

BEFORE THE
COUNTY SUPERINTENDENT OF SCHOOLS
TULARE COUNTY
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

RONNI AGUILAR, et al.,

Respondents.

OAH No. 2010031425

PROPOSED DECISION

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in Visalia, California, on April 29, 2010.

Desiree Y. Serrano, Deputy County Counsel, County of Tulare,¹ represented the complainant, Jim Vidak, County Superintendent of Schools, Tulare County, California.

James F. McBrearty, Attorney at Law,² represented the respondents. There are seven respondents, and they are listed in exhibit A.

The matter was submitted on April 29, 2010.

FACTUAL FINDINGS

GENERAL FINDINGS CONCERNING STATUTORY REQUIREMENTS

1. Respondents are certificated district employees.
2. Education Code sections 44949 and 44955,³ provide for two notices to be given in connection with terminating an employee. The first notice is given by the superintendent. The superintendent makes a recommendation that certain employees be laid off, and the superintendent gives notice of that recommendation to those employees and the

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³ All references to the Code are to the Education Code unless otherwise specified.

governing board. The superintendent must give that notice no later than March 15. That notice will be referred to as the Superintendent's Notice of Layoff Recommendation. There is no requirement that a governing board take any action in March. But while it is unnecessary, governing boards usually adopt a resolution ratifying the superintendent's recommendation.

3. In this case, because the superintendent is the employing authority, he designated a delegate to give the Superintendent's Notice of Layoff Recommendation.

4. The second notice is a notice of a governing board's decision to terminate an employee. That notice is provided for in Code section 44955 and must be given before May 15.

5. In this case, not later than March 15, 2010, the superintendent's delegate caused the superintendent and respondents to be notified in writing that it was recommended that respondents be notified before May 15, 2010, that the County Office would not require their services for the ensuing school year.

6. The Superintendent's Notice of Layoff Recommendation stated the reasons for the recommendation. The recommendation was not related to respondents' competency.

7. A Superintendent's Notice of Layoff Recommendation 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.

8. The Superintendent's Notice of Layoff Recommendation 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 was served.⁴ And the failure to request a hearing would constitute a waiver of the right to a hearing.

9. 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.⁵ Respondents filed timely notices of defense. All prehearing jurisdictional requirements were met.

⁴ 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."

⁵ 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.

10. The County Office 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 COUNTY OFFICE INTENDS TO REDUCE OR DISCONTINUE

11. The County Office determined that, because particular kinds of services are to be reduced or discontinued, it is necessary to decrease the number of permanent or probationary employees in the district by 13 full time equivalents (FTE).

12. The particular kinds of services the County Office resolved to reduce or discontinue are:

Court/Community School Teaching Services	2.0
Neverstreaming Teaching Services	3.0
La Sierra Charter School Teaching Services	5.5
Reconnecting Youth Coping and Support Facilitator/Teacher	1.0
Project Coordinator/Community Challenge Grant	1.0
School Counseling Services	.5

USE OF TIE-BREAKING CRITERIA BASED ON THE CURRENT NEEDS OF THE DISTRICT AND STUDENTS

13. Pursuant to Code section 44955, subdivision (b), tie-breaking criteria were adopted for determining the order of termination as among employees who first rendered paid service on the same day. It was not necessary, however, to use the tie-breaking criteria for determining the order of layoff.

INTENTION TO DEVIATE FROM SENIORITY (SKIPPING)

14. Pursuant to Code section 44955, subdivision (d)(1), the County Office resolved to deviate from terminating employees in the order of seniority.

15. The County Office identified the following courses or courses of study as ones creating a specific need for personnel:

- Speech and Language
- Special Education
- English

Mathematics
Biological Science
Physical Science
Geoscience
Social Science

16. The County Office demonstrated a specific need for personnel to teach those courses or courses of study.

17. The County Office properly skipped employees who have special training and experience necessary to teach those courses or courses of study.

RIGHT TO BE RETAINED ACCORDING TO SENIORITY AND QUALIFICATIONS – DATE OF HIRE

18. Job security is not inherent in seniority. The Legislature chose to provide teachers with limited job security according to their seniority.

19. There is a dispute as to the date from which Rohn Wittwer's seniority should be measured. The County Office contends it should be measured from September 18, 2002. Respondents Patrick Jones, Stephen Reid, and Phillipa Smith were employed after that date but before August 17, 2006. They contend Mr. Wittwer's seniority should be measured from August 17, 2006. The district did not send Mr. Wittwer a Superintendent's Notice of Layoff Recommendation. Mr. Wittwer and the three respondents are permanent employees. Code section 44955, subdivision (b), provides, in part, "the services of no permanent employee may be terminated . . . while . . . any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render." If one of the three respondents is certificated and competent to render the service Mr. Wittwer is rendering and if Mr. Wittwer's seniority should be measured from August 17, 2006, the most senior respondent who is certificated and competent to render the service must be retained.

20. Mr. Wittwer first taught for the County Office on September 18, 2002. Because he was teaching on an emergency permit, the County Office did not consider him to be in a probationary status. However, he was not a substitute, and there is no evidence that the County Office notified him that he was temporary. Mr. Wittwer now holds a preliminary multiple subject credential. It is not clear why the County Office gave him a probationary classification as of August 17, 2006. It is possible that that is when he obtained his preliminary multiple subject credential. It is not necessary, however, to determine why the County Office chose that date. It is not necessary because, as is explained below, his seniority must be measured from September 18, 2002.

RIGHT TO BE RETAINED ACCORDING TO SENIORITY AND QUALIFICATIONS – BUMPING

21. The second paragraph of section 44955, subdivision (c), does not add to teachers' seniority rights. It does, however, make it clear that governing boards must make assignments in such a way as to protect seniority rights. Employees must be retained to

render any service their *seniority* and qualifications entitle them to render. Thus, if a senior teacher whose regular assignment is being eliminated is certificated and competent to teach a junior teacher's courses, the district must retain the senior teacher and reassign him or her to render that service. This is commonly referred to as bumping. The district must either reassign or terminate the junior employee.

22. The County Office operates certain alternative or continuation schools. Education Code section 44865 provides special credentialing rules for teachers in various special settings – including teachers in alternative and continuation schools. A teacher may be assigned to teach in those special settings if he or she has a bachelor's degree and special fitness to perform. The credentialing requirements to teach in a regular, academic high school are more restrictive. In August of 2009, the County Office opened a college preparatory high school, University High School. The County Office is working to obtain accreditation for University High School. Two of the respondents, Patrick Jones and Stephen Reid, teach in alternative or continuation schools. If University High School were an alternative or continuation school they would have the right to bump into positions there. They contend that, because University High School is not yet accredited, it should be treated as an alternative or continuation school. They, however, cited no authority for that proposition and offered no evidence in support of it. It is found that Education Code section 44865 does not apply to University High School and that neither Mr. Jones nor Mr. Reid has the credentials required to bump into a position that some other teacher holds at University High School.

MANDATED SERVICES

23. State and federal laws mandate that certain services be provided at or above mandated levels. There was no evidence that the district is reducing those services below mandated levels.

STIPULATION TO RESCIND ONE NOTICE

24. Complainant stipulated that the Superintendent's Notice of Layoff Recommendation sent to Robert Roldan will be rescinded.

SUMMARY OF FINDINGS REGARDING RETENTION OF EMPLOYEES

25. 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.

26. 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.⁶

27. 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.⁷

LEGAL CONCLUSIONS

PROCEDURAL MATTERS

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

THE DATE FROM WHICH MR. WITTWER'S SENIORITY SHOULD BE MEASURED

2. As noted above, there is a dispute as to whether Mr. Wittwer's seniority should be measured from the date he began teaching with only an emergency permit or the date when the County Office recognized him as a probationary employee.

3. Three recent cases deal with the consequences of a teacher's being or not being classified as a probationary employee.

4. *Summerfield v. Windsor Unified School District* (2002) 95 Cal.App.4th 1026, concerns a teacher who taught under an emergency permit for two years and under a preliminary credential the following year. Before March 15 of the teacher's third year, the district sent her a notice of non-reelection. She contended that, as a result of being reelected after serving two years under the emergency permit, she became a tenured teacher and that, therefore, she no longer was subject to non-reelection. The court disagreed and held that time spent teaching under an emergency permit cannot be counted toward accruing tenure as a permanent employee.

5. *California Teachers' Association v. Governing Board of the Golden Valley Unified School District* (2002) 98 Cal.App.4th 369, concerns a mid-year, "for cause" dismissal. The court held that teachers serving under an emergency permit, who are not classified as permanent or substitute employees, are entitled to the statutory protections

⁶ 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.*"

⁷ 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."

governing the dismissal of a probationary employee. The *Golden Valley* court acknowledged the ruling in *Summerfield*. Thus, in essence, the *Golden Valley* court created a new category of probationary employees – individuals who are entitled to the statutory dismissal protections provided to probationary employees but who never attain probationary status for tenure purposes. Because first year probationary employees are often referred to as “Prob-1” and second year probationary employees as “Prob-2,” the new category created by the *Golden Valley* holding has been dubbed “Prob-0.” So long as Prob-0 employees hold only emergency permits, they remain in that category; they cannot advance to Prob-1 status until they obtain preliminary or clear credentials. They, however, may not be dismissed mid year without being given the procedural protections afforded a teacher who is being dismissed for cause.

