

BEFORE THE GOVERNING BOARD
SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

RICHARD ABERS, ERICH
ACKERMANN, ATHENA AGUSTIN, et
al.,

Respondents.

OAH No. 2009020299

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in Danville, California, on April 20-21, 2009.

Robert Thurbon, Attorney at Law, Thurbon & McHaney, represented the San Ramon Valley Unified School District.

Teague P. Paterson and David C. Coleman, Attorneys at Law, Beeson, Tayer & Bodine, represented the respondents set forth on Appendix A, attached hereto and incorporated herein by this reference.

There was no appearance by or on behalf of the respondents set forth on Appendix B, attached hereto and incorporated herein by this reference.

The matter was submitted on April 21, 2009.

FACTUAL FINDINGS

1. On March 10, 2009, the governing board (board) of the San Ramon Valley Unified School District (district) adopted Resolution 68-08/09, in which the board resolved to reduce or eliminate the following particular kinds of services not later than the beginning of the 2009-2010 school year, and directed the district's superintendent or his designated representative to send appropriate notices to all employees whose services will be affected by the board's action.

SERVICES	F.T.E. ¹
Discontinue K-3 20:1 class size reduction services resulting in consolidation and elimination of elementary classes	
Multiple Subject	89.901 FTE
Discontinue 9th grade 20:1 class size reduction services resulting in consolidation and elimination of Math and English classes/sections	
Mathematics	5.000 FTE
English	5.800 FTE
Reduction in 1-5 grade specialized prep support	
Music	2.898 FTE
Science FTE	22.802 FTE
Physical Education	8.500 FTE
Spanish	2.000 FTE
Reduction in secondary librarians	
Library Media Specialist	6.000 FTE
Discontinue 5th grade instrumental music program	10.698 FTE
Increase middle school and high school class sizes resulting in a corresponding reduction of secondary teaching services	
Multiple Subject	6.000 FTE
Physical Education	3.167 FTE
Music	1.333 FTE
Art	2.000 FTE
Technology	.833 FTE
Science	5.633 FTE
Voc Ed	1.800 FTE
Spanish	1.000 FTE
Social Science	.400 FTE
Mathematics	5.100 FTE
Foods/Home Economics	1.400 FTE
English	2.600 FTE
Reduction in psychology services	1.000 FTE

¹ Full-time equivalent.

SERVICES	F.T.E.
Reduction in TSA ² support services	
Multiple Subject	6.400 FTE
Physical Education	.833 FTE
Music	1.000 FTE
Art	1.000 FTE
Technology	1.833 FTE
Reduction in administrative services	
Multiple Subject	2.000 FTE
Physical Education	1.000 FTE
Social Science	1.000 FTE
 TOTAL	 <u>198.697 FTE</u>

2. The board is reducing or eliminating particular kinds of service because the district is receiving less money from the state and cannot provide the levels of service it has maintained in the past and still balance its budget.

3. On March 12, 2009, the superintendent gave notice written notice to respondents of his recommendation that notice be given them pursuant to Education Code sections 44949 and 44955 that their services would not be required for the 2009-2010 school year. The superintendent did not take action on the reduction in psychology services and the district is not reducing this service.

4. Respondents timely filed requests for hearing to determine if there is cause for terminating their services for the 2009-2010 school year. An accusation was served on respondents, all of whom filed timely notices of defense. All prehearing jurisdictional requirements have been met.

5. Since the accusations were served, some district employees who were sent layoff notices have elected to exercise their bumping rights. The parties stipulated at hearing that, as a consequence, the district is withdrawing the layoff notices it had issued to Christine Bertolero, Kyra Barale, Mark Boyd, Jeanette Brown, Leslie Collins, Pamela Crowfoot, Donnine Davis, Maritza Francisco-Choa, Austin Glimme, Kimberly Hansell, Kent Heckenlively, Sandra Isbell, Holly Meyer, Sapna Nair, Robert Paddock, Maria Pan, Mark Pelham, Teresa Pierce, Linda Post, Joan Reuveni, Lisa Sawires, and Iris Trujillo. They are not respondents in this proceeding.

6. The district has also rescinded the layoff notice issued to respondent Sharon Mosbaugh. Mosbaugh is not a respondent in this proceeding.

² Teachers on special assignment.

Seniority date issues

7. Maria Bratton-Kearns is an elementary school teacher at Twin Creeks Elementary School. She is classified by the district as a “P2”³ with a seniority date of August 22, 2007, her first day of service as a probationary employee.

