

BEFORE THE GOVERNING BOARD
MONTEREY PENINSULA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

113.8 Full-Time Equivalent Certificated
Employees,

Respondents.

OAH No. 2009020830

PROPOSED DECISION

Mary-Margaret Anderson, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Del Rey Oaks, California, on April 16 and 17, 2009.

Sarah Levitan Kaatz, Attorney at Law, Lozano Smith, represented the Monterey Peninsula Unified School District (District).

Michelle A. Welsh, Attorney at Law, Stoner, Welsh & Schmidt, represented all of the Respondents except Colonel Charles W. Hurd, Jr., Alison Leleua, Brian Neal, Beatrice Nguyen, Commander Paul Tanks, George Turner and Irene Valdez.

Respondents Colonel Charles W. Hurd, Jr., and Commander Paul Tanks represented themselves.

No appearance was made by or on behalf of Respondents Alison Leleua, Brian Neal, Beatrice Nguyen, George Turner and Irene Valdez.

The record closed on April 17, 2009.

SUMMARY

The Governing Board of the Monterey Peninsula Unified School District decided to reduce or discontinue particular kinds of services provided by certificated employees for the 2009-2010 school year for financial reasons. The decision was not related to the competency and dedication of the employees whose services were proposed to be reduced or eliminated.

District staff carried out the Board's decision by using a selection process involving review of credentials and seniority, breaking ties between employees with the same first

dates of paid service, and “skipping” teachers with specific qualifications. The selection process complied with Education Code requirements.

FACTUAL FINDINGS

1. Dr. Marilyn K. Shepard filed the Accusation in her official capacity as Superintendent of the District.

2. Respondents¹ are certificated employees of the District.

3. On February 17, 2009,² the Governing Board of the District adopted Resolution No. 08/09-10, in which the Board resolved to reduce or discontinue the following particular kinds of services (PKS) for the 2009-2010 school year and directed the Superintendent or her designee to send notice to certificated employees that their services would be terminated at the end of the 2008-2009 school year:

Elementary School Classroom Teachers (K-3) (Class Size Reduction)	70 F.T.E ³
Elementary School Classroom Teachers (K-6)	10 F.T.E
Counselors	4.0
JROTC	4.0
Librarians	2.0
Elementary Music	3.0
Instrumental Music	5.0
Vocal Music	1.0
Nurses	2.0
School Psychologists	3.0
Industrial Technology	0.4
Construction Technology	0.2
Computer Systems/Maintenance Repair	0.2
<u>Certificated Management</u>	
Director of Categorical Programs	1.0
Middle School Assistant Principals	3.0

¹ Appendix A contains a list of Respondents that remained subject to layoff as of the close of the hearing.

² All dates are in 2009 unless stated otherwise.

³ Full Time Equivalent positions

High School Assistant Principals	2.0
Elementary Principal	1.0
Middle School Principal	1.0
Management Trainee	1.0

Total Full-Time Equivalent Reduction= 113.8 F.T.E

4. The reason for the Board’s resolution was a projected reduced budget for the 2009-2010 school year. The decision to reduce or discontinue the identified services was not arbitrary or capricious.

5. On March 6 the Superintendent gave written notice to Respondents that it had been recommended that notice be given them that their services would not be required for the 2009-2010 school year. All of the Respondents filed timely requests for hearing. All of the Respondents except Irene Valdez, Brian Neal, and Allison Leleua filed timely notices of defense. All jurisdictional requirements of Education Code sections 44949 and 44955 have been met.

6. On proof of compliance with Government Code section 11505 and 11509, the matter proceeded as a default pursuant to Government Code section 11520 against Irene Valdez, Brian Neal, and Allison Leleua.

7. At or before the hearing, the District rescinded the Accusations against the following Respondents, all of whom will be retained for the 2009-2010 school year: Jolene Lange, George Turner, Christina Kliever and Celia Mattos.

Skipping issues

8. A district may deviate from terminating employees in strict seniority order if it demonstrates a specific need to retain junior employees possessing training or experience that more senior employees do not have. (Ed. Code, § 44955, subd. (d).) Accordingly, at the February 17 meeting at which the Board adopted the PKS resolution, it also resolved:

that deviation from layoff or reappointing in order of least seniority shall include the following:

1. Teachers who currently hold a preliminary or clear credential
2. BCLAD⁴
3. Special Education
4. English
5. Mathematics
6. Science

⁴ Bilingual, Crosscultural Language and Academic Development.

9. The District has determined that it will skip holders of BCLAD certificates because it cannot otherwise meet its needs for competent bilingual instruction. The District requires that teachers in its dual language immersion and bilingual classrooms hold a BCLAD. Accordingly, the District intends to skip the following Respondents because they hold BCLAD certificates: Maria Aguilera, Victor Garcia, Kelly Garcia, Mariana Monge, and Katharine Stubbendick. All of them will be assigned to bilingual classes in the 2009-2010 school year and all are appropriately skipped.

