

BEFORE THE GOVERNING BOARD OF THE
SAN RAFAEL ELEMENTARY SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Non-Reemployment of
Certain Certificated Employees,

OAH No. 2009030895

PROPOSED DECISION

Administrative Law Judge Steven C. Owyang, State of California, Office of Administrative Hearings, heard this matter in San Rafael, California, on April 29, 2009.

Attorney Ingrid A. Scherschel, Miller Brown Dannis, 71 Stevenson Street, 19th Floor, San Francisco, represented the San Rafael Elementary School District (referred to in some documents as San Rafael City Schools, San Rafael City School District, and San Rafael City Schools District). Ken Gallegos, Executive Director, Human Resources, was present as a representative of the district.

Attorney David N. Weintraub, Beeson, Tayer & Bodine, 1404 Franklin Street, 5th Floor, Oakland, represented respondents.

The parties resolved various issues through stipulations. Still in contention are the status and rights of respondents Jennifer MacPhail and Anelie Smith. The matter was submitted for decision on April 29, 2009.

FACTUAL FINDINGS

1. District Superintendent Michael R. Watenpugh, Ed.D., made the accusation in his official capacity.
2. The respondents in this matter are listed in Appendix A, attached hereto. Each of the respondents is a certificated employee of the district.
3. On February 9, 2009, the district's governing board adopted Resolution #1381, which set forth criteria for establishing the order of termination among employees with the same first date of paid service to the district ("tie-breaker criteria"). The resolution set forth the following tie-breaker criteria:

1. Special Education Credential/Service Authorization
2. Math
3. Science
4. BCLAD
5. CLAD/SDAIE
6. Broad teaching authorization (i.e. NCLB, additional authorizations, single subject)
7. Most years of experience teaching in California public schools
8. Clear Credential (includes Professional)
9. Preliminary Credential
10. Lottery

4. On February 26, 2009, the board adopted Resolution #1386, which reduced or discontinued particular kinds of services by 33.31 full time equivalent (FTE) positions and directed the superintendent or his designated representative to give notices to certificated employees that their services would not be needed for the 2009 – 2010 school year. The particular kinds of service to be reduced or discontinued were:

	FTE
Director of Special Education	0.5
Special Education Program Manager	1.0
Counselors (6-8)	2.4
Middle School Dean	1.0
Homeless Coordinator	1.0
Literacy Coaches (K-5)	4.75
K-8 Special Day Class Teacher	1.0
K-3 Class Size Reduction (CSR)	20.0
Teacher on Special Assignment Categorical Programs	0.3
Middle School English (2 sections)	0.34
Middle School PE (2 sections)	0.34
Middle School Music (1 section)	0.17
Middle School Spanish (1 section)	0.17
Middle School Science (1 section)	0.17
Middle School Art (1 section)	0.17
Total	33.31

The reduction or elimination of particular kinds of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

5. There are no issues or disputes regarding the layoff notices, requests for hearing, service of the accusation, or the notices of the defense in this matter.

6. There is an April 27, 2009 agreement between the district and certificated employees Anna Holstedt, Alison Jacobs, Kimberly Pearson, Yoana Renteria, and Sophia Rivera. (Some of the employees signed the agreement on April 28, 2009.) By this agreement, the signatory employees acknowledged that they did not contest the district's reduction-in-force for the 2009 – 2010 school year, that they withdrew any and all requests for hearing and/or notices of defense previously submitted, and that they declined to exercise their right to a hearing.

JENNIFER MacPHAIL AND ANELIE SMITH

7. The parties stipulated that Jennifer MacPhail (also identified in some documents as Jennifer Macphail and Jennifer MacPhail-Weller) has an August 20, 2007 date of first paid service (“seniority date”).

8. In December 2008, the district circulated to its various school sites a draft seniority list. The draft seniority list incorrectly listed Anelie Smith's seniority date as August 25, 2008. Smith brought the error to the attention of the district.

9. The district and Smith agree that her seniority date is in the 2007 – 2008 school year and that she is a probationary employee. The district, however, asserts Smith's seniority date is September 5, 2007, while Smith asserts her seniority date is August 20, 2007. The 2007 – 2008 school year began on August 20, 2007.

10. Smith was a kindergarten teacher at the district's Venetia Valley School in the 2007 – 2008 school year. The school principal selected Smith to teach a newly-created fifth kindergarten class at the school. At the principal's request, Smith attended a new teacher orientation meeting at Venetia Valley on Friday, August 17, 2007. Smith prepared her classroom on August 20 and 21. Her students arrived on August 22. The district paid Smith for her services beginning August 20, 2007. The district initially paid Smith \$100 per day.

11. Although Smith's monthly time sheet does not show that she worked on August 24 or 27 (Friday and Monday), Smith's testimony and her lesson plan book establish that she worked those dates. The time sheet notes that Smith was working in a “New Position.” Although the time sheet has several boxes and lines where substitute status can be marked, none of those boxes and lines was completed to show that Smith was working as a substitute teacher as opposed to being the teacher assigned to the new kindergarten classroom at Venetia Valley.

12. On September 5, 2007, the district had Smith sign a contract by which she accepted employment with the District “for the 2007 – 2008 school year, commencing **September 5, 2007** and terminating **June 13, 2008.**” The contract recited Smith's

classification as “Temporary – Long” and provided, “Notwithstanding the dates set forth in this section of the contract, temporary certificated employees serve at the will of the District and may be dismissed at any time.” Smith taught the 2007 – 2008 school year in her own kindergarten classroom at Venetia Valley. The contract was internally inconsistent; it recited that Smith was being employed “for the 2007 – 2008 school year” and that the year commenced September 5, 2007. The school year had already commenced on August 20, 2007.

13. Smith served more than 75 percent of the number of days the regular schools of the district were maintained in the 2007 – 2008 school year and performed the duties normally required of a certificated employee of the district. Smith did not serve in an on-call status and did not replace an absent regular employee.

14. Smith’s testimony and supporting documentation regarding her work in the 2007 – 2008 school year was credible and persuasive. The district’s sole witness, Ken Gallegos, Executive Director, Human Resources, was a credible witness but did not assume his position with the district until February 4, 2008. Gallegos did not have personal knowledge of Smith’s work experience in the 2007 – 2008 school year.

15. Jennifer MacPhail was one of several employees with an August 20, 2007 seniority date and to whom the district applied its tie-breaking criteria, including a lottery. Respondents assert that the district violated MacPhail’s due process rights when it failed to assign an August 20, 2007 seniority date to Anelie Smith and failed to include Smith in the tie-breaking lottery for employees with that seniority date.

LEGAL CONCLUSIONS

1. Cause exists in accordance with Education Code sections 44949 and 44955 for the elimination of particular kinds of service in accordance with district Resolution #1386. Further, cause exists to give notice to respondents representing up to an equal number of positions that their services will not be required for the 2009 – 2010 school year, after taking into account the April 27, 2009 agreement discussed in Factual Finding 6. This cause relates solely to the welfare of the schools and pupils within the meaning of Education Code section 44949.

2. The parties agree that Anelie Smith is a probationary employee with a seniority date in the 2007 – 2008 school year. Education Code section 44918, subdivision (a), provides:

Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served **a complete school year**

as a probationary employee if employed as a probationary employee for the following school year. [Emphasis added.]

Pursuant to the above provision, Smith is entitled to credit for serving the complete 2007 – 2008 school year. That the district did not have her sign her contract until September 5, 2007, is not determinative of her seniority date.

The district will be ordered to correct Smith’s seniority date to August 20, 2007, a seniority date already shared by several other employees. Thus the district will be further ordered to apply its tie-breaking criteria, including a lottery if necessary, to determine Smith’s relative order of layoff.

3. It was not shown that Jennifer MacPhail’s due process rights were violated by the district’s initial failure to assign an August 20, 2007 seniority date to Anelie Smith or to include Smith in a tie-breaking lottery. It is recognized, however, that application of the district’s tie-breaking criteria to Anelie Smith may (or may not) affect MacPhail’s (and other employees’) relative order of layoff.

ORDER

1. The district shall correct Anelie Smith’s seniority date to August 20, 2007. The district shall apply its tie-breaking criteria, including a lottery if necessary, to determine Smith’s relative order of layoff.

2. Notice may be given respondents representing the FTE positions reduced or discontinued pursuant to district Resolution #1386 that their services will not be required for the 2009 – 2010 school year. The district shall take into account its April 27, 2009 agreement with certain employees. The accusations issued to all remaining respondents are dismissed.

DATED: _____

STEVEN C. OWYANG
Administrative Law Judge
Office of Administrative Hearings

APPENDIX

LIST OF RESPONDENTS

Abate Stacey
Bridgman Melissa
Chaudhuri Jane
Chitsaz Jennifer
Donavan-Kansora Mary
Estavillo Gloria
Evans Kimberly
Guerrero Melissa
Hagerty Sarah
Holstedt Anna
Jacobs Alison
Macphail Jennifer
May Johanna
Odonohughe Molly
Pearson Kimberly
Press Kimberly
Reiss Katrina
Renteria Yoana
Rivera Sophia
Sakellariou Alexandra
Shenson Lisa
Smith Anelie
Weighall Chelsea