

BEFORE THE
GOVERNING BOARD
OF THE
SAN YSIDRO SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Layoff/Accusation
Against:

14 CERTIFICATED EMPLOYEES,

Respondents.

OAH No. 2009030722

PROPOSED DECISION

This matter came on regularly for hearing before Roy W. Hewitt, Administrative Law Judge, at San Ysidro, California on April 22, 2009.

Marie C. Mendoza, Esq. and E. Luis Saez, Esq. of Garcia, Calderon & Ruiz, LLP, represented the San Ysidro School District (the district).

Jon Y. Vanderpool, Esq. of Tosdal, Smith, Steiner & Wax represented all of the respondents who appeared at the hearing.

Oral and documentary evidence was received and the matter was continued for good cause until April 27, 2009 so that the parties could submit closing briefs. The briefs were received, read and considered and the matter was deemed submitted on April 27, 2009.

FACTUAL FINDINGS

1. On March 6, 2009, the Governing Board of the district (the board) adopted Resolution number 08/09-0006, determining that it would be necessary to reduce or discontinue particular kinds of services (PKS) at the end of the current school year.

The board determined that the PKS that must be reduced for the 2009-2010 school year were the following full time equivalent (FTE) positions:

| <u>PKS</u> | <u>FTE</u> |
|--|------------|
| K-6 Classroom Teaching | 26 |
| 7-8 Language Arts/ELD/History-Social Science Core Teaching | 2 |
| 7-8 Mathematics/Science Core Teaching | 2 |
| 7-8 Mathematics | 0.8 |
| 7-8 Multimedia | 0.2 |
| 7-8 Physical Education Teacher | 1 |
| District Literacy Reading First Coordinator | 1 |
| Reading First Literacy Coaches | 3 |
| High Priority Schools Grant Resource Teachers | 2 |
| Psychologist | 1 |
| | <hr/> |
| Total FTE positions to be reduced or eliminated | 39 |

The services listed above are PKS, which may be reduced or discontinued within the meaning of Education Code section 44955.

2. On March 12, 2009, based on the board’s resolution, the Superintendent of the district recommended, with regard to the ensuing school year, that the board reduce or eliminate the specified PKS provided by the district for the 2009-2010 school year by notifying the certificated employees listed in Finding 7, below, that their services will not be required for the 2009-2010 school year¹.

3. The district’s recommendation and the board’s decision to reduce or discontinue the services listed in Finding 1, above, were neither arbitrary nor capricious; rather, the recommendation and decision were based on the projected budget deficit. No particular kinds of services were lowered to levels less than those levels mandated by state or federal law. Thus, the board’s decision represents a proper exercise of its discretion.

4. The reduction and 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 as determined by the board.

5. The board considered attrition, including resignations, retirements and requests for transfer, in determining the actual number of necessary layoff notices to

¹ Although the board resolution called for the elimination of 39 FTE, it was ultimately determined that only the fourteen (14) named respondents are involved in these proceedings.

be delivered to its employees. No evidence was presented that any known positively assured attrition was not considered.

6. The Superintendent designated the respondents, permanent or probationary teachers employed by the district, by creating a seniority list, first selecting teachers to be laid off in the inverse of the order in which they were employed, then assigning and reassigning employment in such a manner that all employees to be retained will be retained so as to render any service which their seniority and qualifications entitle them to render.

7. Prior to March 15, 2009, the following 14 certificated employees (respondents) affected by the layoffs received written notice notifying them that pursuant to Education Code sections 44949 and 44955, their services “will not be required for the 2009-10 school year:” (Exh. 4)

1. Black, Holly
2. Carey, Amy
3. Castillo, Blanca
4. Del Rio, Sally
5. Galindo, Gerardo
6. Gonzalez, Cynthia Monreal
7. Herrera, Jose
8. Huerta, Brenda
9. Lopez, Christian
10. Martinez-Rivera, Carmen
11. Mosqueda, Cynthia
12. Sedano, Norma
13. Tec, Elizabeth
14. Valarezo, Erika

8. Based on board resolution number 08/09-0006, the Superintendent of the district made and filed an accusation in his official capacity.

9. Prior to March 15, 2009, all respondents were served with board resolution number 08/09-0006, a Notice of Recommendation that Services Will Not be Required, the Accusation, a Notice of Defense, a Notice of Hearing, the “skipping” criteria, the “tiebreaking” criteria, and copies of Education Code sections 44949 and 44955 and Government Code sections 11506, 11507.5, 11507.6, and 11507.7. Additionally, the Notice of Recommendation that Services Will Not be Required advised respondents as follows:

“You may request a hearing to determine if there is cause for not reemploying you for the 2009-2010 school year. A Request for Hearing form is enclosed. If you wish to make such a request, you must submit it, in writing, to me at the following address on or before 4:30 p.m. on March 23, 2009: [address omitted]

“If you fail to deliver a written request for a hearing to me at or before this deadline, your failure to do so shall constitute a waiver of your right to a hearing.” (Exh. 4)

10. Respondents timely submitted their notices of defense requesting a hearing to determine if cause exists for not re-employing them for the ensuing year.

11. Each respondent who requested a hearing and filed a Notice of Defense was properly noticed of the date, time and place of the instant hearing.

12. All prehearing jurisdictional requirements were met.

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

14. The following concerns were raised during the hearing:

a. Certain respondent contended that four junior seniority certificated employees, Valerie Ayola, Laura Carbajal, Ryan Dickes and Luis Ramos, were improperly skipped because they held Advancement Via Individual Determination (AVID) certification; and,

b. One respondent, Gerardo Galindo, contended that his lay off was actually a “termination concealed as a PKS reduction.”

15. In connection with these concerns, the evidence established the following:

a. California Education Code section 44955, subdivision (d) allows a district to retain employees out of seniority date order if the following elements exist:

1) The district has a specific need for personnel to teach a specific course or course of study;

2) The less senior employees being retained have special training and experience necessary to teach that course or course of study; and

3) The more senior employees to be laid off do not possess the necessary training and experience.

In the present instance, the board established the following “skipping” criterion, among others, for retaining certain employees regardless of their seniority:

“2. Employees who possess Advancement Via Individual Determination certification and who are expected to teach Advancement Via Individual Determination strategies in their classes in the 2009-2010 school year.”
(Exh. 3)

The AVID program includes an elective course that is designed to teach learning and study skills to students who have the potential to be high achievers but need help in maximizing their potential (i.e. “students in the middle”); particularly students from groups that are historically underrepresented at the college level. The AVID program was originally implemented by the district during the 2008-2009 school year in the 7th and 8th grades due to the historically low number of district graduates pursuing college degrees. The district is committed to expanding the AVID program to the lower grade levels, starting with the 6th grade in the 2009-2010 school year.

AVID certification requires teachers to attend a full week of training at a “Summer Institute.” The Summer Institute is conducted by the “AVID organization.” The AVID trained teachers continue to attend training throughout the school year. The teachers work with AVID tutors and attend regular meetings that are held “approximately once a month.”

The current AVID program is “far different from any implementation of AVID in previous years,” so the fact that teachers may have had past experience with AVID concepts and other AVID programs does not establish their competency to teach current AVID concepts and principles.

The AVID program provides a “course” and a “course of study” in academic survival and there is a specific need in the district for the AVID course of study. Consequently, the district properly skipped those teachers who had current AVID certifications.

b. Gerardo Galindo holds a “SS [single subject] Foreign Lang Intro Math” credential. He currently teaches “7-8 Mathematics” and “7-8 Multimedia.” Although he is senior to some teachers being retained, he is ineligible to “bump” any of the more junior teachers because at the 7th and 8th grade levels the district is implementing “Core settings” in which the teachers are required to teach two subject areas, either English Language Arts and History, or Math and Science. In the 2009-2010 school year the district will not have any need for Multi-media teachers or single subject teachers. Mr. Galindo was notified about the implementation of the Core

setting program and is in the process of obtaining a credential to teach science; however, since he has not yet obtained the credential he is ineligible to teach the Core, Math and Science program, and he has neither credential necessary to qualify him to teach the English Language Arts and History Core program. Consequently, Mr. Galindo was properly noticed for lay off and there is no evidence that the instant the lay off proceedings, as concerns him, were initiated for some nefarious reason.

16. The services of no permanent employee are being terminated while any probationary employee, or any permanent employee with less seniority, is being retained to render services which such permanent employee is certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the instant proceedings exists pursuant to Education Code sections 44949 and 44955, and all notices and other requirements of those sections have been provided, as required.

2. The services listed in Factual Finding 1 are PKS that can be reduced or discontinued under Education Code section 44955. The board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

3. Based on the Factual Findings, considered in their entirety, cause exists to reduce the number of certificated employees of the District by 14, due to the budget crisis described in Factual Finding 3.

4. Cause to reduce or discontinue services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

5. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

6. Cause exists to notify respondents that their services will not be needed during the 2009-2010 school year due to reduction or discontinuance of PKS.

ADVISORY DETERMINATION

WHEREFORE, THE FOLLOWING ADVISORY DETERMINATION is hereby made:

1. The Accusation is sustained. The district shall notify the 14 respondents listed in Finding 7 that their services will not be needed during the 2009-2010 school year due to lack of funds and the resulting need to reduce or discontinue PKS.

DATED: May ____, 2009

ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings