

BEFORE THE GOVERNING BOARD
OF THE ANAHEIM CITY SCHOOL DISTRICT

In the Matter of the Accusation Against:

Certificated Employees of the Anaheim City
School District,

Respondents.

OAH Case No. 2010030554

PROPOSED DECISION

Chris Ruiz, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on April 30, 2010, in Anaheim, California.

Cathie L. Fields, Attorney at Law, Atkinson, Andelson, Loya, Ruud & Romo, represented the Anaheim City School District (ACSD).

Henry Willis, Attorney at Law, Schwartz, Steinsapir, Dorhmann, and Sommers, represented all Respondents listed in exhibit 16 and that exhibit is hereby incorporated by reference as if fully set forth herein.

The matter was submitted on April 30, 2010. Thereafter, Respondents submitted a closing brief which was marked as exhibit A and ACSD submitted a closing brief which was marked as exhibit 17.

FACTUAL FINDINGS

1. On or about March 8, 2010, by resolution number 2009-10/28 (resolution), the Board adopted the Superintendent's recommendation to reduce or discontinue particular kinds of services provided by ACSD, effective the 2010-2011 school year.

2. The resolution included a listing by type and full-time equivalent (FTE) of those positions (157.219 FTE) which the Board resolved to reduce or eliminate no later than the beginning of the 2010-2011 school year.

3. The Board adopted another resolution (resolution number 2009-10/26) that included a list and description of the criteria used by ACSD to determine the order of termination of certificated employees who first rendered paid service to ACSD on the same date. The Board further adopted resolution number 2009-10/29 regarding non-reelection of temporary certificated employees.

4. On or about March 9, 2010, ACSD served written notice on certain probationary and permanent certificated employees, pursuant to the direction of the Board, that they would not be reemployed in the ensuing school year.

5. The written notices described directly above included a request for hearing form that, if returned to ACSD by March 19, 2010, would constitute a hearing request. ACSD served 44 probationary and permanent teachers with preliminary layoff notices, and also served 89 temporary employees with same. Of the 44 teachers, 15 requested a hearing. Of the 89 temporary employees, 9 requested a hearing. After some modifications, because some respondents withdrew their request for hearing, or did not subsequently file a Notice of Defense, the only remaining Respondents at issue are listed in exhibit 16.

6. ACSD's Assistant Superintendent filed and timely served the individuals who submitted a request for hearing form with an Accusation, Notice of Defense, Notice of Hearing, and related materials. The Accusation and related materials served on each Respondent included the Notice of Hearing, which noticed the instant hearing. The Accusation included a form, that if returned by a date certain, would constitute a Notice of Defense.

7. The certificated employees who were served with the Accusation and related materials were identified as Respondents. (See exhibit 16, "List of Respondents") However, the Board pled and argued at hearing that those individuals listed in exhibit 16 as "Temporary (Precautionary) Respondents" were only provided with all jurisdictional documents in this proceeding as a precaution to enable them to participate and exercise arguable rights in this matter. ACSD argued that the temporary employees are not entitled to participate in this proceeding. ACSD requests an order in conformance with its position that it may non-re-elect these temporary employees separately and independently from the instant process, a process meant solely for its probationary and permanent employees.

8. Some of the temporary employees are employed in categorically funded positions, pursuant to Education Code section 44909. Other temporary employees are employed pursuant to Education Code section 44920.

9. The recommendation that Respondents be terminated from employment was not related to their professionalism and dedication as teachers.

10. ACSD identified the certificated employees providing the particular kinds of services that the Board directed to be reduced or discontinued.

11. The services at issue were "particular kinds of services" that could be reduced or discontinued within the meaning of Education Code section 44955. The Board's decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

12. The reduction or discontinuation of particular kinds of services related to the welfare of ACSD and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of ACSD, as determined by the Board because of a budget shortfall.

13. The Board considered all known attrition, including resignations, retirements, and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees.

14. In cases where individual Respondents shared a first date of paid service, ACSD was required to apply the tie-breaker criteria approved by the Board. The Board's resolution number 2009-10/26 established tie breaker criteria that were fair and reasonable. ACSD applied those tie-breaker criteria fairly and appropriately.

15. Respondent Karen Hernandez (Hernandez) contended that ACSD has inappropriately classified her as a temporary employees for too long. Hernandez failed to present evidence that would shield her from layoff. She is not a probationary or permanent employee.

16. Hernandez and Respondent Christine Sato (Sato), also a temporary employee, are employed in positions that require part of their day to be spent performing services funded by "class size reduction" (CSR), a categorically funded program. Both signed temporary employment contracts for the present school year, as did all temporary employees. It was established that these employees are in categorically funded positions, and thus should be treated as temporary employees. While it was established that the district does not always segregate categorical funds into specific categorical fund categories, it was not established that categorical funds and general funds are commingled. Thus, *Schnee v. Alameda Unified School District* (2004) 125 Cal.App.4th 555, is inapplicable. Further, *Zalac v. Governing Board of Ferndale Unified School District* (2002) 98 Cal.App.4th 838, 851, concluded that CSR qualifies as a categorically funded program.

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

LEGAL CONCLUSIONS

1. The parties met all notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955.

2. Cause exists to sustain ACSD's action to reduce or discontinue particular kinds of services, as set forth in ACSD's resolution number 2009-10/28 for the 2010-2011 school year, pursuant to Education Code sections 44949 and 44955, as set forth in Factual Findings 1-17, and Legal Conclusions 1, and 3-17.

3. Education Code section 44955 states, in pertinent part:

[¶] . . . [¶]

(b) Whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or . . . when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

[¶] . . . [¶]

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render.

4. Education Code section 44949 states, in pertinent part:

(a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

[¶] . . . [¶]

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

[¶] . . . [¶]

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition.

5. Education Code section 44920 states, in pertinent part:

The governing board of a school district may employ as a teacher, for a complete school year . . . any person holding appropriate certification documents, and may classify such person as a temporary employee. The employment of such persons shall be based upon the need for additional certificated employees during a particular semester or year because a certificated employee has been granted leave for a semester or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board.

6. Education Code section 44909 states, in pertinent part:

The governing board of any school district may employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted under contract with public or private agencies, or categorically funded projects which are not required by federal or state statutes. The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the governing board and such agreement shall be reduced to writing. Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of the district by which he is employed are maintained and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications. Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially

funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees other than Section 44918.

Whenever any certificated employee in the regular educational program is assigned to a categorically funded project not required by federal or state statute and the district employs an additional credentialed person to replace that certificated employee, the replacement certificated employee shall be subject the provisions of Section 44918.

7. The services identified in the Board's resolution are particular kinds of services that the Board can reduce or discontinue under Education Code section 44955. The Board's decision to reduce or discontinue the identified services was not arbitrary or capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of ACSD's schools and pupils within the meaning of Education Code section 44949.

8. ACSD identified the certificated employees providing the particular kinds of services that the Board directed to be reduced or discontinued.

9. A school district may reduce services within the meaning of Education Code 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.)

10. Categorically funded Respondents, those employed pursuant to Education Code section 44909, are temporary employees that can be dismissed without the requirement of this hearing.

11. There is no question that Respondents employed pursuant to Education Code section 44920 are temporary employees and can be dismissed without a right to participate in this proceeding. As to those Respondents, ACSD may take action to dismiss them as the law allows regarding temporary employees.

12. A review of case law finds that other categorically funded teachers have been treated like temporary employees. (*Zalac v. Ferndale Unified School District* (2002) 98 Cal.App.4th 838, 840-841 [a kindergarten teacher's first two years of employment was as a temporary employee in a categorically funded program pursuant to Education Code section 44909].) In *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, the Court of Appeal found that teachers in categorically funded positions "are treated in much the same way [as temporary employees] in that they may be dismissed without the formalities required for probationary and permanent employees in the event the program expires or is terminated, and their service does not count toward acquiring permanent status (unless they are reemployed the following year in a probationary position)."

The *Bakersfield* court, citing *Zalac*, noted the purpose of Education Code section 44909 was “to prevent a person from acquiring probationary status solely through teaching in a categorically funded program. This permits the hiring of qualified persons for categorically funded programs of undetermined duration without incurring responsibility to grant tenured status based on such teaching services alone.” [Citation.] The section ‘was intended to give school districts flexibility in the operation of special educational programs to supplement their regular program and to relieve them from having a surplus of probationary or permanent teachers when project funds are terminated or cut back.’ [Citation.]” (*Bakersfield Elementary Teachers Association v. Bakersfield City School District, supra*, 145 Cal.App.4th 1260, 1286.) To characterize categorically funded Respondents as probationary employees here would go against that purpose. (See also *Haase v. San Diego Community College District* (1980) 113 Cal.App.3d 913 [a certificated employee in a categorically funded position in a community college district not found to be a probationary employee].)

13. Furthermore, in Education Code section 44909, the Legislature directed categorically funded employees to be subject to the provisions of Education Code section 44918, but “without regard to other requirements of this code respecting the termination of probationary or permanent employees.” This direction provides further support for the conclusion reached here, that categorically funded employees may be treated as temporary employees.

14. Thus, ACSD may dismiss its temporary employees, including those categorically funded pursuant to Education Code section 44909, in the manner the law allows for temporary employees. It is noted that ACSD served its temporary employees with the jurisdictional documents and provided them the opportunity to participate in the instant hearing. Those temporary employees participated in the hearing to the fullest extent possible, as if probationary employees. Had the Administrative Law Judge concluded that categorically funded Respondents were probationary, they would have been entitled to the hearing that was had and in which they participated.

15. Nevertheless, ACSD established cause to not reemploy all noticed Respondents for the ensuing school year and Respondents did not establish facts or sufficient legal argument to the contrary.

16. Hernandez and Sato contended that they work in CSR positions, a categorically funded program, and that the District is required to segregate CSR funds in order to categorize their positions as “categorically funded.” ACSD contended that even though it does not segregate said funds, it is not required to do so and that the State allows flexibility in categorically funded positions and that the funding may even be utilized for different categories than initially intended. For the reasons stated in Factual Finding 16, Hernandez and Sato may be treated as temporary employees.

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

ORDER

1. Notice may be given to Respondents listed in exhibit 16, as required by law, that their services will be terminated at the close of the 2009-2010 academic year. Notice shall be given in inverse order of seniority.

2. Notice may be given to those Respondents, identified as temporary employees in exhibit 16, as provided for by law for temporary employees, that their services will be terminated at the close of the 2009-2010 academic year.

Dated: May ____, 2010.

CHRIS RUIZ
Administrative Law Judge
Office of Administrative Hearings