

BEFORE THE
GOVERNING BOARD
CENTRAL SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2009020857

MEMBERS OF THE CENTRAL
TEACHERS ORGANIZATION
IMPACTED BY THE REDUCTION IN
FORCE, et al.,

Respondents.

PROPOSED DECISION

On April 6, 2009, in Rancho Cucamonga, California, Alan S. Meth, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Margaret A. Chidester, Attorney at Law, represented the Central School District.

Henry M. Willis, Attorney at Law, represented the respondents set forth on Exhibit A attached hereto.

Prior to the hearing, the following respondents withdrew their requests for hearing: Katharine Annigian, Laura Armstrong, Karen Bagnall, Tara Barrington, Amber Brown, Amanda Calzada, Mary Cook, Suellen Crocker, Romania Galloway, Dustin Guerra, Cristina Mathiesen, Brooke Perry, Kristen Roberts, Joanna Schaefer, Karen Sieger, Lindsay Stewart, Jenifer Tamayo, Ruth Urie-Campbell, Brittany Whitesel, and Joann Wiebe.

During the hearing, the District withdrew layoff notices for Yvette Harris and Christina Espinoza.

The matter was submitted on April 17, 2009.

FACTUAL FINDINGS

1. On or about March 13, 2009, Sharon L. Nagel, Superintendent of the Central School District (hereafter, "the District"), made and filed the accusations against respondents in her official capacity.

2. Respondents are certificated employees of the District.

3. Before March 15, 2009, pursuant to Education Code sections 44949 and 44955, the Superintendent notified the Governing Board of the District of the Superintendent's recommendation that respondents be notified their services will not be required for the ensuing school year. The Superintendent's notification to the Board of Education set forth the reasons for the recommendation.

4. On or before March 15, 2009, each respondent was given written notice that the Superintendent had recommended that notice be given to respondents, pursuant to Education Code sections 44949 and 44955, that their services will not be required for the ensuing year. Each written notice set forth the reasons for the recommendation. The notices satisfied the requirements of sections 44949 and 44955. *San Jose Teachers Association, Inc. v. Allen* (1983) 144 Cal.App.3d 627, 632; *Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 803-04, distinguishing *Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, 360-63.

5. Each respondent timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year. Accusations were timely served on respondents, and each respondent filed a timely Notice of Defense. All pre-hearing jurisdictional requirements have been met.

6. The Governing Board of the District took action in Resolution No. 13-08-09 to discontinue the following services for the 2009-10 school year:

- | | | |
|-------|---|-------------|
| (1.1) | 20 Regular Education Teaching Positions | (20 F.T.E.) |
| (1.2) | 1 RSP Position | (1 F.T.E.) |
| (1.3) | 1 SDC Position | (1 F.T.E.) |
| (1.4) | 3 Counseling Positions | (3 F.T.E.) |
| (1.5) | 1 Nursing Position | (1 F.T.E.) |
| (1.6) | 1 Principal Position | (1 F.T.E.) |
| (1.7) | 2 Assistant Principal Positions | (2 F.T.E.) |
| (1.8) | 1 Assistant Superintendent Position | (1 F.T.E.) |

The resolution proposed elimination of a total of 30 full-time equivalent positions.

The resolution exempted from layoff the following certificated personnel who possess:

1. Administrative credentials, who are currently assigned to administrative positions, and who will be assigned to administrative positions for the 2009-2010 school year.

2. A credential authorizing service in language, speech and hearing, and who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2009-2010 school year.

3. A single subject credential authorizing service in mathematics, science, music or physical education, and who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2009-2010 school year.

The services set forth above are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. *California Teachers Association v. Board of Trustees of the Goleta Union School District* (1982) 132 Cal.App.3d 32, 34-37 and cases cited therein. *See also San Jose Teachers Association v. Allen, supra* at 635-38, in which the court specifically rejected the reasoning of *Burgess v. Board of Education* (1974) 41 Cal.App.3d 571; *Zalac v. Governing Board* (2002) 98 Cal.App.4th 838, 853-54.

Furthermore, these services may be reduced because of budgetary difficulties. *Zalac v. Governing Board, supra*, and cases cited therein. The decision to reduce or discontinue the services is neither arbitrary nor capricious but rather a proper exercise of the District's discretion.

7. No certificated employee junior to any respondent is retained to perform services which any respondent is certificated and competent to render.

8. The reduction or discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees of the District as determined by the Governing Board.

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

10. The Governing Board established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. The Governing Board provided the order of termination shall be based on the needs of the District and its students in accordance with the following:

- a. One half point for each year of prior public school experience.
- b. One point for each earned Masters degree.
- c. Two points for each Special Education credential.
- d. Two points for each Subject Matter Authorization.
- e. One point for each Supplementary Authorization.

The Governing Board determined if the criteria listed above do not break a tie, the District will hold a lottery prior to the layoff hearing.

11. The District created a Seniority List which contains employees' seniority dates (first date of paid service), current site, credentials, and authorizations. The District used the Seniority List to develop a proposed layoff and "bumping" list of the least senior employees currently assigned in the two services being reduced. The District then determined whether the least senior employees held credentials in another area and were entitled to "bump" other employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and whether they could "bump" other employees.

12. Respondent Leane Houg holds a multiple subject credential. Her seniority date, that is, the date upon which she first rendered paid service in a probationary position, according to the District's records, at first was listed on the seniority list as August 24, 2006. During the hearing, the date was changed to August 18, 2005. The District's records also reflect a hire date of August 19, 2004. Respondent Houg did not testify at the hearing, and no evidence was offered as to her assignment or her status during the 2004-05 school year.

13. Respondent Hillary Miller holds a multiple subject credential. Her seniority date is also August 18, 2005, and the District's records reflect a hire date of August 19, 2004. Respondent Miller did not testify at the hearing, and no evidence was offered as to her assignment or her status during the 2004-05 school year.

14. Respondent Jaime Pemberton holds a multiple subject credential. Her seniority date is August 23, 2007, and the District's records reflect a hire date of August 24, 2006. Respondent Pemberton did not testify at the hearing, and no evidence was offered as to her assignment or her status during the 2006-07 school year.

15. Respondent Christina Espinoza holds a multiple subject credential. She first began working for the District on August 22, 2002, as a temporary teacher. During the hearing, her seniority date was changed from August 18, 2005, to August 21, 2003, and as a result of this change, the District withdrew its layoff notice.

Respondent Espinoza testified she spoke to Richard Carr, the assistant superintendent of personnel services, during the 2003-04 school year. She testified that Mr. Carr described the progression of teachers from temporary to probationary, and at the end of the school year, she received a letter from him indicating that she would be released at the end of that school year. However, she was rehired for the ensuing school year. Respondent Espinoza testified that she had another meeting with Mr. Carr during that school year in which he said that there was not much movement on the seniority list, that she could not move up until there were retirements or someone left, and that she would remain a temporary teacher. He added, according to respondent Espinoza, that her status could change and she could become

probationary. Respondent Espinoza described a conversation she had with Curtis Fricke, Mr. Carr's successor, in 2006 in which Mr. Fricke also said there was not enough movement on the seniority list to make a teacher probationary. However, he did indicate that some teachers were converted from temporary to probation, depending on the year they were hired.

16. Respondent JoAnna Ambrozich first started working for the District on August 15, 2005, but her first date of probationary service is August 24, 2006. She teaches math and science and two elective courses at Ruth Musser Middle School. She has a multiple subject credential and a subject matter authorization in Introductory English. She does not have a credential or subject matter authorization to teach algebra. She was bumped by Sally Haas, whose seniority date is October 1, 1992, and who possesses a standard elementary credential.

