

BEFORE THE
BOARD OF EDUCATION
PALM SPRINGS UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2009030700

Respondents listed on Exhibit A,

Respondents.

PROPOSED DECISION

On April 30, 2009, in Palm Springs, California, Alan S. Meth, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

William A. Diedrich, Attorney at Law, represented the Palm Springs Unified School District.

Brenda Sutton-Wills, Attorney at Law, represented the respondents set forth on Exhibit A attached hereto, except Tara LaBeaf, Marja Martin, and Lori Moore, who did not appear at the hearing.

Prior to the hearing, the District withdrew the layoff notices and dismissed the accusations against Luis Figueroa and Wilfred Martin.

During the hearing, the District withdrew the layoff notices for and dismissed the accusations against Daniel Spencer Faddis, Veronica Pena-Silva, Thomas Rowin, and William Urdrian.

The matter was submitted on April 30, 2009.

FACTUAL FINDINGS

1. On or about March 13, 2009, Mauricio Arellano, Assistant Superintendent, Human Resources of the Palm Springs Unified School District (hereafter, "the District"), made and filed the accusations against respondents in his official capacity.

2. Respondents are certificated employees of the District.

3. Before March 15, 2009, pursuant to Education Code sections 44949 and 44955, Dr. Lorri McCune, Superintendent of the District, notified the Board of Education of the District of the Superintendent's recommendation that respondents be notified their services will not be required for the ensuing school year. The Superintendent's notification to the Board of Education set forth the reasons for the recommendation.

4. On or before March 15, 2009, each respondent was given written notice that the Superintendent had recommended that notice be given to respondents, pursuant to Education Code sections 44949 and 44955, that their services will not be required for the ensuing year. Each written notice set forth the reasons for the recommendation. The notices satisfied the requirements of sections 44949 and 44955. *San Jose Teachers Association, Inc. v. Allen* (1983) 144 Cal.App.3d 627, 632; *Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 803-04, distinguishing *Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, 360-63.

5. Each respondent timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year. Accusations were timely served on respondents, and each respondent except Eduardo Martinez filed a timely Notice of Defense. All pre-hearing jurisdictional requirements have been met.

6. The Board of Education of the District took action in Resolution No. 2008/09-48 to discontinue the following services for the 2009-10 school year:

Automotive Shop Teaching Services	1	F.T.E.
Secondary Business Teaching Services	3	F.T.E.
Secondary Social Studies Teaching Services	2	F.T.E.
Secondary Health Teaching Services	1	F.T.E.
Secondary Art Teaching Services	2	F.T.E.
Middle School Core Teaching Services	3	F.T.E.
"Reading First" Teachers on Special Assignment	6	F.T.E.
Middle School Deans	2	F.T.E.
Secondary Counseling Services	4	F.T.E.
TOTAL CERTIFICATED POSITIONS	24	F.T.E.

The resolution contained the following:

That "competency" as described in Education Code section 44955(b) for the purposes of bumping shall necessarily include: (1) possession of a valid credential in the relevant subject matter area; (2) "highly qualified" status under the No Child Left Behind Act in the position into which the employee is bumping; (3) and an

appropriate EL authorization (if required by the position); and (4) with regard to bumping into a position that includes instruction in "Read 180," special training in implementing the "Read 180" program.

The services set forth above are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. *California Teachers Association v. Board of Trustees of the Goleta Union School District* (1982) 132 Cal.App.3d 32, 34-37 and cases cited therein. *See also San Jose Teachers Association v. Allen, supra* at 635-38, in which the court specifically rejected the reasoning of *Burgess v. Board of Education* (1974) 41 Cal.App.3d 571; *Zalac v. Governing Board* (2002) 98 Cal.App.4th 838, 853-54.

Furthermore, these services may be reduced because of budgetary difficulties. *Zalac v. Governing Board, supra*, and cases cited therein. The decision to reduce or discontinue the services is neither arbitrary nor capricious but rather a proper exercise of the District's discretion.

7. No certificated employee junior to any respondent is retained to perform services which any respondent is certificated and competent to render.

8. The reduction or discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees of the District as determined by the Governing Board.