Bratton-Kearns contends that she should be assigned an earlier seniority date. After the district offered her a job for the 2007-2008 school year in April 2007, she attended a district professional development day on May 15 or 16, and a district reading workshop on July 30 to August 1. She was not paid by the district for attending these events.

Under Education Code section 44845, an employee’s seniority date is the date upon which she “first rendered paid service in a probationary position.” Bratton-Kearns first rendered paid service to the district on August 22, 2007. She is not entitled to an earlier seniority date.

8. Karen Mile is a Library Media Specialist. She is classified by the district as a P2 with a seniority date of August 22, 2007.

Mile, who lived in Michigan before coming to work for the district for the 2007-2008 school year, testified that she placed book orders for the district’s library as early as March 2007, that she came to California twice for staff meetings before August 2007, and that she started working for the district during the last week in July. Mile’s work prior to August 22, 2007, was not part of her contract with the district for the 2007-2008 school year; the district paid her an hourly rate for her work before August 22.

As noted above in Finding 7, a certificated employee’s seniority begins on the date she first rendered paid service to the district in a probationary position. The evidence does not establish that Mile’s service to the district before August 22, 2007, was part of her probationary position. Mile does not claim that she was required by the district to perform work before the school year began. She was paid an agreed amount for her pre-school year services that was not part of her salary as a probationary employee. It is concluded that Mile first rendered paid service to the district in a probationary position on August 22, 2007.

9. Laura Neary holds a 0.53 FTE position as a science prep support teacher at Vista Grande Elementary School. She is classified by the district as a P1 with a seniority date of August 20, 2008.

³ “P2” stands for a probationary employee in her second year of probation. Generally speaking, a certificated employee acquires tenure, and is then classified as “permanent,” when he or she is reelected after serving two complete successive school years as a probationary employee. (Ed. Code, § 44929.21, subd. (b).) Thus the district classifies a teacher in her first probationary year as a “P1” and a teacher in her second probationary year as a “P2.”

Neary asserts that she is entitled to an earlier seniority date because of her service to the district before August 20, 2008. Neary has worked for the district since August 2004. For the 2004-2005, 2005-2006, and 2006-2007 school years she was employed under a contract as a temporary certificated employee. During each of those years, she worked four days per week. Neary returned to Vista Grande as a science prep support teacher for the 2007-2008 school year, during which she worked three days per week for a total of 119 days, fewer than 75 percent of the days that the district's schools were maintained in that school year.

As noted above, seniority is measured from the first date on which an employee renders paid service in a probationary position. Under some circumstances, however, a probationary employee can "tack" on her prior year's service as a temporary employee. Education Code section 44918, subdivision (a), provides:

Any employee classified as a . . . 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.

Neary's first date of paid service in a probationary position is August 20, 2008. She did not work 75 percent of the school days during the 2007-2008 school year, and therefore she is not entitled to an additional year of service credit under section 44918.

10. Donna Friend is a physical education teacher for the district. She was hired into a probationary position on August 23, 2002, and that is her assigned seniority date.

Friend asserts that she is entitled to an earlier seniority date. In March 2000, Friend was hired as a long-term substitute through the end of the 1999-2000 school year. (Friend had been working as a substitute – apparently a day-to-day substitute – for many years before that.) Friend then signed temporary employment contracts for 0.666 FTE or less for the 2000-2001 and 2001-2002 school years. She has never worked more than three days per week.

Friend did not work 75 percent of the school days during the 2001-2002 school year. She is not entitled to tack on her time from the 2001-2002 school year.

11. Lisa Freels is a fourth grade teacher at Live Oak Elementary School. She is classified as a P2 with August 22, 2007, as her seniority date.

Freels contends that she is entitled to seniority for the 2006-2007 school year. She worked part of that year as a long-term substitute, part as a temporary employee, and part as

a day-to-day substitute. Her work as a long-term substitute and as a temporary employee did not amount to 75 percent of the school days in the year. Freels believes that the days she worked as a day-to-day substitute should be included when determining whether she worked 75 percent of the school days.

Freels is not entitled to tack on her service during the 2006-2007 school year. Her work as a day-to-day substitute does not count toward the 75 percent time required by Education Code section 44918. (Ed. Code, § 44918, subd. (d).) Without counting the days she worked as a day-to-day substitute, she does not meet the requirements of section 44918.

12. Keith Philapil is a math teacher at San Ramon Valley High School. He is classified as a P1 with a seniority date of November 5, 2008. Philapil was employed by the district under temporary employment contracts for the 2006-2007, 2007-2008, and 2008-2009 school years. Until he received his clear credential on November 5, 2008, he worked under an emergency credential. The district granted him seniority effective November 5, 2008.

Philapil contends that, under Education Code section 44918, he is entitled to tack on his service to the district during the 2007-2008 school year to establish an earlier seniority date. Under section 44918, however, Philapil is only entitled to seniority credit for the 2007-2008 year if he was “employed as a probationary employee for the following school year.” He was not. He was hired as a temporary employee for the 2008-2009 school year, and did not become a probationary employee until November 5, 2008. Philapil is not entitled to an earlier seniority date.

13. April Roy is an elementary school teacher at Twin Creeks Elementary School. She is classified as a P2 with a seniority date of August 22, 2007.

Roy contends that she should be given an earlier seniority date because of her work for the district before August 22, 2007. During the 2005-2006 school year, while she was working on her credential, Roby worked for the district as a paraprofessional. During the 2006-2007 school year, Roy worked as a long-term substitute from about October 2006 to April 2007; for the remainder of that year, before and after her long-term substitute assignment, she worked in the same classroom as a student teacher or a day-to-day substitute. During the 2006-2007 school year, Roy was working under an emergency credential. Roy’s classification and credential status for the 2007-2008 school year are unclear. Roy believes that she began work as a probationary teacher on August 22, 2007; the district believes that she did not become classified as probationary until the 2008-2009 school year, at which time she was allowed to tack on her prior year to give her a seniority date of August 22, 2007.

Roy is not entitled to a seniority date earlier than August 22, 2007, for two reasons. First, even if Roy was hired as a probationary employee on August 22, 2007, as she claims, she is not entitled to tack on the 2006-2007 school year to her seniority date. During that year, she was working under an emergency credential. An employee working under an emergency credential does not accrue credit toward permanent status. (Ed. Code, § 44911;

Summerfield v. Windsor Unified School Dist. (2002) 95 Cal.App.4th 1026.) Roy argues that even if her service under an emergency credential does not count toward tenure, it should still count for the purpose of establishing seniority. She offers no support for this argument and it is not persuasive. Under Education Code section 44845, a certificated employee's district seniority is measured from her first date of paid service in a probationary position, that is, from the first day of service that counts towards tenure. If Roy's argument were accepted, teachers who work for three or four years on an emergency credential could establish greater seniority than fully-credentialed teachers who only worked for two years.

Second, Roy's service during the 2006-2007 school year cannot be used to establish an earlier seniority date, because it was not established that she worked as a temporary employee or a long-term substitute for at least 75 percent of the school days during that school year.

14. Carla Biven teaches fourth grade at Walt Disney Elementary School. She is classified as a P1 with a seniority date of August 20, 2008.

Biven contends that she should be granted an earlier seniority date that reflects her work for the district during the 2007-2008 school year. From September to October 2007, Biven worked as a day-to-day substitute. From about mid-October until Thanksgiving, she worked three days per week as a long-term substitute and as a day-to-day substitute on the other days. She then worked three days per week as a resource specialist for the remainder of the year. Biven taught summer school during the summer of 2008. All of Biven's teaching during the 2007-2008 school year, and during summer school in 2008, was performed on an emergency credential. She received her credential on October 7, 2008, and was granted seniority as a P1 effective August 20, 2008, the first day of that semester.

Biven is not entitled to an earlier seniority date. As noted above in Finding 13, the time that Biven taught on an emergency credential does not count toward seniority. Time spent teaching summer school does not count toward seniority. (Ed. Code, § 44913.) And it appears that Biven did not work 75 percent of the days of the 2007-2008 school year.

15. Jenifer Bertolero is a music prep support teacher at Country Club and Walt Disney Elementary Schools and a teacher at Iron Horse Middle School. She is classified as a permanent employee with a seniority date of August 26, 2004. At this time, Bertolero holds a 1.0 FTE position. Most of that position (0.833 FTE) involves her duties as a music prep support teacher; for the remainder of her 1.0 FTE position, 0.167 FTE, Bertolero teaches middle school, where her duties are unrelated to elementary music prep support. Bertolero presents two claims.

a. Bertolero contends first that her seniority date should reflect her service to the district before August 26, 2004. She taught music during the 2003-2004 school year under an emergency credential. (She also taught during the 2002-2003 school year.) Bertolero received her clear credential on February 17, 2004. It is noted that the district granted

respondent Biven retroactive seniority to the beginning of the school year in which she received her clear credential. (Finding 14.) The district is not obligated to do so, however, and it is the district's policy not to do so unless the teacher worked at least 75 percent of the school days of that year on a clear credential. Bertolero did not work 75 percent of the days of the 2003-2004 school year on a clear credential. She is not entitled to a seniority date earlier than August 26, 2004.

b. Bertolero contends next that she is not subject to layoff from her 0.167 FTE position at Iron Horse Middle School. The evidence established that Bertolero was identified for layoff because of the reductions in the elementary school music prep support program and that her 0.167 FTE middle school teaching assignment is unrelated to her duties in music prep support. The district's resolution does not justify laying off Bertolero from that portion of her 1.0 FTE position that is not associated with elementary music prep support.