Brittany Whitesel has a seniority date of August 23, 2007, and is therefore junior to Ms. Ambrozich. Ms. Whitesel has a multiple subject credential and a subject matter authorization in mathematics. She currently teaches six classes of math at Cucamonga Middle School, and because of that assignment and her authorization which allows her to teach algebra, the District proposes to skip her.

The District employs Tami Oliveri-Llewellyn who, like Ms. Whitesel, has a multiple subject credential and a subject matter authorization in mathematics. She currently teaches algebra. Her seniority date is September 5, 1985.

Ms. Ambrozich argues that the District could avoid laying her off and skipping Ms. Whitesel if it reassigned Ms. Oliveri-Llewellyn, and the District's failure to reassign her is a violation of Education Code section 44955, subdivision (c).

Ms. Nagel testified that during the 2005-06 school year, Ms. Ambrozich could teach algebra without a math credential or authorization, but under No Child Left Behind, beginning with the 2006-07 school year, she could not do so in a compartmentalized setting. Ms. Ambrozich is, therefore, limited to teaching math under her multiple subject credential in a classroom setting that does not compartmentalize classes.

The District determined that it was necessary to retain teachers who had single subject credentials or subject matter authorizations in, among other fields, math, and Ms. Nagel explained why that was necessary, in part, because of the requirements of No Child Left Behind. For these reasons, the District could deviate from the order of seniority to retain Ms. Whitesel. Furthermore, even a reassignment of Ms. Oliveri-Llewellyn would not have allowed Ms. Ambrozich to retain her position.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter relating to the elimination of 52 full-time equivalent positions exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. Respondents Houg, Miller, and Pemberton argue they were improperly classified as temporary teachers in their initial years with the District before they became probationary teachers. They rely upon the testimony of respondent Espinoza, which they assert demonstrates a policy on the part of the District of not hiring new probationary teachers. Relying on recent case law, they argue the District failed to demonstrate that the District properly classified them as temporary teachers, and they therefore should be treated as probationary teachers as of the first day they began working for the District.

Respondents' argument must be rejected for several reasons. First, respondent Espinoza's testimony does not establish that a policy existed not to hire new teachers as probationary. There is no context in which to place the conversation, and little reason to believe that conversations occurring many years ago accurately portrayed how the District operated. Second, since respondents Houg, Miller, and Pemberton did not testify, and no records regarding their service with the District were introduced into evidence except for the information contained on the seniority list, there is no way to determine whether they were temporary teachers or substitute teachers, how much of the school year they worked, whether they worked in positions that were categorically funded, and so forth.

In the absence of evidence, it cannot be determined if the District violated Education Code section 44920 by hiring more temporary teachers than the number of teachers on leaves of absence. Nor can it be determined if respondents were entitled to credit for their year as temporary teachers pursuant to Education Code section 44918. Indeed, there was no reason for the District to even offer evidence regarding the status of respondents Houg, Miller, and Pemberton.

In contrast to respondents Houg, Miller, and Pemberton, evidence was introduced at the hearing regarding respondents Espinoza and Yvette Harris. Both testified and the District introduced records from their files. As a result of that testimony and file review, the District determined that their seniority dates were incorrect, and changed them accordingly.

In order to ensure that the District properly determined the seniority dates of respondents Houg, Miller, and Pemberton, the District should review its records to see if each was properly notified before the beginning of the school year as to their status for that year, whether any of them might be entitled to receive an additional year of service under Education Code sections 44917 or 44918, or whether the District violated section 44920 at the time they were serving as temporary or substitute teachers.

3. Respondents challenge the Board's resolution that sets forth the tie-breaking criteria and argue it is invalid because it is not rational. The criteria have to meet the requirements of section 44955:

“As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. (See also § 44846.)”

Prior to 1978, ties between teachers who shared the first date of paid service were broken by lotteries, but the system was changed by what was called the Behr Bill. Its purpose, according to the legislative counsel, was “to enable districts to respond efficiently to declining enrollment by laying off the less essential of the certificated staff hired on the same date.” Ozsogomonyan, Teacher Layoffs in California: An Update, 30 *Hast. Law Journal* 1746.