9. The Board considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

10. The Board of Education established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. The criteria set forth in Resolution No. 2008/09-43 were to be applied based on information on file as of February 1, 2009, one step at a time, until the tie was broken in accordance with the following:

1. *Highly Qualified Status under NCLB in area of assignment.*
2. *Possession of an authorization to teach English Language Learners in order of priority:*
 - a. *Bilingual Cross Cultural Language and Academic Development (BCLAD)*
 - b. *Cross Cultural Language and Academic Development (CLAD), SB 1969 or SB 395 Certificate, Language Development Specialist Certificate, Supplemental Authorization for English as a Second Language, Specially Designated Academic Instruction in English (SDAIE), other*

3. *Credential status in area of assignment, in order of priority:*
 - a. *Clear, Life, Standard Secondary, etc.;*
 - b. *Preliminary;*
 - c. *Intern;*
 - d. *Provisional, STP, other*

4. *Possession of a Clear or Preliminary Single Subject credential in the following areas, in order of priority:*
 - a. *Special Education*
 - b. *Math*
 - c. *Science*
 - d. *English*

5. *Possession of a supplemental authorization to teach in the following areas, in order of priority:*
 - a. *Math*
 - b. *Science*
 - c. *English*

6. *Total number of Clear or Preliminary credential in different subject areas.*

7. *Total number of supplementary authorizations in different subject areas.*

8. *Number of years of credentialed teaching experience prior to employment with District, as indicated by initial salary schedule placement.*

9. *Possession of a Doctorate Degree, earliest date prevails.*

10. *Possession of a Masters Degree, earliest date prevails.*

11. *Total number of post-secondary credits on file with the District by February 1, 2009.*

12. *If ties cannot be broken by using the above criteria, then order of seniority shall be determined by a random drawing of lots among employees in the individual tie.*

11. The District created a Seniority List which contains employees' seniority dates (first date of paid service), current site, credentials and status, CLAD, and authorizations. The District used the Seniority List to develop a proposed layoff and "bumping" list of the least senior employees currently assigned in the services being reduced. The District then determined whether the least senior employees held credentials in another area and were entitled to "bump" other employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and whether they could "bump" other employees.

12. Elizabeth Robinson teaches Language Arts at the eighth grade level. She has a multiple subject credential; her seniority date is October 16, 2008. In order to be considered "competent" to teach that class, pursuant to the Board of Education's resolution, a teacher must have the requisite credential and be highly qualified under No Child Left Behind. Ms. Robinson has the requisite credential, a multiple subject credential, and is highly qualified under No Child Left Behind.

Desira Grandmain, Megan Gross, Kaitlyn Stockdale, and Caroline Paz are all senior to Ms. Robinson. Ms. Grandmain, Ms. Gross, and Ms. Stockdale have multiple subject credentials and Ms. Paz has an intern multiple subject credential. However, none of them are highly qualified under No Child Left Behind.

13. The resolution reducing particular kinds of services provided for the reduction of four secondary counseling services full-time equivalent positions. Of the four counselors, Monica Mendyk, the most senior, bumped Tara LaBeaf and retained her position. Three other counselors were initially designated for layoff. On the morning of the hearing, the District determined that it was able to bring back one of the three counselors. According to the seniority list, Angela Meraz was the most senior, even though she and Kai Lyles had the same seniority date, August 14, 2007. Prior to the hearing, a discussion was held among the attorneys, Ms. Meraz, and Mr. Lyles, which resulted in an agreement among all the participants that Ms. Meraz would be retained because she was the more senior of the two. Accordingly, once the hearing began, the District dismissed the accusation against Ms. Meraz. However, given some time to think about the situation, Mr. Lyles changed his mind, concluded that he was the more senior of the two, and conveyed this information to Mr. Diedrich. Mr. Diedrich then moved to withdraw the dismissal of the accusation against Ms. Meraz to allow the two counselors to present their respective positions to the Administrative Law Judge, who would then decide which of the two was the more senior. The motion was granted, and both Mr. Lyles and Ms. Meraz testified.

Linda Riccio is a senior credential specialist for the District. She has worked in that position for nine years. Her job duties include ascertaining all relevant information regarding the District's certificated staff and maintaining a database in which all this information is stored. She created the seniority list and used the tie-breaking criteria to break any ties when certificated employees had the same seniority date.

In breaking the tie between Ms. Meraz and Mr. Lyles, Ms. Riccio determined that the tie was not broken using the first seven criteria (Finding 10). She broke the tie using the eighth criterion, the number of years of "credentialed teaching experience prior to employment with the District," because Ms. Meraz had one year of such experience and Mr. Lyles had none. She testified at the hearing that she applied this criterion to the counselors even though the wording of the criterion does not mention counselors.

Mr. Lyles testified that at first he agreed that Ms. Meraz was senior to him but upon reflection, concluded the eighth criterion should not apply to break the tie between them because it does not specifically provide for its application to counselors. He noted there was no other wording in the criterion that could broadly encompass counselors, such as certificated staff or certificated employees. He pointed to the tenth criterion, possession of a masters degree, with the earliest date prevailing, and asserted that because he obtained his masters degree on May 1, 2006, while Ms. Meraz obtained hers on May 26, 2006, according to the tie-breaking matrix, he should be considered the senior of the two and, therefore, he should retain his position.

The District obtained the official transcripts showing completion of Mr. Lyles' and Ms. Meraz' masters programs and introduced them into evidence. Mr. Lyle attended the University of Redlands. The transcript indicated that his Master of Arts degree was conferred on him on March 7, 2007, not May 1, 2006. Mr. Lyles testified he was not sure the exact date he received the masters degree, but believed it was in May 2006, and the March 7, 2007 date shown on the transcript resulted from a paperwork mix-up. He testified he "walked" on May 1, 2006, and believed that was the correct date of his graduation.

Mr. Lyles' transcript also shows that he took three courses totaling seven units for a semester lasting between May 1 and July 28, 2006. He testified he did not complete his classes until July 28, 2006. The transcript indicates that those seven units were part of the 48 units which he completed, and he testified that 48 units were required before he could complete the program.

Ms. Meraz' transcript indicates that she was awarded her Master of Education from the University of Maryland on May 21, 2006. She testified that by that time, she had completed all of her coursework and the requisite number of units, and received her grades. She testified she did not take any classes after May 21, 2006.

The eighth tie-breaking criterion refers to prior employment "as indicated by initial salary schedule placement." Ms Riccio testified that counselors were given credit for employment prior to employment with the District in establishing the starting salary. She further testified that she always treated counselors and teachers the same and believed the

eighth criterion was intended to cover counselors as well as teachers. She could think of no reason why they would be treated differently. Ms. Meraz agreed that in her experience with the District, counselors and teachers were treated the same when it came to bargaining.

In Ms. Riccio's opinion, based upon the transcript of Mr. Lyle's masters degree program, his date should be March 7, 2007. She added that she would not rely on any oral representation that the date on the transcript was incorrect.

14. Ryan Rygmar teaches math/science at the sixth grade level and has an intern multiple subject credential. He is senior to Robert Wood and Luis Figueroa, who teach earth science. However, according to Ms. Riccio, because Mr. Rygmar is in an internship program, he cannot teach outside the program but instead must stay within the program until he completes it. Accordingly, he could not bump either Mr. Wood or Mr. Figueroa.

15. Ira Rosenberg started with the District on February 13, 2001; he has a designated subject credential in automotive. He teaches five automotive classes in high school. The District pays 20 percent of his salary for one of his classes, and the Riverside County Office of Education, through the Regional Occupation Program (ROP), pays the other 80 percent of his salary. He testified that since 2003, the District has never paid more than a third of his salary, and has expended very little money in expenses relating to auto shop. He noted there were 714 certificated employees hired after him and he believed that he was terminated, not laid off. However, he understood that he did not have the credentials to bump any other teacher.

Mr. Arellano testified that the District's budget situation was "dire," with the Board of Education expecting a \$7 to 10 million cut in its budget and a 15 to 20 percent reduction in categorical funding for the next school year. To address the shortfall, he, the superintendent, other assistant superintendents, and other managers, formed a cabinet to develop cost cutting measures. With respect to certificated employees, the cabinet first recommended a reduction in force of 140 employees, but ultimately the Board of Education reduced that to 24. During budget discussions, the cabinet members prioritized and considered as many factors as they could, including class size reduction and flexibility.

Mr. Arellano explained that in connection with Mr. Rosenberg's position, it was the District two years earlier which asked the county Office of Education to continue to fund it, but this year, the Office of Education informed the District that it would not continue to fund the 0.8 FTE of Mr. Rosenberg's position. Mr. Rosenberg, on the other hand, testified he was told by people in the ROP office, including Barbara Brown, his principal, that it was the District which closed the automotive program, and the county was unwilling to fund the entire program.

No direct evidence was introduced regarding the funding issue. The testimony of both Mr. Rosenberg and Mr. Arellano was based upon hearsay, and neither was sufficient to warrant a finding as to the basis for the Board of Education's decision to reduce the automotive shop teaching services by one FTE.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter relating to the elimination of 24 full-time equivalent positions exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. Regarding Finding 12, Ms. Grandmain, Ms. Gross, Ms. Stockdale, and Ms. Paz could not bump Ms. Robinson although they are all senior to her. The Board of Education's definition of competence for purposes of bumping required highly qualified status under No Child Left Behind. That is a reasonable requirement and since none of the more senior teachers had highly qualified status under No Child Left Behind, they could not bump Ms. Robinson.

3. Regarding Finding 13, it is concluded for several reasons that Ms. Meraz is more senior to Mr. Lyles and, therefore, she may be retained while the layoff of Mr. Lyles must be upheld. First, the Board twice made it clear that the tie-breaking criteria were to be applied to certificated employees. Resolution No. 2008/09-48, the resolution to reduce particular kinds of services, in paragraph E provides:

That, as between certificated employees with the same seniority date, the order of termination shall be determined solely by Board-adopted criteria.

