

BEFORE THE
GOVERNING BOARD OF THE
SAN MATEO UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

ASHLEY BRAINARD and various other
certificated employees of the District

Respondents.

OAH No. 20090030372

PROPOSED DECISION

Administrative Law Judge Ruth S. Astle, State of California, Office of Administrative Hearings, heard this matter in San Mateo, California on April 17, 2009.

Chesley D. Quaide, Attorney at Law, represented the Governing Board of the San Mateo Union High School District.

Dale L. Brodsky, Attorney at Law, represented all the respondents.

Submission of the matter was deferred to April 20, 2009, for receipt of further argument, which was received and considered. The matter was submitted on April 20, 2009.

FACTUAL FINDINGS

1. Kirk Black made this accusation in his official capacity as the Associate Superintendent of the San Mateo Union High School District (District) and not otherwise.

2. Each of the named respondents was at all times mentioned herein, and now is, a certificated employee of the District.

3. On March 4, 2009, the Governing Board of the District adopted Resolution No. 09 - 09 as attached (Attachment 1), directing that notices be given to certificated employees that their services will not be required for the 2009-2010 school year.

The particular kinds of service to be reduced or eliminated included 27.3 F.T.E. positions. That number was later reduced to 10.4 F.T.E.

4. On or before March 15, 2009, respondents and the Governing Board of the District were given written notice by certified mail that it has been recommended that Notice be given respondents pursuant to Education Code sections 44949 and 44955 that their services will not be required for the ensuing school year and setting forth the reasons therefor.

5. Pursuant to Education Code section 44949, respondents, in writing, duly requested a hearing to determine if there is cause for not reemploying them for the ensuing school year.

6. Cause exists within the meaning of Education Code sections 44949 and 44955 for not reemploying respondents for the ensuing school year except as noted in Findings 7, and 9, below. In the opinion of the Governing Board, it will be necessary to decrease the number of certificated employees in the District on account of the above reduction or discontinuance of services. As a consequence, the Board has determined that the services of a corresponding number or less of the certificated employees of the District shall be terminated at the close of the current 2008-2009 school year.

7. The Governing Board by Resolution No. 09-08 dated March 12, 2009, (Attachment 2), has further determined that, as between employees who first rendered paid service on the same date, the order of termination listed on the seniority list has been based solely on the basis of the needs of the District and the students thereof, except that a lottery was used when the tie-breaking criteria resulted in more than one employee with the same date of hire being found to have the same number of points under the tie-breaking criteria. This occurred for three employees (biology teachers) who were hired August 13, 2007. Two of the three employees had undergraduate majors that the District considered equal, so the District went on to apply the next tie breaking criteria (f: the possession of a master's degree). As a result, Heather Johnson was ranked highest for having an undergraduate major of Earth Sciences and Science Policy; Alexandra Zee was ranked the next highest and Ashley Brainard was the lowest. Brainard received a lay-off notice. Education Code section 44955, subdivision (b), requires, in part, that "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 . . ." The Governing Board's resolution (3e) listed undergraduate majors in order of preference. Mathematics, Chemistry, Physics, Geosciences and Biological sciences were listed in that order. The District decided that Brainard's undergraduate major of Science Education and Medical Technology was equal to Zee's undergraduate major of Biological Engineering. Brainard testified that her major included Chemistry, Physics, Geosciences, and Biology. The District determined that a little of each of these subjects was equal to a Biology major. There was nothing in writing concerning this decision. This decision did not have any basis in the tie breaking resolution and could have easily gone the other way if the person making the tie breaking decisions had decided Brainard's major was ranked above Zee's major. This creates an arbitrary and capricious ranking of employees with the same date of service after other criteria failed to rank order the two employees. Therefore, district employee Brainard cannot be laid off under these circumstances.

8. Tiffany Fay was one of three employees with the same seniority date of August 15, 2008, who taught English. Fay argued that she should get more credit under tie breaking criteria (d) “Demonstration of experience supervising or being responsible for school sponsored extra curricular activities,” than Melissa Wang. Fay and Wang were tied under all criteria so the District went to a lottery. Fay lost the lottery. Fay may have done more supervising of school sponsored extra curricular activities than Wang, but she got the maximum credit for this criteria. The tie breaking criteria were properly applied to Fay and Wang. Fay can be laid off.