On its face, the criteria set forth in the resolution appear to meet the needs of the district and its students. However, upon closer inspection of the criteria in light of their application to the teachers with the same first date of service, the criteria are deficient. There are only five criteria used to break ties. Of the fourteen teachers who had the same seniority dates as reflected on Exhibit 10, three had prior public school experience, four held masters degrees, two held a special education credential, one had a subject matter authorization, and one had a supplemental authorization. Six of the fourteen received no points, and four of the seven with the seniority date of August 18, 2005 received no points. As a result, the District will be required to hold a lottery.

It is obvious the criteria employed did little to break ties. While none of them can be criticized as being irrational or arbitrary, it must be concluded that in total, the District failed to establish its criteria satisfied the statutory requirement of meeting the needs of the District and its students. A lottery may be used as a last resort, but its use in this case came far too early, after the District failed to consider a number of potential criteria. Such potential criteria might include, for example, Highly Qualified Status under NCLB, possession of an authorization to teach English Language Learners (CLAD/BCLAD), the type of credential (clear, life, standard secondary, preliminary, etc.), credentials in different subject areas, possession of a Doctorate Degree or National Board of Certification, post-secondary credits, resource teacher certification, and so forth.

Consequently, the District is ordered to create additional tie-breaking criteria which meet the needs of the District and its students, and apply those additional criteria to those teachers who had been subjected to the lottery system. The lottery may be employed as a last resort, but by then, there should be very few ties to break by lottery.

4. Cause exists under Education Code sections 44949 and 44955 for the District to discontinue particular kinds of services relating to the 30 full-time equivalent positions. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. A preponderance of the evidence sustained the charges set forth in the Accusation. It is recommended that the Board give respondents notice before May 15, 2009, that their services will no longer be required by the District.

ORDER

1. The District is ordered to create additional tie-breaking criteria which meet the needs of the District and the students thereof, and apply these criteria to those teachers who had been subjected to the lottery under the original tie-breaking criteria.

2. The accusations served on respondents Yvette Harris and Christina Espinoza are dismissed.

3. Regarding respondents Houg, Miller, and Pemberton, the District is ordered to review its records to determine if each was properly notified before the beginning of their school years before they became probationary teachers as to their status for that year, whether any of them might be entitled to receive an additional year of service under Education Code sections 44917 or 44918, or whether the District violated section 44920 at the time they were serving as temporary or substitute teachers, and, if appropriate, to make any changes in their seniority dates.

4. The Accusations served on the remaining respondents are sustained. Notice shall be given to each respondent before May 15, 2009 that his or her services will not be required for the 2009-10 school year pursuant to the Governing Board's resolution because of the reduction of particular kinds of services.

Notice shall be given in inverse order of seniority.

DATED: _____

ALAN S. METH
Administrative Law Judge
Office of Administrative Hearings

Exhibit A

- 1) Ambrozich, JoAnna
- 2) Annigian, Katharine
- 3) Armstrong, Laura
- 4) Bagnall, Karen
- 5) Barrington, Tara
- 6) Brown, Amber
- 7) Calzada, Amanda
- 8) Cook, Mary
- 9) Crocker, Suellen
- 10) Espinoza, Christina
- 11) Galloway, Romania
- 12) Gregoire, Renee
- 13) Guerra, Dustin
- 14) Harris, Yvette
- 15) Houg, Leanne
- 16) Mathiesen, Cristina
- 17) Miller, Hillary
- 18) Pemberton, Jaime
- 19) Perry, Brooke
- 20) Roberts, Kristen
- 21) Schaefer, Joanna
- 22) Sieger, Karen
- 23) Stewart, Lindsay
- 24) Tamayo, Jennifer
- 25) Urie-Campbell, Ruth
- 26) Whitesel, Brittany
- 27) Wiebe, Joann