

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

In the Matter of the Reduction in Force
Involving the Respondent's Identified in
Exhibit A.

OAH No. 2010020339

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 22, 2010, in San Ysidro, California.

Maria Mendoza, Garcia, Calderon, Ruiz LLP, represented San Ysidro School District.

Jon Vanderpool, Tosdal, Smith, Steiner & Wax, represented the respondents identified in Appendix A, including respondents Gabriela Gonzalez and Victor Vargas who did not appear at hearing or file notices of defense.¹

The matter was submitted on April 22, 2010.

FACTUAL FINDINGS

1. Jennifer Brown de Valle² made and filed the accusation in her official capacity as Assistant Superintendent, Human Resources of the San Ysidro School District.
2. Respondents are identified on Appendix A, attached hereto and by this reference are incorporated herein. Each respondent is a certificated employee of the district.
3. On February 25, 2010, the Governing Board adopted Resolution No. 09/10-0007 reducing particular kinds of services and directing the superintendent to give appropriate notices to certificated employees whose positions would be affected by the action. The resolution identified 30 FTEs to be reduced. The decision to reduce or discontinue a particular kind of service is matter reserved to the district's discretion and is not

¹ The parties stipulated that all respondents filed a request for hearing.

² Jennifer Brown de Valle is also known as Jennifer Brown.

subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.)

4. In its resolution the district defined “competency” pursuant to Education Code section 44955, subdivision (b), as an employee who had actually rendered instruction or services in the subject matter area in which he/she claimed to be entitled to render instruction or services, while employed by the district.

5. The district established skipping criteria pursuant to Education Code section 44955(d)(1). The district was required to implement the governing board’s resolution in a manner that was consistent with the board’s policies and the district’s efforts to offer certain services to its students. There is no legal requirement mandating that skipping criteria be contained in a governing board’s resolution. Employees who met any of the skipping criteria for some but not all of their assignment(s) shall be retained only as to that portion of their assignment that meets the skipping criteria.

6. The district skipped employees who possess an active special education credential, are currently working in a special education position, and are expected to work as a special education teacher in the 2010-2011 school year. The district skipped special education teachers because it is difficult to recruit and retain teachers to fill those positions.

7. The district skipped employees who possess Advancement Via Individual Determination (AVID) certification and are expected to teach AVID in seventh and/or eighth grade classes in the 2010-2011 school year. The district skipped AVID teachers because of the district’s need to expose its students to the concept of obtaining a post-secondary education and to prepare them for college.

8. The district skipped employees who possess specialized training in mathematics, have taught mathematics in a core setting in the seventh and/or eighth grades during each year in the past four school years including the current 2009-2010 school year, and are expected to teach mathematics, in a core setting in the seventh and/or eighth grades in the 2010-2011 school years. The district skipped mathematics teachers because it is difficult to recruit and retain teachers to fill those positions and the district is focused on improving its students’ math scores.

9. The district’s skip list demonstrated that 19 teachers had been skipped; 12 because of special education, four because of AVID, and three because of mathematics.

10. The district established tie-breaking criteria to determine the order of termination for those employees who shared the same seniority dates.

11. The district also implemented a bump analysis to determine which employees could bump into a position being held by a junior employee.

12. The evidence established that the master schedules for the schools for the 2010-2011 school year have not yet been established.

13. On or about March 3, 2010,³ Superintendent Manuel Paul gave written notice to certificated employees, including respondents, of the recommendation that their services would not be required for the 2010-11 school year. The reasons for the recommendation were set forth in these preliminary layoff notices. Thereafter, an accusation was served on each respondent.

14. A Stipulation introduced at hearing indicated that there were 17 respondents in this matter and that all prehearing jurisdictional requirements were met.

15. Before issuing the preliminary layoff notices, the district took into account all positively assured attrition. The district must issue final layoff notices before May 15, and when it does so the district will take into account any additional attrition that has occurred. After that, further attrition will allow the district to rehire laid off employees. The testimony between Superintendent Paul and Assistant Superintendent Brown was in conflict regarding whether or not any employees had retired since March 15, but the district asserted that it would continue to consider those attritions for purposes of rehiring and recalling respondents, and no evidence contradicted that assertion.

16. The layoffs will not reduce any of the district's offerings in code mandated courses below the level required by law.

17. The district alleged that it had relied on its seniority list when making layoff decisions which was the reason it sent verification requests to employees prior to March 15 to verify the accuracy of the information on that list.⁴ During the hearing the district revised its seniority list but those revisions⁵ did not result in the district rescinding any layoff notices.

18. Education Code section 44955, subdivisions (b) and (c), set forth a general rule requiring school districts to retain senior employees over more junior employees and to retain permanent employees over temporary employees. Any exception to this general rule must be based on statute. For employees hired on the same date, Education Code section 44955, subdivision (d) provides:

“(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

³ The district introduced a sample of the notice sent to employees which was dated March 3, 2010.

⁴ The district also referenced the seniority list that was introduced into evidence at last year's hearing.

⁵ Respondent Norma Sedano was placed “higher up” on the seniority list, above two employees and Respondent Luis Ramos was placed ahead of one employee.

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.”

19. Under subdivision (d)(1), the District may skip a junior teacher being retained for specified reasons. (*Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 131.) Junior teachers may be given retention priority over senior teachers only if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.)