9. James Cowan (seniority date August 30, 1993) teaches a .8 F.T.E. class entitled The Design & Manufacturing Studio, with the “Spirit of Entrepreneurship.” This class was created by Cowan to allow students to explore different technologies in industrial design. The District is reducing .4 F.T.E. Wood Shop and .4 Auto Shop. Those two classes are being taught by James DeJong (seniority date September 3, 1985). Both employees have Industrial Arts credentials. The District determined that DeJong could bump into Cowan’s .8 F.T.E. based on a course prospectus that Cowan created and updated as of 2007. Cowan’s course requires the ability to teach computer aided drafting (CAD) as well as many interdisciplinary technologies in such areas as foundry, welding, plastics, and industrial design. The District indicated that it wanted to keep the content of this class as it is. DeJong testified that he is qualified to teach this course because of his experience in teaching auto shop and woodworking, but he does not have any experience with CAD and did not indicate that he was interested in learning CAD. The District was unsure about the qualifications needed to teach the class. Cowan established that this is not a woodworking class. Based on the testimony of Cowan and DeJong, DeJong is not competent and/or qualified to bump Cowan. DeJong can be laid off. Cowan cannot be laid off.

10. Helen Shao is a biology teacher for the District. She was hired August 15, 2008. Her contract stated that she was a temporary teacher. The District hires temporary teachers to replace teachers on leave and/or to teach in categorically funded programs. After Shao was initially hired as a temporary teacher, it was discovered that the funding for her position was less than originally thought and the District converted her position to .6 F.T.E. temporary and .4 F.T.E. probationary. They never explained to Shao why her position was changed from a 1.0 temporary teacher to a .6 temporary and a .4 probationary teacher. Even if Shao was a 1.0 probationary teacher she would be laid off as a result of this proceeding. The District is required¹ to clearly inform the teacher as to the nature of the contract. Shao’s contract clearly states that she is a temporary teacher. The District then properly reclassified her at part temporary and part probationary, therefore giving her more rights under the law for her .4 F.T.E. probationary employment. While it would be best practice to indicate, in writing why Shao was temporary (part replacing a teacher on leave and part categorically funded), it is not required by law.

¹ See *Kavanaugh v. West Sonoma County Union High School District* (2002) 98 Cal.App.4th 911.

11. No permanent or probationary certificated employee with less seniority is being retained to render a service, which the respondents, or any of them, are certificated and competent to render except as noted above.

12. The cause for not reemploying respondents relates solely to the welfare of the schools in the District and the pupils thereof.

13. The District rescinded the notices sent to 15 certificated employees.²

11. The greatest number of reductions or eliminations in particular kinds of service is a result of increasing class size and collapsing classes in grades K through 6. The respondents claim that this violates the collective bargaining agreement. That is irrelevant to these proceedings.

LEGAL CONCLUSIONS

1. Except as set forth in Findings 7 and 9, cause for the termination of the particular kinds of service listed in Finding 3 and the corresponding positions exists in accordance with Education Code section 44949 and 44955. It is determined that the cause relates solely to the welfare of the schools and their pupils.

2. By reason of the matters set forth in Findings 7 and 9, employees Brainard and Cowan cannot be given a lay off notice. In the case of Brainard, the tie breaking criteria were applied in an arbitrary manner. In the case of Cowan, the senior employee DeJong is not competent and qualified to bump into Cowan's position.

ORDER

Except as set forth above, and in accordance with the seniority list, notice may be given to respondents except Brainard and Cowan, that their services will not be required for the 2009-2010 school year.

DATED: _____

RUTH S. ASTLE
Administrative Law Judge
Office of Administrative Hearings

² Ten counselors' notices were rescinded. Notices given to Dove, Devine, Colangelo, Ratto, and Nguyen were partially or totaling rescinded.