16. Kristen Edgren is a fourth grade teacher at Greenbrook Elementary School. She is classified as a P1 with a seniority date of August 20, 2008.

Edgren believes that she should be granted an earlier seniority date based on her service during the 2007-2008 school year. Edgren, however, taught almost all of that year on an emergency credential. She received her clear credential in May 2008. For the reasons set forth in Finding 14a, she is not entitled to retroactive seniority for the 2007-2008 school year.

17. Nanette Wehe holds a 0.5 FTE position teaching music at Windemere Ranch Middle School. She is classified as a permanent employee with a seniority date of August 23, 2006.

Wehe contends that she is entitled to an earlier seniority date. She worked for the district as a temporary employee for the 2005-2006 school year, and again as a temporary for the 2006-2007 school year. She was hired as a probationary employee at the start of the 2007-2008 school year. At that time, the district tacked on her service from the 2006-2007 school year pursuant to Education Code section 44918 and granted her a seniority date of August 23, 2006. Wehe was granted seniority credit for the 2006-2007 school year. No legal basis is apparent, and Wehe cites none, to grant her an earlier seniority date.

Classification issues

18. Angela Corritone holds a 0.4 FTE position as a technology teacher at Hidden Hills Elementary School. The district contends that Corritone is a temporary employee because her position is categorically funded. Nevertheless, the district issued Corritone a layoff notice and served her with the accusation as a "precautionary" measure in the event Corritone contests her status as a temporary employee.

Categorically funded positions are those that are financed outside the district's base revenue limit with funds designated for a use specified by the particular program. (Ed. Code, § 44909; *Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th

838.) Certificated employees in categorically funded programs are treated as temporary employees for layoff purposes and are not entitled to the protections that Education Code sections 44944 and 44955 grant to probationary and permanent employees.

Corritone's position, like all technology positions in the district, is funded entirely by parent contributions that are outside the district's base revenue limit. The parent contributions are distributed to the district by an "educational council" which restricts how the funds may be used. Funds are distributed on a year-to-year basis. Since she started working for the district in November 2005, Corritone has worked each school year under a temporary employment contract and has been released at the end of each year. Corritone has never been employed as a probationary employee. The evidence establishes that Corritone is a temporary employee under Education Code section 44909.

Other matters

19. Respondents who have been classified as temporary employees, and who are deemed by the district to be part of its "Temp Leave Match" program, argue that the district has exceeded its authority in employing temporary teachers. The district, however, may employ certificated employees for an entire school year, and classify them as temporary employees, provided that the number of temporary teachers does not exceed the number of probationary and permanent employees on leave at any one time. (Ed. Code, § 44920; *Santa Barbara Federation of Teachers v. Santa Barbara High Sch. Dist.* (1977) 76 Cal.App.3d 223.) The evidence established that the number of teachers in the Temp Leave Match program does not exceed the number of probationary and permanent employees on leave at any one time.

20. Any other assertions put forth by respondents at the hearing and not addressed above are found to be without merit and are rejected.

21. No permanent or probationary employee with less seniority is being retained to render a service which any respondent is certificated and competent to provide.

22. The cause for the reduction in particular kinds of services relates to the welfare of the district's schools and their pupils.

LEGAL CONCLUSIONS

1. Cause exists because of the reduction of particular kinds of services pursuant to Education Code section 44955 to give respondent Jenifer Bertolero notice only that her services will be reduced from 1.0 FTE to 0.167 FTE for the 2009-2010 school year. (Finding 15b.) This cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

2. Cause exists because of the reduction of particular kinds of services pursuant to Education Code section 44955 to give notice to the remaining respondents that their

services will not be required for the 2009-2010 school year. This cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

ORDER

1. In accordance with Legal Conclusion 1, the district may give notice to respondent Jenifer Bertolero only that her services will be reduced by 0.833 full-time equivalent for the 2009-2010 school year.

2. In accordance with Legal Conclusion 2, , notice may be given to the remaining respondents in 198.697 full-time equivalent positions that their services will not be required for the 2009-2010 school year because of the reduction or elimination of particular kinds of service.

DATED: _____

DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings