

BEFORE THE
GOVERNING BOARD
MARYSVILLE JOINT UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE MARYSVILLE
JOINT UNIFIED SCHOOL DISTRICT,

Respondents.
Respondents.

OAH No. 2010011155

PROPOSED DECISION

Catherine B. Frink, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Marysville, California, on April 15, 2010.

Kingsley Bogard Thompson, LLP, by Kimberly Kingsley Bogard, Attorney at Law, represented the Marysville Joint Unified School District.

Langenkamp & Curtis, LLP, by Carolyn Langenkamp, Attorney at Law, represented 76 respondents identified in Exhibit A, a copy of which is attached hereto and incorporated herein by reference.

Evidence was received, the hearing was closed, and the matter was submitted for decision on April 15, 2010.

FACTUAL FINDINGS

1. Gay Todd, Ed.D., Superintendent of the Marysville Joint Unified School District (District), State of California, filed the Accusations in her official capacity as a public officer.

2. On March 2, 2010, the Board of Trustees of the Marysville Joint Unified School District (Board) adopted Resolution No. 2009-10/29 and Resolution No. 2009-10/31, which reduced and/or discontinued particular kinds of certificated services no later than the beginning of the 2010-2011 school year.

3. The Board further determined that it shall be necessary by reason of the reduction and/or discontinuance of services to decrease the number of permanent and/or probationary certificated employees at the close of the 2009-2010 school year by a corresponding number of full-time equivalent positions, and directed the Superintendent or her designee to proceed accordingly by notifying the appropriate employees to implement the Board's determination.

4. On or before March 15, 2010, the District served 123 certificated employees, including respondents, with a written notice that it had been recommended that notice be given to them pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year (Notice). Each Notice set forth the reasons for the recommendation. The Notice attached and incorporated by reference Attachment A to Resolution No. 2009-10/29 and Resolution No. 2009-10/31, which listed the services to be reduced or discontinued, resulting in a proposed reduction in the certificated staff by 67.15 full-time equivalent (FTE) positions.

5. At the same time that employees were served with the Notice, they were served with an Accusation, required accompanying documents, and a blank Request for Hearing/Notice of Defense form.

6. Requests for Hearing/Notices of Defense were timely filed by 90 certificated employees.

7. The following individuals filed Notices of Defense, but were not represented by Ms. Langenkamp: Spencer Ansjorge; Jennifer Clayton; Sherri Dwyer; Wendy Fritzinger; Debra Jones; James Kupser; Cullen Meyer; Nichole Nakamura; Stephanie Peterson; Kellie Pickell; Vanessa Purdy; Christine Spade; Peri Sutherland; Alicia Wright; and Michael Zysk.

8. Except as set forth in the stipulations below, any unrepresented employee (i.e., not listed on Exhibit A) that failed to file a Request for Hearing/Notice of Defense, or who failed to appear at hearing, including the individuals listed in Finding 7, has waived his or her right to a hearing, and may be laid off by the District. No unrepresented employee appeared at the hearing.

9. Each respondent (set forth in Exhibit A) is presently a certificated probationary or permanent employee of the District.

10. Resolution No. 2009-10/29 and Resolution No. 2009-10/31 called for the reduction or discontinuance of the following particular kinds of services for the 2010-2011 school year:

Service	Grade Level	FTE
Administrators	K-6	1.35
Coordinator – Educ. Services	K-12	1.0
Counselors	9-12	2.0
Elementary Education	K-6	50.0
Math	9-12	1.8
English	9-12	0.4
P.E.	9-12	0.4
Work Experience	9-12	0.2
ELD/AVID	9-12	1.0
Ag	9-12	0.8
Ag/Science	9-12	0.2
Health	9-12	0.2
Careers (ROP)	9-12	0.6
Community Development (ROP)	9-12	0.2
Dental (ROP)	9-12	0.6
Air Force Jr. ROTC	9-12	1.0
Independent Study Program	K-12	5.0
Drivers Education	9-12	0.2
Athletic Director	9-12	0.2
District Total		67.15

The above-described services are “particular kinds of services” that can be reduced or discontinued within the meaning of Education Code section 44955.

11. In arriving at the number of certificated employees required to be terminated, Resolution No. 2009-10/29 and Resolution No. 2009-10/31 both state that the Board “considered anticipated certificated employee attrition (resignation, retirements, non-relections, temporary teacher releases, etc.)” as of March 2, 2010. The Board concluded

that, notwithstanding any vacancies resulting in positively assured attrition, it would still be necessary to terminate certificated employees equal to 67.15 FTE.

12. The District maintains a seniority list which contains pertinent information such as employees' date of first paid service, current assignment, and credentials on file. The District used the seniority list to develop a proposed layoff list. The District considered whether senior employees currently assigned in the various services being reduced or eliminated could displace, or "bump," more junior employees. In determining who would be laid off for each kind of service reduced or eliminated, the District first applied known vacancies and then applied in progressive sequence the seniority list in inverse order, from least to most senior. Employees with the same date of hire were laid off according to the needs of the District and its students.

13. On March 2, 2010, the Board adopted Resolution No. 2009-10/30, which set forth criteria "to be applied, in the order listed, to determine the relative seniority of those certificated employees who first rendered paid probationary service on the same day." (tiebreaking criteria).

Stipulations Re: Seniority

14. Haley Phelan has seniority date is October 1, 2006. She is a permanent employee of the District.

15. Joua Xiong has a seniority date of September 1, 2006. She is a permanent employee of the District.

16. Katrina Simpson has a seniority date of September 17, 2007. She is a second year probationary employee of the District.

17. The following employees are second year probationary: Alyce Elliott; Michelle Teesdale; and Miranda Hartridge.

18. Genae DuChatea-Belding and Nikki Greminger have clear Multiple Subject (MS) credentials and seniority dates of August 17, 2007.

19. Deanna Hayes has a seniority date of August 17, 2007. She was given credit for her Administrative Eligibility Certificate in the application of the District's tiebreaker criteria. Therefore, she was accorded greater seniority than other certificated employees with the same hire date (August 17, 2007) whose positions on the seniority list were identified by means of a lottery pursuant to the tiebreaking criteria, as follows: Mailee Lor (1); Amber Baker (2); Nicole Robertson (3); Arie Choy Phongmany (4); Andrea Presser (5); Genae DuChateau-Belding (6); Jennifer McAdam (7); Karen McNay (8); Kellie Pickell (9); Peri Sutherland (10); Nikki Greminger (11); Melissa Gonzales (12); Leslie Fields (13); Mel Noel-Vermillion (14); and Sia Cha Xiong (15).

Stipulation Re: Rescission of Dismissal Notices

20. The parties stipulated that notices to the following certificated employees were rescinded by the District: Tracy Blake; Wendy Olson; James Rogers;¹ Amanda Brown; Amanda Escheman; Jennifer Campbell; Lori Whitmore; Stephanie Peterson; Ryan Heasty; Michael Zyst; Jonathan Kinsman; Durea Jones; Phillip Waters; Dallas McBride; Michael Grace; Daniel DeVlaming; Peter Pantoja; Michelle Berry; Patricia Price; Michael O'Brien; Alicia Wright; Krishna Domingo; Walter Gallentine; Nichole Nakamura; Patricia Norby; Christopher Babb; John (Pete) Jeffrey; Vickie Sampson; Roxanne Burrow; Debra Jones; Cullen Meyer; Spence Ansorge; Joseph Flood; Eugene Duggan; James Kupser; and Billy Priddy.

21. The parties stipulated that, if the District prevails on all issues, then Grace Callaway is the most senior teacher with an MS credential to be laid off, and the notices to Jami Owen, Inge Schlussler, and Melinda Goodson shall be rescinded by the District.

Stipulation Re: Status of Temporary Employees

22. The parties stipulated that Sarah Moffitt is a first year probationary employee with a seniority date of October 13, 2009, and that Celeste Guess is a first year probationary employee with a seniority date of August 14, 2009. Respondents withdrew all other challenges to the status of temporary employees.

23. The parties stipulated that the notice to Sarah Moffitt was rescinded by the District. As result of the reclassification of Celeste Guess as a probationary employee who is now subject to layoff as a certificated employee with an MS credential, the parties stipulated that the notice to Angela Holt is rescinded by the District.

Denise Huber

24. In 2005, respondent Huber was a student in the California State University Chico (Chico State) teacher credentialing program. In October 2005, she was placed in a classroom in the District as a student teacher. On November 3, 2005, the principal at Johnson Park Elementary School, Louise McKray, asked respondent Huber to take over an "overflow" class, with students in grades 2, 3, and 4.

25. The State of California Commission on Teacher Credentialing (CTC) issued an Internship MS Credential to respondent Huber, valid from January 30, 2006 through February 1, 2008, which by its terms was "restricted to service in MARYSVILLE JOINT UNIFIED SCHOOL DISTRICT, YUBA COUNTY OFFICE OF EDUCATION." On February 27, 2006, Ramiro Carreón, Assistant Superintendent/Personnel Services, sent a form addressed to Dr. Deborah Summers, Chair of the Department of Education at Chico

¹ Any issue pertaining to Mr. Rogers' seniority date was rendered moot by the fact that his notice was rescinded, and he was no longer a respondent in this proceeding.

State, with the subject line: “Re: Intent to Hire Intern Teacher,” pertaining to respondent Huber. The form listed the following information:

<i>School Site:</i>	Johnson Park Elementary School
<i>Grade Level(s):</i>	Elementary
<i>Full-time/percent:</i>	100%
<i>Subject(s):</i>	Multiple Subject or self contained classroom
<i>Beginning Date:</i>	1/30/06
<i>Is salary reduced by 1/8?</i>	NO
<i>Local Support Teacher:</i>	Lisa Goodman

The district understands that hiring this intern establishes a partnership between the school district and the Department of Education, CSU, Chico. The district and the Department of Education will collaborate in the support and performance assessment of the intern.

[¶] . . . [¶]

26. Respondent Huber did not sign a contract with the District to work as a District intern. The District considered her to be a substitute teacher. The “Earnings History” payroll records for respondent Huber for the period from July 1, 2005 through June 30, 2006, did not show any payment to respondent Huber until the February 2006 pay period. The Earnings History showed gross earnings of \$300 paid on February 10, 2006; \$2,000 paid on March 10, 2006; \$2,300 paid on April 10, 2006; \$1,500 paid on May 10, 2006; and \$9,077.24 paid on June 9, 2006.

27. According to Mr. Carreón, the Earnings History reflects the fact that respondent Huber was paid as a day-to-day substitute at the daily rate of \$100 per day; at the end of the school year, when it was determined that respondent Huber qualified for the long-term substitute pay rate (the daily rate for a first year teacher), she was paid in a lump sum in June 2006. He stated that the retroactive payment could not be for service as a District intern, because there would have been a contract in place, and respondent Huber would have been paid in accordance with the contract. Mr. Carreón also stated that the form sent to Chico State reflected the District’s willingness to hire respondent Huber as an intern, but was not a contract to do so. The District does not have a practice of issuing contracts to day-to-day or long-term substitute teachers.

28. Respondent Huber was hired as a classroom teacher for the 2006-2007 school year. Her seniority date, as reflected on the District’s seniority list, is August 18, 2006.

29. In February 2009, respondent Huber questioned her seniority date, and contacted the District’s Human Resources Department. On February 26, 2009, Mr. Carreón sent respondent Huber an email which stated:

We have you as having worked from November 3, 2005 to the present. We will calculate the total percentage of actual days worked per the law. If the total is at least 75%, we will change your seniority date to Nov. 3, 2005.

I will follow up, after we run the calculation.

30. The District did not change respondent Huber's seniority date, because she had not worked for 75 percent of the school days for the 2005-2006 school year.²

31. Respondent Huber acknowledged that she did not work for a sufficient number of days to permit her service to be counted toward probationary status, if she is considered a substitute teacher. Rather, she contended that she should have been accorded probationary status as a district intern. In the alternative, she contended that she should be classified as probationary because she was never notified by the District that she was a substitute or temporary employee, under the rationale of *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911.

32. Education Code section 44917 states:

Except as provided in Section ... 44920, governing boards of school districts shall classify as substitute employees those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service.

After September 1 of any school year, the governing board of any school district may employ, for the remainder of the school year, in substitute status any otherwise qualified person who consents to be employed in a position for which no regular employee is available, including persons retired for service under the State Teachers' Retirement System. Inability to acquire the services of a qualified regular employee shall be demonstrated to the satisfaction of the Commission on Teacher Credentialing.

² Education Code section 44918, subdivision (a), states: "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."

Any person employed for one complete school year as a temporary employee shall, if reemployed for the following school year in a position requiring certification qualifications, be classified by the governing board as a probationary employee and the previous year's employment as a temporary employee shall be deemed one year's employment as a probationary employee for purposes of acquiring permanent status.

33. In this case, respondent was employed as a substitute teacher after September 1, 2005, in a position for which no regular employee was available. She was not hired as a temporary employee, nor was she hired as a District intern. She did not work for at least 75 percent of the number of days the regular schools of the district were maintained in the 2005-2006 school year. Therefore, she was not entitled to probationary status as of November 3, 2005. Her correct seniority date is August 18, 2006.

34. Respondent Huber also contended that, if her seniority date could not be changed, she should be given greater seniority than other individuals with the same first date of paid service with the District, in consideration of the fact that she had previous teaching experience in the District. Respondent Huber's argument is not persuasive. The District must apply its tiebreaker criteria to all teachers with the same first date of paid service, in accordance with Resolution 2009-10/30.

Deanna Hayes

35. Respondent Hayes is currently employed by the District as a teacher on special assignment. She is the project director for the Making Mathematics Matter (M³) project, funded by the California Department of Education's California Mathematics and Science Partnership Professional Development Program (CMSPPDP). Respondent Hayes co-authored the grant application, and she has served as the director for two and a half years. Respondent Hayes contended that she "play[s] a critical role in the continued life of the grant," and therefore she should be retained by the District in her current position.

36. Respondent Hayes has a seniority date of August 17, 2007. She holds a clear MS credential and an Administrative Eligibility Certificate. She received a layoff notice because she is being displaced by a more senior teacher who holds an MS credential whose position has been eliminated as a result of Resolution No. 2009-10/29.

37. The Request for Applications (RFA) for the CMSPPDP sets forth the duties and responsibilities of the project director, and includes the recommendation that the project director "be involved in the writing of the grant application." The RFA states that "[t]he Grantee [District] may change the Project Director or other key personnel, but the Grantee shall immediately notify the CDE Program Monitor in writing via e-mail or fax of any such change." The RFA does not specify that the program director shall hold any specific credential or have any special qualifications.

38. The District recognizes that respondent Hayes has done an excellent job in her position as project director of the M³ project. However, it has determined that certificated employees with greater seniority than respondent Hayes who would otherwise be slated for layoff are competent and qualified to perform the duties of project director. This determination is an appropriate exercise of the District's discretion, and respondent Hayes' challenge to her layoff is overruled.

Independent Study

39. The District has proposed a reduction of 5.0 FTE positions in the independent study program. As a result, more senior certificated employees whose positions are being eliminated are displacing less senior respondents who hold MS credentials. The District has not determined whether independent study services will be provided at all in the 2010-2011 school year, or how those services would be provided if it is determined that those services are needed.

40. Respondents contend that independent study services are not being reduced or eliminated, but instead will be provided next year; therefore, it is unlawful for the District to "bump" less senior certificated employees. This argument is not persuasive. Independent study services are not mandated services or programs, and the District is not required to provide them as part of the regular school day. As of the date of hearing, the Board has proposed the elimination of these services. Respondents' contention that the District will be providing these services in the ensuing school year is speculation. In any event, the District has discretion to determine how and in what manner services are to be provided. (*Campbell Elementary Teachers Assn v. Abbott* (1978) 76 Cal. App.3d 796, 811; *Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571, 1582-1590.) Changing the way in which a service is to be performed constitutes a reduction in a particular kind of service, as does having fewer employees available to perform the service. (*Rutherford v. Board of Trustees* (1976) 64 Cal. App.3d 167, 179; *Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796, 811.)

41. The Board's decision to reduce or discontinue the particular kinds of services identified in Resolution No. 2009-10/29 and Resolution No. 2009-10/31 was not arbitrary or capricious, but constituted a proper exercise of discretion.

42. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

43. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

LEGAL CONCLUSIONS

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

2. The services identified in Resolution No. 2009-10/29 and Resolution No. 2009-10/31 are particular kinds of services that could be reduced or discontinued under section Education Code section 44955. Cause exists to reduce the number of certificated employees of the District due to the reduction or discontinuance of particular kinds of services. Cause for the reduction or discontinuance of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

3. A District may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees, supra*, 64 Cal.App.3d at p. 178-179.)

4. As set forth in Findings 24 through 34, the District properly classified respondent Denise Huber as a substitute teacher during the 2005-2006 school year, and properly identified her seniority date as August 18, 2006.

5. As set forth in Findings 35 through 38, the District properly identified respondent Deanna Hayes as a certificated employee to be laid off pursuant to Resolution No. 2009-10/29 and Resolution No. 2009-10/31.

6. As set forth in Findings 39 and 40, the District did not abuse its discretion with regard to the proposed reduction of 5.0 FTE independent study services for the 2010-2011 school year.

7. The District has prevailed on all issues. Therefore, as set forth in Findings 20, 21, and 23, the District has rescinded or shall rescind notices of layoff to the following individuals: Tracy Blake; Wendy Olson; James Rogers; Amanda Brown; Amanda Escherman; Jennifer Campbell; Lori Whitmore; Stephanie Peterson; Ryan Heasty; Michael Zyst; Jonathan Kinsman; Durea Jones; Phillip Waters; Dallas McBride; Michael Grace; Daniel DeVlaming; Peter Pantoja; Michelle Berry; Patricia Price; Michael O'Brien; Alicia Wright; Krishna Domingo; Walter Gallentine; Nichole Nakamura; Patricia Norby; Christopher Babb; John (Pete) Jeffrey; Vickie Sampson; Roxanne Burrow; Debra Jones; Cullen Meyer; Spence Ansorge; Joseph Flood; Eugene Duggan; James Kupser; Billy Priddy; Jami Owen; Inge Schlussler; Melinda Goodson; Sarah Moffitt; and Angela Holt.

8. No employee with less seniority than any named respondent is being retained to render a service which any named respondent is certificated and competent to render. Except as set forth in Legal Conclusion 7, the Board may give respondents final notice

before May 15, 2010, that their services will not be required for the ensuing school year, 2010-2011.

ORDER

Except as set forth in Legal Conclusion 7, the Accusations served on respondents are sustained. Notices of layoff shall be rescinded as to the certificated employees listed in Legal Conclusion 7. Notices shall be given to the remaining respondents identified in attached Exhibit A that their services will not be required for the 2010-2011 school year because of the reduction or discontinuation of particular kinds of services. Notice shall be given to respondents in inverse order of seniority.

Dated: _____

CATHERINE B. FRINK
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT A

MARYSVILLE JOINT UNIFIED SCHOOL DISTRICT

RESPONDENTS REPRESENTED BY LANGENKAMP & CURTIS, LLP

Allan, Stephanie

Berry, Michelle

Blake, Tracey

Brandt, Alison

Brown, Amanda

Buist, Rebecca

Burrow, Roxanne

Campbell, Jennifer

Choate, Lindsey

Chue, Youa

DeVlaming, Daniel

Domingo, Krishna

Duarte, Megan

DuChateau-Belding, Genae

Duggan, Eugene

Elliott, Alyce

Flood, Joe

Gallentine, Walter

Gonzalez, Melissa

Goodson, Melinda

Greminger, Nikki

Guess, Celeste

Gunter, Thorsteinn

Hane, Troy

Hansard, Bridget

Hansen, Amy

Harlow, Starla

Haro, Cindy

Hayes, Deanna

Heap, Heather

Heasty, Ryan

Heinz, Katie

Hendrix, Michelle

Hollingsworth, Christine

Holt, Angela

Huber, Denise

Jeffrey, John (Pete)

Johal, Jetender

Kinsman, Jonathan

Leal, Daiquiri

Lor, Mailee

Lucas, Lynnette

Maas, Michelle

McAdam, Jennifer

McBride, Dallas

McCarty, Carlene

McNay, Karen

Moffitt, Sarah

Morse, Melissa

Nethaway, Heather

Nielsen, Jens

Noel-Vermillion, Melissa

Norby, Tricia

O'Brien, Michael

Olson, Wendy

Pantoja, Pete

Phongmany, Arie

Presser, Andrea

Price, Patricia

Priddy, Billy

Pulgarin, Alma

Robertson, Nicole

Rogers, James

Sampson, Vickie

Schlussler, Inge

Seiler, Joe

Simpson, Catrina

Teesdale, Michelle

Turner, Kimberly;

Van Houten, Aileen

Westcamp, Kathryn

Whitmore, Laurie

Williams, Jill

Xiong, Joua

Xiong, Sia