10. Respondents Reyna Avalino, Martha Diaz, and Cassie Milam all hold emergency BCLAD certificates and contend that they should also be skipped. The District, however, decided not to skip holders of emergency certificates at this time. This decision was well within the District's discretion, as there are no guarantees that the authorization will be renewed or that the teacher will pass the final tests.

11. Respondents Anthony Klevan and Scott Laxier both assert that they are fluent in Spanish and would be willing to teach a bilingual class. They do not hold BCLAD certificates or emergency BCLAD certificates. As explained above, it is well within the District's prerogative to require its bilingual teachers to hold BCLAD certificates. Although the offers are no doubt appreciated, teachers without such certification have no right to require the District to place them in bilingual positions.

12. The Board's PKS resolution includes the reduction of 4.0 FTE JROTC positions. The District offers JROTC at two high schools: an Army program at one and a Navy program at the other. The District's contracts with the Army and the Navy require that each program be staffed with a minimum of one commissioned and one non-commissioned officer. In order to meet this requirement, the District is required to skip two Respondents who are less senior than two non-commissioned officers: Respondent Col. Hurd and Respondent Cdr. Tanks. They are appropriately skipped.

Tiebreaking issues

13. On February 17 the Board also adopted Resolution No. 08/09-11, which established tiebreaking criteria to be used to determine the order of termination of employees having the same seniority date. In the tiebreaking process, employees are accorded points in five specified criteria. If ties remain after all five criteria are applied, a sixth criterion is used.

14. The District stipulated that Respondent Katherine Stubbendick be granted an additional nine points pursuant to the tiebreaking criteria calculation because she holds a CLAD certificate.

15. The same tiebreaking criteria have been used by the District since approximately 1993 and contain a criterion that is no longer valid. Criterion No. 1(d) awards eight points for participation in the "Plan to Remedy (CLAD)." The Plan to Remedy was

instituted by the state to assist the District to comply with state requirements for teachers to possess a CLAD certificate, but the program expired in 2005 or 2006.

Reyna Avalino, Beth Cina, and Cassie Milam request that they be granted additional points under the tiebreaking criteria because they hold emergency BCLAD certificates and holding such a certificate is similar to participating in the Plan to Remedy. The District disagrees and has decided not to award points for holding emergency certifications. This decision is within the District's discretion and these Respondents are not entitled to additional points.

Attrition considerations

16. Throughout this process, the District has taken into consideration information brought to its attention regarding whether certificated employees would be returning to their positions in the 2009-2010 school year. Prior to issuing preliminary notices, all positively assured attrition was considered. In classifications containing retirements or non-reelections, notices were reduced. Accordingly, it is found that the District properly considered attrition information.

Further, the District asserts that it will continue to apply information as it is received. If the District is certain of a vacancy in a certain position, a final layoff notice will not be issued. And if vacancies occur after layoffs, employees will be called back in seniority order.

Seniority list accuracy

17. Diane Becker was originally hired by the District on July 28, 2005, as a temporary employee in a third/fourth grade combination class. She was hired as a probationary employee beginning December 5, 2005, and remained teaching the same class. She requests her seniority date be changed from December 5, 2005, to July 28, 2005.

18. Michelle Cry was originally hired by the District as a probationary employee in 2001. She taught Kindergarten at Del Monte School until it closed, but does not remember the date of the closure. Cry immediately began working for the District as an independent study teacher. She was paid on an hourly basis and informed that she was a temporary employee. She cannot recall if she was notified of this status annually in writing; sometimes she was provided a copy of a requisition.

On September 17, 2004, Cry resigned due to family reasons. She began working again for the District on November 4, 2005, as an independent study instructor and again was paid on an hourly basis. On July 30, 2008, the District hired Cry as a probationary employee. She requested her seniority date be changed from July 30, 2008, to November 4, 2005.

19. Thomas Gregory began working for the District as a substitute on October 22, 2007. He signed a contract as a probationary employee on November 5, 2007, and remained in the same classroom. He requests his seniority date be changed from November 5, 2007, to October 22, 2007.

20. Deidre Hopkins began working for the District as a substitute on November 8, 2005. She signed a contract as a probationary employee on December 1, 2005, and remained in the same classroom. She requests her seniority date be changed from December 1, 2005, to November 8, 2005.

21. Virginia McCormick asserts that she began working for the District as a long-term substitute in April or May of 2006. She signed a contract as a probationary employee on August 3, 2006. She requests that her seniority date be changed from August 3, 2006, to “about April 1, 2006.”

22. Dionne Meyer began working as a substitute in the District in January of 2007. She began working as a long-term substitute on March 12, 2007, and was hired as a probationary employee on July 30, 2007. She requests that her seniority date be changed from July 30, 2007, to March 12, 2007.