Resolution No. 2008/09-43, provides that the criteria shall be applied, “. . . one step at a time until the tie is broken, to resolve ties in seniority between certificated employees.” Thus, based upon the language and intent of the two resolutions, as well as prior practice within the District as described by Ms. Riccio, certificated counselors should be treated the same as certificated teachers because they are both certificated employees. The absence of the word “counselors” or a broader term such as “employees” in the eighth criterion does not establish that the criterion should be applied only to teachers and not to counselors.

Second, even if the eighth criterion should be limited only to teachers and, therefore, not be used to break the tie between Ms. Meraz and Mr. Lyles, Mr. Lyles must still be found to be junior to Ms. Meraz. Mr. Lyles' official transcript indicates the date he was conferred his masters degree was March 7, 2007, ten months after Ms. Meraz received her masters degree. According to Ms. Riccio, the date appearing on the official transcript would be the date upon which she would rely to determine the date of a masters degree for tie-breaking purposes, and that is a reasonable conclusion, particularly in the absence of any other official documentation that showed a different date. Mr. Lyles' recollection and testimony in and of itself is insufficient to establish that he received his masters degree on May 1, 2006. Further, his testimony is contradicted by the transcript itself which shows that Mr. Lyles did not even complete his coursework until July 28, 2006. Since Mr. Lyles did not complete the coursework required for his masters degree until after Ms. Meraz received her degree, and since the transcript indicates the masters degree was conferred on him after Ms. Meraz received her degree, it must be concluded that Mr. Lyles received his master degree after Ms. Meraz.

Accordingly, the accusation against Ms. Meraz should be dismissed and the accusation against Mr. Lyles sustained.

4. Regarding Finding 15, a school district may reduce particular kinds of services so long as the decision is reasonable and not fraudulent, arbitrary, or capricious. *Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978), 76 Cal.App.3d 796, 808. Nor can a school district use the reduction in force statutes to terminate the services of a teacher it considers unqualified. *See Forker v. Board of Trustees* (1984) 160 Cal.App.3d 13, 18-19 and cases cited therein.

There is no evidence in the record to establish that the Board of Education's decision to reduce automotive shop teaching services by one FTE is fraudulent, arbitrary, or capricious. There is no question but that the District, like every other school district in the state, faces budget reductions and uncertainty. The evidence established that the District sought to address its shortfall in a systematic way, and considered other alternatives than simply laying off teachers. While the record raises concern about the wisdom of reducing this particular service in light of the historical manner in which it had been funded, it cannot be concluded that this one factor established that the decision by the Board of Education to reduce automotive shop teaching services was fraudulent, arbitrary, or capricious.

Similarly, there is no evidence in the record to establish that the reduction of automotive shop services, thereby causing the layoff of Mr. Rosenberg, was in reality a termination of his services that should have been addressed pursuant to Education Code sections 44932 and 44944. Accordingly, Mr. Rosenberg's layoff must be upheld.

5. Cause exists under Education Code sections 44949 and 44955 for the District to discontinue particular kinds of services relating to the 24 full-time equivalent positions. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. A preponderance of the evidence sustained the charges set forth in the Accusation. It is recommended that the Board give respondents notice before May 15, 2009, that their services will no longer be required by the District.

ORDER

1. The accusations served on respondents Angela Meraz, Daniel Spencer Faddis, Veronica Pena-Silva, Thomas Rowin, and William Urdrian. are dismissed.

2. The Accusations served on the remaining respondents listed on Exhibit A are sustained. Notice shall be given to each respondent before May 15, 2009 that his or her services will not be required for the 2009-10 school year pursuant to the Governing Board's resolution because of the reduction of particular kinds of services.

Notice shall be given in inverse order of seniority.

DATED: _____

ALAN S. METH
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT A

PALM SPRINGS UNIFIED SCHOOL DISTRICT

The following certificated personnel will receive a layoff notice:

- | | |
|-------------------------|------------------------|
| 1. CHAO, TE-FANG JOSHUA | 12. PURNEL, AMBROSIA |
| 2. CORONA, MELINA | 13. ROSENBERG, IRA |
| 3. GRANDMAIN, DESIRA | 14. RYGMAR, RYAN |
| 4. GROSS, MEGAN | 15. STOCKDALE, KAITLYN |
| 5. LABEAF, TARA | |
| 6. LYLES, KAI | |
| 7. MARTIN, MARJA | |
| 8. MATHIS, TODD | |
| 9. MOORE, LORI | |
| 10. OROZCO, MAYRA | |
| 11. PAZ, CAROLYN | |