A school district’s decision to reduce a particular kind of service must not be fraudulent, arbitrary or capricious. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 637.) A district’s decision to retain junior bilingual teachers absent a showing that they were employed to teach classes in a formal bilingual program was improper. (*Alexander v. Delano Joint Union High School District* (1983) 139 Cal.App.3d 567.)

20. At issue in this hearing was the district’s skipping criteria. Three respondents, Ana Alvidrez, Luis Ramos and Brenda Huerta testified that they are credentialed and competent to teach math at the middle school, although all three currently teach at an elementary school. The district’s middle schools are structured as “Core settings” in which the teachers teach in two subject areas, either English Language Arts and History or Mathematics and Science. The district described the unique characteristics of the Core math program, all of which the elementary school teachers implement.⁶ Assistant Superintendent Brown explained the Improvement Plans currently taking place in the district and the great strides the district has made to improve student test scores and performances. Assistant Superintendent Brown credibly explained the needs of the district to retain math teachers in the middle schools. Respondent Huerta had at one time accepted an offer to teach math at the middle school and then changed her mind to accept a position at the elementary school. Unfortunately, the risk any teacher runs when choosing which district job to take is the possibility that the chosen job will be eliminated, as occurred here. The district’s decision to skip middle school mathematics teachers did not appear arbitrary or capricious.

21. The more disturbing skip was the district’s decision to skip middle school AVID certified teachers. AVID is a program designed to teach certain skills to students in order to better their chances for attending college. In the 2009 layoff proceeding, the district skipped all teachers who were AVID certified, a skip that was upheld following last year’s hearing. This

⁶ Those characteristics included team meetings, collaboration with colleagues, reviews and analysis of test scores and data and teacher trainings.

year the district narrowed its skip to AVID certified teachers who were expected to teach AVID to seventh and/or eighth graders during the next school year. The district explained that the AVID middle school program, unlike in the elementary schools, consists of a separate AVID class taught to a specific group of students and that AVID middle school teachers undergo unique and more intensive training than do AVID elementary school teachers.

22. While the evidence established that AVID middle school teachers have received additional training that their elementary colleagues have not, it did not establish that the respondents who are presently AVID certified were not certified and competent to teach an AVID middle school course. Although there are various trainings that teachers can take after receiving AVID certification, and those trainings appeared to be directed towards the particular ages of students taught, the initial AVID certification is the same for all teachers; there is no distinction between certification for middle school AVID teachers and certification for elementary school AVID teachers. As such, the district's skip was a distinction without a difference making the skip arbitrary and capricious.

23. Respondents Brenda Huerta and Norma Sedano asked the district to take the AVID training, but were refused. Respondents Luis Ramos and Catalina Jauregui, who are AVID certified, requested to participate in the additional middle school AVID training but were denied. Specifically precluding groups of teachers from participating in the middle school AVID training and then using that training as a basis to skip those teachers, further made the use of that AVID training as a skipping criteria arbitrary and capricious.⁷ This is not to say that the use of AVID certification as a skipping criteria was arbitrary and capricious; rather its restriction to middle school teachers in the district's resolution made it so.⁸

24. Any respondent certificated and competent, who received a layoff notice and is senior to a certificated employee who was skipped because the junior teacher was an AVID middle school teacher was improperly noticed, the notice should be rescinded and that respondent retained. Respondents Brenda Huerta, Norma Sedano, Luis Ramos, and Catalina Jauregui who requested AVID training, but were denied by the district, were improperly noticed, the notices should be rescinded and those respondents retained.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to sections 44949 and 44955, and all notices and other requirements of those sections have been provided as required.

⁷ Even assuming arguendo that the skip was not arbitrary, the district's resolution only skipped employees with AVID certification "who are expected to teach AVID" in middle school next year and since the master schedules are not final, the evidence did not establish that any of the AVID respondents were unable to meet that skip.

⁸ As an aside, the district's resolution appeared to be inconsistent with its professed desire to implement AVID district-wide to all of its students. If that were true, it seemed odd to implement a resolution which would eliminate any AVID certified teachers.

2. 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* (1976) 64 Cal.App.3d 167, 178-179.)

3. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or “bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469, 473-474.) Junior teachers may be given retention priority over senior teachers only if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.)

4. Because of the reduction of particular kinds of services, cause exists pursuant to Education Code section 44955 to give notice to respondents that their services will not be required for the 2010-2011 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949. The district has identified the certificated employees who are providing the particular kinds of services that the Governing Board directed be reduced or discontinued. It is recommended that the Governing Board give respondents notice before May 15, 2009, that their services will not be required by the District for the school year 2010-11.

5. A preponderance of the evidence sustained the charges set forth in the accusation subject to the recommendations listed in the factual findings. This determination is based on all factual findings and on all legal conclusions.

RECOMMENDATION

It is recommended that the governing board give notice to the respondents whose names are set forth below except for those respondents identified above in the Findings of Fact Nos. 21-24, inclusive, that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2010-2011 school year.

DATED: _____

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings

Appendix A

RESPONDENTS

1. Ana Veronica Alvidrez
2. Alejandra Camacho
3. Amy Carey
4. Sally J. Del Rio
5. Karla Garciadealba
6. Gabriela Gonzalez
7. Lorena Guerrero
8. Brenda Huerta
9. Catalina Jauregui
10. Christian Lopez
11. Carmen Luna
12. Cynthia Mosqueda
13. Vanessa Murphy
14. Luis Ramos
15. Yvonne San Martin Vallejo
16. Norma Sedano
17. Loreana Torres
18. Erika Valarezo
19. Victor Vargas