23. Kyra Shugars began working for the District as a long-term substitute on October 17, 2005. She was hired as a probationary employee on January 2, 2006, and stayed in the same position for the remainder of that school year. She requests that her seniority date be changed from January 2, 2006, to October 17, 2005.

24. Christina Vallin began working for the District as a long-term substitute on February 6, 2008, and remained in the same position for the remainder of that school year. She was hired as a probationary employee on July 28, 2008. She requests that her seniority date be changed from July 28, 2008, to February 6, 2008.

Other issues

25. Respondents contend that the reductions in services set forth in the Board resolution will be detrimental to the District, and that it therefore cannot be found, as required by Education Code section 44949, that “the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof.” This contention was made specifically concerning the planned reductions in JROTC, music, and the class size reduction program. It is true that any reduction of service will likely be detrimental, but the District is required to operate in a fiscally sound manner and is facing a serious shortage of funds. There will always be disagreements concerning which programs to cut and how extensive the cuts should be, but these decisions must be made by the Board. In these circumstances and in the absence of a showing that the District acted in an arbitrary or capricious manner, it is necessarily concluded that the service reduction is related to the welfare of the Districts’ schools and its pupils.

26. No certificated employee junior in seniority to any Respondent is being retained by the Board to perform services that any Respondent is certificated and competent to render.

LEGAL CONCLUSIONS

1. All notices and other requirements of Education Code sections 44949 and 44955 have been provided as required. The District has therefore established jurisdiction for this proceeding as to all Respondents.

2. Education Code section 44955 allows a school district to deviate from seniority order in terminating a certificated employee when:

the district demonstrated a specific need for personnel to teach a specific course or course of study . . . and that the certificated employee has special training or experience necessary to teach that course or course of study . . . which others with more seniority do not possess.

Cause was established that the preference given to teachers who hold BCLAD certificates was reasonable and appropriate. The District may exempt from layoff those teachers who have demonstrated that they possess such certificates: Maria Aguilera, Victor Garcia, Kelly Garcia, Mariana Monge, and Katharine Stubbendick.

3. Cause was established by the matters set forth in Finding 12 that the District may also deviate from seniority order pursuant to Education Code section 44955 in effectuating the layoff as regards the JROTC programs. The District may exempt Respondent Col. Hurd and Respondent Cdr. Tanks from layoff.

4. Education Code section 44918 provides that an employee who works as a substitute for at least 75 percent of the school year is deemed to have served a complete school year as a probationary employee if he or she is employed as a probationary employee for the following school year. Cause was established pursuant to this section to change the seniority date of Respondent Diane Becker.

The evidence was insufficient to establish that Respondents Michelle Cry, Thomas Gregory, Deidre Hopkins, Virginia McCormick, Dionne Meyer, Kyra Shugars, and Christina Vallin are entitled to a seniority date change under Education Code section 44918.

5. Cause was established as required by Education Code section 44955 to reduce the number of certificated employees in 113.8 full-time equivalent positions due to the reduction and discontinuation of particular kinds of services. The decisions made relate solely to the welfare of the Districts schools and pupils within the meaning of Education Code section 44949.

6. All contentions made by Respondents not specifically addressed above are found to be without merit and are rejected.

ORDER

1. Notice may be given to Respondents in 113.8 full-time equivalent positions that their services will not be required for the 2009-2010 school year because of the reduction or discontinuation of particular kinds of services.

2. The Seniority Date of Diane Becker shall be changed to July 28, 2005.

DATED: _____

MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings

APPENDIX A- LIST OF RESPONDENTS

1. Frank Aliotti
2. Reyna Avelino
3. Diana Becker
4. Kelly Becker
5. Alyson Berger
6. Jessica Browne
7. Kevin Calvert
8. Beth Cina
9. Katherine Collier
10. Michele Cry
11. Shari Delp
12. Martha Diaz
13. Greta Dobie
14. Heather Fairman
15. Darcy French
16. Karen Germann
17. Thomas Gregory
18. Laura Guerra
19. Marianne Hart
20. Hilary Heath
21. Elizabeth Heff
22. Deidre Hopkins
23. Kiera Hord
24. Jill Jensen
25. Kimberly Jimenez
26. Anthony Klevan
27. Scott Laxier
28. Allison Leleua
29. Anne Madden
30. Virginia McCormick
31. Elizabeth McLeod
32. Michelle Menczkowski
33. Dionne Meyer
34. Cassie Milam
35. Tonya Miller
36. Brian Neal
37. April Nellist
38. Beatrice Nguyen
39. Kathryn Panzeta
40. Jennifer Parker
41. Claire Phillips

42. Rita Richardson
43. Allison Rodrique
44. Michael Sedgwick
45. Kyra Shugars
46. Shannon Spring
47. Dorna Stoken
48. Heayun Surh
49. Irene Valdez
50. Christina Vallin
51. Summer Wright
52. Alejandro Saldivar
53. William Tolles