

BEFORE THE BOARD OF TRUSTEES OF THE
PORTERVILLE UNIFIED SCHOOL DISTRICT
TULARE COUNTY, CALIFORNIA

In the Matter of the Employment Status of:

AMANDA AVILA, et al.,

Respondents.

OAH No. 2009030514

PROPOSED DECISION

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in Porterville, California, on April 15, 2009.

Carol L. Laird, Deputy County Counsel, County of Tulare,¹ represented the complainant, John Snavelly, Ed.D., Superintendent, Porterville Unified School District.

Joshua F. Richtel, Attorney at Law,² represented the respondents. There are 11 respondents, and they are listed in exhibit A.

The matter was submitted on April 15, 2009.

FACTUAL FINDINGS

GENERAL FINDINGS CONCERNING STATUTORY REQUIREMENTS

1. Respondents are certificated district employees.
2. Not later than March 15, 2009, in accordance with Education Code sections 44949 and 44955,³ the superintendent of the school district caused the governing board of the district and respondents to be notified in writing that it was recommended that respondents be notified that the district would not require their services for the ensuing

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³ All references to the Code are to the Education Code unless otherwise specified.

school year. The notice stated the reasons for the recommendation. The recommendation was not related to respondents' competency.

3. A notice was delivered to each respondent, either by personal delivery or by depositing the notice in the United States mail, registered, postage prepaid, and addressed to respondent's last known address.

4. The notice advised each respondent of the following: He or she had a right to a hearing. In order to obtain a hearing, he or she had to deliver a request for a hearing in writing to the person sending the notice. The request had to be delivered by a specified date, which was a date that was not less than seven days after the notice of termination was served.⁴ And the failure to request a hearing would constitute a waiver of the right to a hearing.

5. Respondents timely filed written requests for a hearing to determine whether there was cause for not reemploying them for the ensuing year. An accusation was timely served on respondents. Respondents were given notice that, if they were going to request a hearing, they were required to file a notice of defense within five days after being served with the accusation.⁵ Respondents filed timely notices of defense. All prehearing jurisdictional requirements were met.

6. The governing board of the district resolved to reduce or discontinue particular kinds of services. Within the meaning of Code section 44955, the services are "particular kinds of services" that can be reduced or discontinued. The decision to reduce or discontinue these services was not arbitrary or capricious but constituted a proper exercise of discretion.

SERVICES THE DISTRICT INTENDS TO REDUCE OR DISCONTINUE

7. The governing board of the district determined that, because particular kinds of services are to be reduced or discontinued, it is necessary to decrease the number of permanent or probationary employees in the district by 18.6 full time equivalents (FTE).

9. The particular kinds of services the governing board of the district resolved to reduce or discontinue are K through 6 Elementary Classroom Teaching.

⁴ Employees must be given at least seven days in which to file a request for a hearing. Education Code section 44949, subdivision (b), provides that the final date for filing a request for a hearing "shall not be less than seven days after the date on which the notice is served upon the employee."

⁵ Pursuant to Government Code section 11506, a party on whom an accusation is served must file a notice of defense in order to obtain a hearing. Education Code section 44949, subdivision (c)(1), provides that, in teacher termination cases, the notice of defense must be filed within five days after service of the accusation.

DISTRICT'S INTENTION TO DEVIATE FROM SENIORITY (SKIPPING)

10. Pursuant to Code section 44955, subdivision (d)(1), the governing board of the district resolved to deviate from terminating employees in the order of seniority. The district identified specific needs as follows: Special Education, Speech Therapy, and Nursing Services.

11. Kathryn Billiou holds a credential in special education and contends the district cannot terminate her because the board identified special education as one of the specific courses for which the district has a specific need for personnel with special training and experience.

12. When a district identifies a course for skipping, it is not required to skip all of the teachers who have the special training and experience necessary to teach that course. And Ms. Billiou does not contend that the district is retaining someone with less seniority than she has to render a service she is qualified to render.

13. Moreover, the district could not demonstrate a need for someone with Ms. Billiou's special training and experience. The district has never used Ms. Billiou to teach special education. Her credential is for a specific handicap – speech and language impaired, deaf, deaf-blind, or hard of hearing. She has extensive training and experience, but not in a field of special education the district needs or is likely to need.

14. The district is not required to skip Ms. Billiou.

RETAINING EMPLOYEES ACCORDING TO SENIORITY AND QUALIFICATIONS (BUMPING)

15. The board determined that assignments and reassignments should be made in such a manner that employees will be retained to render any service their seniority and qualifications entitle them to render. The board resolved that:

The specific criteria to be used in determining competence to render a particular service shall be the following:

Fully credentialed or qualified internship credential in the subject or service area.

At least one year of experience in the subject or service area within the last three years.

Highly qualified under NCLB in the relevant core subject area of English, Math, Social Science, Arts, Foreign Language and Self-Contained (Multiple Subject).

16. It is not at all clear that application of these criteria would have resulted in defensible decisions as to whether teachers were or were not competent to teach particular courses. There is no evidence, however, that the district actually made any decisions concerning competency.

USE OF TIE-BREAKING CRITERIA BASED ON THE CURRENT NEEDS OF THE DISTRICT AND STUDENTS

17. Code section 44955 provides for teachers to be terminated according to their seniority. Seniority, of course, cannot be used to determine the order of termination of teachers who have the same date of hire. As among such teachers there is no seniority. If there are teachers with the same date of hire and a district is going to terminate some but not all of them, the district must determine the order of termination. Code section 44955, subdivision (b), requires that, as among teachers with the same date of hire, a governing board must determine the order of termination solely on the basis of needs of the district and students. That subdivision speaks of a statement of specific criteria.

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 . . . a statement of the specific criteria used in determining the order of termination
(Italics added.)

18. The needs to which the subdivision refers are *current* needs. Determining the order of termination on the basis of needs a district had at some time in the past would violate the requirement.

19. At some time in the past, the district entered into a collective bargaining agreement with a union representing a majority of the teachers. There was no evidence as to the date of the collective bargaining agreement. That agreement provides, in part, as follows:

Ties that exist because of the same first day of service shall be resolved by a point system:

Five (5) points for each clear credential on file with the District.

Four (4) points for each advanced degree (Master's or Doctorate).

Two (2) points for each supplementary area or credential(s) on file with the District.

One (1) point for each year of verified teaching experience in a K-12 position requiring a credential.

20. The board, without considering whether this list reflects current needs of the district and students, used it in deciding the order of termination of teachers hired on August 13, 2007. The district sent lay-off notices to three teachers but retained other teachers with the same certification and the same date of hire.

21. The terms of a collective bargaining agreement cannot displace the requirements of Code section 44955.

22. There was no evidence that the list in the collective bargaining agreement, even at the time it was adopted, would have resulted in a determination solely on the basis of needs of the district and students. It may have resulted in a determination based, in part, on what the union was and was not willing to negotiate.

23. In March of 2009, the board could have concluded that the list would result in a determination solely on the basis of needs of the district and students, but there is no evidence that the board came to such a conclusion or even considered the matter.

24. The district may not terminate the three teachers. The accusations against Amanda Avila, Andrew Lopez, and Tim Lurz must be dismissed. The district does not acknowledge that the three have a right to be retained. The district, nevertheless, stipulates to the dismissals.

SUMMARY OF FINDINGS REGARDING RETENTION OF EMPLOYEES

25. All of the respondents are probationary employees. With the dismissal of the accusations against Ms. Avila, Mr. Lopez, and Mr. Lurz, it is the case that the district is not retaining any employee with less seniority than a respondent has to render a service that the respondent's qualifications entitle him or her to render.⁶

LEGAL CONCLUSIONS

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

2. Within the terms of Code sections 44949 and 44955, the district has cause to reduce or discontinue particular kinds of services and to give notices to certain respondents

⁶ Code section 44955, subdivision (c), provides seniority protection for both *permanent and probationary* employees in terms of the services an employee's "qualifications entitle [him or her] to render."

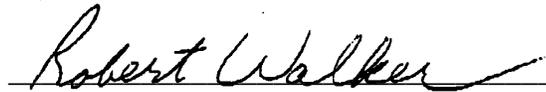
that their services will not be required for the ensuing school year. The cause relates solely to the welfare of the schools and the pupils.

ORDER

1. The accusations against Amanda Avila, Andrew Lopez, and Tim Lurz are dismissed.

2. The district may give notice to the remaining respondents that the district will not require their services for the ensuing school year.

Dated: May 5, 2009

A handwritten signature in cursive script that reads "Robert Walker". The signature is written in black ink and is positioned above a horizontal line.

ROBERT WALKER

Administrative Law Judge

Office of Administrative Hearings

EXHIBIT A

Avila, Amanda

Billiou, Kathryn

Bishop, Sheila

Borjon, Sarah

Cole, Shelby

Gamble, Jennifer

Jackson, Kristy

Lopez, Andrew

Lurz, Tim

Sayre, Barbara

Sifuntes-Suarez, Faviola

MAIL PD TO:

Dennis Martinez
Assistant Superintendent of Human Resources
Porterville Unified School District
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Porterville, California 93257