

BEFORE THE  
MERCED COUNTY SUPERINTENDENT OF SCHOOLS  
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

Shelby Hamby, Ida Johnson, and Abe Perez,

Respondents.

OAH No. 2009031293

**PROPOSED DECISION**

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in Merced, California, on April 14, 2009.

David A. Soldani, Attorney at Law, represented the complainant, Lee Anderson, Ph.D., Superintendent, Merced County Office of Education.

Ernest H. Tuttle, III, Attorney at Law,<sup>1</sup> represented the respondents.

The matter was submitted on April 14, 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,<sup>2</sup> the assistant superintendent for human resources caused the superintendent 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 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.

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<sup>1</sup> Ernest H. Tuttle, III, Attorney at Law, 750 East Bullard Avenue, Suite 101, Fresno, California 93710.

<sup>2</sup> All references to the Code are to the Education Code unless otherwise specified.

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.<sup>3</sup> 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.<sup>4</sup>

6. The superintendent 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 superintendent determined that, because particular kinds of services are to be reduced or discontinued, it is necessary to decrease the number of permanent employees in the district by 34.43 full time equivalents (FTE).

8. The particular kinds of services the superintendent resolved to reduce or discontinue are:

Career Technical Education (CTE) Accounting Teacher - 1 FTE (220 days)  
CTE Animation, Computer Applications, Business Marketing - 1 FTE (184 days)  
CTE Automotive Services - 3 FTE (184 days)  
CTE Business Occupations - 1 FTE (184 days)  
CTE Career Educator - 4.675 FTE (3@200 days, 1@210 days, 1@135 days)  
CTE Career Planning - 2 FTE (1@210 days, 1@184 days)  
CTE Computer Applications - 1 FTE (184 days)  
CTE Construction Technology - 2 FTE (1@184 days, 1@220 days)  
CTE Construction Landscaping - 1 FTE (225 days)  
CTE Creative Design and Merchandising - 1 FTE (184 days)

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<sup>3</sup> 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.”

<sup>4</sup> 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.

CTE Graphic Arts - 1 FTE (184 days)  
CTE Horticulture Landscaping – 1 FTE (184 days)  
CTE Instructor Marketing Office – 1 FTE (220 days)  
CTE Landscaping – 1 FTE (184 days)  
CTE Landscaping Construction – 1 FTE (184 days)  
CTE Marketing Occupations – 5 FTE (4@184 days, 1@220 days)  
CTE Medical Occupations – 1.75 FTE (2@184 days)  
CTE Office Technologies in Medical Environments – 1 FTE (220 days)  
Deaf and Hard of Hearing Teacher – 2 FTE (184 days)  
On Campus Suspension Teacher -- 1 FTE (184 days)  
Special Education Teacher; Mild/Moderate – 1 FTE (184 days)

#### *SUMMARY OF FINDINGS REGARDING RETENTION OF EMPLOYEES*

9. With regard to respondents who are permanent employees, the district is not retaining any probationary employee to render a service that such a respondent is certificated and competent to render.

10. With regard to respondents who are permanent employees, the district is not retaining any employee with less seniority than such a respondent has to render a service that the respondent is certificated and competent to render.<sup>5</sup>

11. With regard to respondents who are either permanent or probationary employees, the district is not retaining any employee with less seniority than such a respondent has to render a service that the respondent's qualifications entitle him or her to render.<sup>6</sup>

#### 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 respondents 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.

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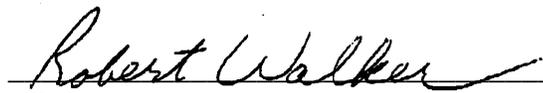
<sup>5</sup> Code section 44955, subdivision (b), provides seniority protection for a *permanent* employee in terms of the services the employee is "*certificated and competent to render.*"

<sup>6</sup> 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."

ORDER

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

Dated: April 24, 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

Mail PD to

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Assistant Superintendent for Human Resources  
Merced County Office of Education  
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