6. *Bakersfield Elementary Teachers Ass’n v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, involves teachers who were classified as temporary. The school district classified a number of teachers as temporary because they were teaching on emergency permits or other certifications that were less than preliminary or clear credentials. Thus, the district made an employee’s classification dependent on his or her certification rather than on the position he or she occupied. At page 1277, the court noted that this was inappropriate.

[A] person who has been determined qualified to teach is not a temporary employee simply because he or she is not yet fully accredited, but rather because he or she occupies a position the law defines as temporary. It is necessary, therefore, to differentiate a teacher’s classification from his or her certification.

7. At page 1280, the court observed that teachers who are not classified in any other classification are classified as probationary.

Thus, section 44915 has been understood to make probationary status the default classification for certificated employees who are not otherwise required by the Education Code to be classified as permanent, substitute, or temporary.

[¶] . . . [¶]

The Education Code’s “complex and somewhat rigid” classification scheme is intended . . . to limit rather than to enlarge the power of school districts to classify teachers as temporary employees.

8. At page 1293, the *Bakersfield* court noted that there are three significant differences between certificated employees classified as probationary and those classified as temporary. “First, probationary employees are afforded more procedural protections in the

event a school district proposes to dismiss them for cause or . . . lay them off as part of a workforce reduction.” [¶] . . . [¶] “Second, service as a probationary employee generally counts toward the two consecutive years required to attain permanent status (tenure). [¶] . . . [¶] [Whereas] a year of service as a temporary employee *may* be counted toward permanent status. [¶] . . . [¶] Third, the seniority of a certificated employee is determined as of the date the employee “first rendered paid service in a probationary position. (§44845.) Temporary employees do not accrue seniority.”

9. At page 1293, in footnote 20, the court addressed the fact that tenure and seniority are distinct concepts. Tenure is a relationship between a teacher and a school district. Seniority, however, has to do with a relationship among teachers and provides job security according to one’s years of service.

10. The *Bakersfield* court then reviewed *Summerfield* and *Golden Valley* and noted that those cases dealt with whether a teacher with only an emergency permit is entitled to some of the benefits normally associated with probationary employees.

Those cases did not resolve the issue of whether a teacher having only an emergency permit – who is not serving in a temporary or substitute position – has a right to be classified as a probationary employee.

11. At page 1299, the court held that teachers – including those with only an emergency permit – must be classified according to the position they occupy.

If a certificated employee occupies a position the Education Code defines as temporary, he or she is a temporary employee; *if it is not a position that requires temporary classification (or permanent or substitute) he or she is a probationary employee. (§44915.) The Code grants school districts no discretion to deviate from this statutory classification scheme. (Italics added.)*

12. At pages 1299 through 1300, the court reiterated the holdings of *Summerfield* and *Golden Valley*.

A probationary employee working under an emergency teaching or specialist permit does not accrue credit toward permanent status . . . but is entitled to the statutory protections accorded such employees in the event of a dismissal for cause or unsatisfactory performance . . . or a layoff as the result of a reduction in the workforce.

13. Neither *Summerfield* nor *Golden Valley* resolved the issue of whether a probationary teacher with only an emergency permit can accrue seniority.

14. At page 1300, the *Bakersfield* court quoted Code section 44845.

Every probationary or permanent employee . . . shall be deemed to have been employed on the date upon which he [or she] first rendered paid service in a probationary position.

15. At page 1301, the court concluded:

[H]aving determined that certificated employees with less than a regular credential must in certain circumstances be classified as probationary, we cannot then overlook the clear directive in section 44845 that, as probationary employees, they are entitled to accrue seniority.

16. Based on the holding in *Bakersfield*, it is determined that Mr. Wittwer should have been classified as a probationary employee as of September 18, 2002, and that his seniority must be measured from that date.

THE NOTICE SENT TO MR. ROLAND SHOULD BE RESCINDED

17. Based on the district's stipulation, it is determined that the notice sent to Mr. Roland should be rescinded.

THE DISTRICT MAY SEND FINAL LAYOFF NOTICES TO THE REMAINING RESPONDENTS

18. 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 the remaining 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.

ORDER

1. The Superintendent's Notice of Layoff Recommendation that was sent to Mr. Roland is rescinded.

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

Dated: May 6, 2010

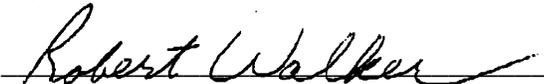

ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT A
RESPONDENTS

Ronni Aguilar
Rhonda Hash
Patrick Jones
Robin Perna Edwards
Stephen Reid
Robert Roldan
Phillipa Smith