class. There was no objection to this procedure, which substantially complied with the governing board’s tie-breaking procedure.

11. Before the administrative hearing, two of the three preliminary notices served on Life Science teachers (Michael Butler and Kevin Glatt) were rescinded. As a result, there is now only one Life Science teacher subject to layoff. Of the four Mathematics teachers who were served with preliminary layoff notices, one teacher resigned and the remaining three layoff notices were rescinded. Layoff notices to instructors in Art and French were rescinded as well. Notices served on Elementary School teachers, Physical Education teachers, English teachers, and Social Science teachers have not been rescinded.

The Administrative Hearing

12. On April 8, 2009, the record in the administrative proceeding was opened. A signed Stipulation of Jurisdictional Facts was presented and received in evidence. The SMUSD represented that it had rescinded the preliminary layoff notices and had dismissed the accusations previously filed and served on Megan Bradley (Art), Michael Butler (Science), Kevin Glatt (Science), Aaron Kachorek (Math), Lindsay Latour (Math), Cheryl Sesito (French), Jason Slowbe (Math), and Tony Spineto (Art). There was no objection. Sworn testimony was received, documentary evidence was introduced, closing statements were given, the record was closed and the matter was submitted.

The Particular Kinds of Services

13. No factual issue was raised to dispute the district's contention that the services that were reduced or eliminated were particular kinds of services. The elimination of those positions was neither arbitrary nor capricious, but rather constituted a proper exercise of the governing board's discretion. Those teachers with less seniority who are being retained to provide a particular kind of service that is not being reduced will continue to provide those services during the 2009-2010 school year.

The Issuing of Preliminary Notices

14. Before issuing preliminary layoff notices, SMUSD staff considered all known positive attrition including resignations, retirements and probationary non-reelects before determining the number of layoff notices that needed to be served. SMUSD served the minimum number of respondents.

No particular kinds of services were lowered to levels less than those levels mandated by state or federal law.

Each certificated employee who provided a particular kind of service identified in the governing board's layoff resolution was given a preliminary notice of the reduction of that service in accordance with law. No junior employee was retained to provide a particular service over a more senior employee who was certificated and competent to provide such a service.

15. The district is pursuing a "Golden Handshake" policy with seasoned teachers and will replace any retiring teachers with qualified teachers who were laid off. SMUSD is actively seeking federal stimulus funding. The district's "goal is to bring everyone back as soon as possible."

16. One respondent raised two specific concerns. The first was that the governing board's tie-breaking criteria for extra/co-curricular assignments was too narrow in that service in a stipend assignment not listed in the Extra Duty Assignment Listing, such as PRIDE (an after school tutoring program which requires considerable effort and for which a stipend is paid), did not receive any tie-breaking points even though the effort was similar to that

provided by those who were coaches or participated in Journalism, the Peace Patrol, or Activity-Photo programs. The second concern was that the same amount of points was awarded for a clear credential as the amount of points awarded for a preliminary credential. These concerns did not involve any issue that needed to be resolved in this proceeding, but it is recommended that the district staff review the concerns and make any appropriate recommendations to the governing board on these issues.

LEGAL CONCLUSIONS

Statutory Authority

1. Education Code section 44944 provides in part:

“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 . . . the governing board and the employee shall be given written notice by the superintendent . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor . . .

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year . . . 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 . . .

(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.

. . .

(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

...

(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. . . .”

2. Education Code section 44955 provides in part:

“(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . and when in the opinion of the governing board of the district it shall have become necessary . . . 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 retained to render a service which said permanent employee is certificated and competent to render.

...

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 . . . 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 . . . shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by

the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.”

Jurisdiction

3. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied as to all respondent certificated employees identified in the seniority list.

The Reduction of Particular Kinds of Services

4. A school board's decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. Where a governing board determines to discontinue or reduce a particular kind of service, it is within the discretion of the board to determine the amount by which it will reduce a particular kind of service so long as a district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.)

5. Since high school offerings, such as mathematics, science, history and art, are a particular kinds of service, elementary grade classes which teach the same offerings,

although with a single teacher, are also a particular kind of service. A school board may reduce services by making fewer employees available to deal with the pupils involved. A reduction of kindergarten through sixth grade classes is a reduction of a particular kind of service, and the termination of the teachers who provide those services is permitted under Education Code section 44955. (*California Teachers Association v. Board of Trustees (Goleta)* (1982) 132 Cal.App.3d 32, 34-37.)

6. The services identified by SMUSD's governing board were "particular kinds of service" within the meaning of Education Code section 44955, subdivision (b). The board's reduction of those particular kinds of services was not fraudulent, arbitrary, or capricious, but was related to the welfare of the schools and the pupils thereof. The district's seniority chart demonstrated that seniority was the criterion the district used to determine which personnel should be retained, and that the district deviated from seniority only when a junior teacher possessed specialized skill, training or experience to move into a vacant position that a more senior employee did not possess. The district's adoption of the tie-breaking criteria and the tie-breaking procedure and was neither arbitrary nor capricious, and it was based on solely on the needs of the district and the students thereof.

Determination

7. It is determined that all of the charges were sustained by the evidence were related to the welfare of the schools and the pupils thereof.

This determination is based on all Factual Findings and on all Legal Conclusions.

RECOMMENDATION

It is recommended that the governing board dismiss the accusations previously filed and served on Megan Bradley, Michael Butler, Kevin Glatt, Aaron Kachorek, Lindsay Latour, Cheryl Sesito, Jason Slowbe, and Tony Spineto.

It is recommended that the governing board give notice to all remaining respondents previously served with a preliminary layoff notice that their services will not be needed for the 2009-20010 school year.

DATED: _____

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings