

BEFORE THE
GOVERNING BOARD
OAK PARK UNIFIED SCHOOL DISTRICT
COUNTY OF VENTURA
STATE OF CALIFORNIA

In the Matter of the Layoffs Of:

Erik Amerikaner and Other
Certificated Employees of the
Oak Park Unified School District,

Respondents.

OAH Case No.: L2009030104

PROPOSED DECISION

Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 9, 2008, in Oak Park, California.

Warren S. Kinsler, Attorney at Law, represented Anthony Knight (Knight), Superintendent of the Oak Park Unified School District (District).

Richard J. Schwab, Attorney at Law, represented Erik Amerikaner (Amerikaner), Tim Chevalier (Chevalier), DJ Cook (Cook), Jessica Curtis (Curtis), Rebecca Custodio (Custodio), Michael Davis (Davis), Ty De Long (De Long), Debi Fries (Fries), Caitlin Fowler (Fowler), Julie Heeney (Heeney), Frances Hermosillo (Hermosillo), Allan Hunt (Hunt), Matt Kracht (Kracht), Dianne Large (Large), Elana Levine (Levine), Monica Mirras (Mirras), Dan O'Brien (O'Brien), Ken Paulson (Paulson), Brenda Pasqua (Pasqua), and Barbara Wechter (Wechter), collectively referred to as Respondents.

The District has decided to reduce or discontinue certain educational services and has given Respondents notice of its intent not to reemploy them for the 2009-2010 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2009-2010 school year.

At the hearing, the District moved to dismiss the Accusation against Respondents Chevalier and Custodio, which motion was granted.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

FACTUAL FINDINGS

1. Superintendent Knight filed the Accusation in his official capacity.
2. Respondents are certificated employees of the District.
3. On March 3, 2009, the Governing Board of the District (Governing Board) adopted Resolution number 09-06, reducing or discontinuing the following services for the 2009-2010 school year:

<u>Service</u>	<u>Full-Time Equivalent Positions</u>
Elementary Music Instruction	2.6
Elementary Counseling Services	1.0
Middle School Drama Instruction	.4
Middle School Technology Instruction	.2
Middle School Instrumental Music Instruction	.4
Middle School Special Education Instruction	1.0
High School Choral Music Instruction	.2
High School Video Production/Theatre Arts Instruction	.4
High School Science Instruction	1.0
High School Mathematics Instruction	1.0
High School Instrumental Music Instruction	.4
High School English Instruction	1.2
High School History/Social Science Instruction	.6
High School Life Skills Instruction	.2
High School Academic Decathlon Services	.1
High School Special Education Instruction	1.0
Secondary Counseling Services	2.0
ROP Computer Instruction	.5
ROP Athletic Training	.4
ROP Millwork, Cabinet-making & Drafting	<u>.5</u>
Total	15.1

4. On March 3, 2009, Superintendent Knight notified the Governing Board the he recommended that notice be given to Respondents that their services will not be required for the 2009-2010 school year due to the reduction or discontinuance of particular kinds of services.

5. On or about March 11, 2008, the District provided notice to Respondents that their services will not be required for the 2009-2010 school year due to the reduction of particular kinds of services. The notices sent to Respondents Amerikaner, Paulson, and Pasqua were designated as “precautionary,” in the event that it was determined, after hearing, that they were probationary employees and not temporary as designated by the District.

6. In order to simplify the process for teachers and administrators, the notice provided by the District was included in a single “packet,” which contained the documents required by Education Code sections 44949 and 44955, as well as those required by Government Code section 11500 et seq. In a Notice of Accusation, the District informed Respondents that unless they requested a hearing by March 25, 2009, the Board may proceed on the Accusation without a hearing. A form entitled “Request for Hearing/Notice of Defense” was enclosed for Respondents’ use, if desired. The time for requesting a hearing was determined by adding the seven days allowed for requesting a hearing and the five days permitted for the filing of a notice of defense.

7. On March 17, 2009, Respondent Chevalier requested a hearing by submitting the District-provided “Request for Hearing/Notice of Defense.” On the same date, Respondents Curtis, Custodio, Davis, Fries, Heeney, Hermosillo, Hunt, Kracht, Large, Mirras, O’Brien, and Wechter submitted individual documents entitled “Request For Hearing,” which stated in printed text, which was the same on all the documents: “I hereby request a hearing to determine whether there is cause to not re-employ me for the 2009-2010 school year.” All of the requests for hearing were timely submitted.

8. On March 18, 2009, Respondent Chevalier filed a separate notice of defense by submitting the District-provided “Request for Hearing/Notice of Defense.” On March 17, 2009, Respondents Curtis, Custodio, Davis, Fries, Heeney, Hermosillo, Hunt, Kracht, Large, Mirras, O’Brien, and Wechter submitted individual documents entitled “Notice of Defense,” which stated, in text identical in all the documents, that the employee requested a hearing, that the employee objected to the accusation in that it did not state acts or omissions upon which the District may proceed, and that the employee objected to the form of the accusation. All of the notices of defense were timely submitted.

9. On March 17, 2009, Respondent’s counsel filed a “Joint Notice of Defense” on behalf of all Respondents, specifically requesting a hearing and raising other defenses to the accusations. Respondents were entitled to rely on the District’s statements contained in its Notice of Accusation and other documents served on Respondents, set forth in factual finding number 6, and the joint notice of defense constitutes the timely request for hearing and notice of defense for Respondents Amerikaner, Cook, De Long, Fowler, Levine, Paulson, and Pasqua, as well as duplicative ones for the Respondents who submitted their individual documents, as set forth in factual finding numbers 7 and 8.

10. All prehearing jurisdictional requirements have been met.

11. The services set forth in factual finding number 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.¹

12. The decision by the Governing Board to reduce or discontinue the services set forth in factual finding number 3 is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

13. Given the anticipated lack of funding and its impact on the District's ability to carry out its educational mandate, the reduction of services set forth in factual finding number 3 is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

14. In determining the number of final layoff notices to issue, the District expects to take into account the possible retirements or resignations of three or four certificated employees.

15. On February 17, 2009, the Governing Board adopted Resolution No. 09-02, setting forth the criteria to determine seniority among employees who first rendered paid service in a probationary position on the same date (tie-breaking criteria). The tie-breaking criteria are reasonable as they relate to the skills and qualifications of certificated employees. Moreover, the District properly utilized the criteria to break ties involving Respondents.

16. Application of the tie-breaking criteria impacted employees with a seniority date of August 27, 2007, including several Respondents. Respondent Curtis holds a preliminary single subject (English) credential and an authorization in social studies. Respondents Amerikaner, Chevalier, Custodio, De Long, and Fowler, and retained employees Stephanie Walker-Sean and Jan Willis (Willis), were all ranked ahead of Respondent Curtis in the seniority list because they hold clear credentials, which credentials are ranked above preliminary credentials in the tie-breaking criteria.

17. Respondent Curtis challenges her seniority date. She started working on August 24, 2007, when she was required to participate in a mandatory orientation meeting for all new employees. She is credentialed and competent to teach high school English, a service Willis has been retained to perform.

18. Respondent Mirras, who holds a preliminary single subject (math) credential,

¹ All further references are to the Education Code.

also challenges her assigned seniority date of August 25, 2008. She attended a curriculum conference on August 11, 2008, for which she was paid her regular salary. However, even with the earlier seniority date, Respondent Mirras is the most junior math teacher in a service reduced by 1 FTE position.

19. Respondent Kracht, whose seniority date is August 30, 2004, holds a single subject credential (biological sciences) and authorizations in chemistry and geological sciences. He taught high school science, a service that suffered a 1 FTE reduction.

20. Respondents Amerikaner, Paulson, and Pasqua did not appear at the hearing. The District has designated them as temporary employees for that portion of their assignment that involves teaching in ROP subjects being discontinued. No evidence was presented to establish that they were certificated and competent to render a service a more junior employee was retained to render.

21. Except for the possible exception of Respondent Curtis, no certificated employee junior to any Respondent was retained to render a service which any of the Respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 10.

Respondents argue that the process utilized by the District in providing all required documents in a single step is not authorized by section 44949 and, therefore, jurisdiction does not exist. They correctly point out that the statute provides for a two-step process. Thus, section 44949, subdivision (a), provides for a notice of non-reemployment; section 44949, subdivision (b), requires the employee to request a hearing within seven days of service of the notice; and section 44949, subdivision (c)(1), requires that, “In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with [the Administrative Procedure Act] . . . except that . . . [t]he respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.”

Section 44949 does not contain a specific penalty for deviation from the two-step process. It does state, in subdivision (c)(3), that “[n]onsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial.”

In this case, the District has afforded Respondents all procedural safeguards and

complied with all requirements found in section 44949. The District provided Respondents with all required notices and documents, and afforded them the opportunity to request a hearing and to file a notice of defense. They were allowed the statutory time to file the required documents. Moreover, the merging of the two steps into one can at most be characterized as a “nonsubstantive procedural error,” and no prejudice to any Respondent has been established. No Respondent testified about any confusion or apprehension about the process. More importantly, no Respondent was deprived of the opportunity to be heard. The seven Respondents who did not individually reply to notices, Amerikaner, Cook, De Long, Fowler, Levine, Paulson, and Pasqua, were protected by the joint notice of defense filed by counsel. Accordingly, Respondents’ argument is unpersuasive and jurisdiction exists in this matter.

2. The services listed in factual finding number 3 are particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 3 and 11.

3. Cause exists under sections 44949 and 44955 for the District to reduce or discontinue the particular kinds of services set forth in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 21.

4. The seniority date of a certificated employee is defined as the date the employee “first rendered paid service in a probationary capacity.” (§ 44845.) If the date on which the employee first rendered paid service in a probationary capacity is incorrect, the employee’s seniority date may need to be adjusted to reflect the earlier first date of probationary service. (*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1273.) Respondent Curtis’ correct seniority date is August 24, 2007, because she actually first rendered paid service on that date. She was required to attend new employee orientation and received her regular salary. This new seniority may impact her retention, depending on whether Willis also attended the mandatory new employee orientation. Inasmuch as no evidence was received regarding Willis, the order is contingent on such information being provided to the Governing Board.

5. Cause exists to terminate the services of Respondents Amerikaner (.5 FTE), Cook (.6 FTE), Davis, De Long (.6 FTE), Fries, Fowler (.6 FTE), Heeney, Hermosillo (.6 FTE), Hunt (.4 FTE), Kracht, Large, Levine (.8 FTE), Mirras, O’Brien, Paulson (.5 FTE), Pasqua (.4 FTE), and Wechter (.2 FTE), for the 2009-2010 school year due to the reduction of particular kinds of services, by reason of factual finding numbers 1 through 21, and legal conclusion numbers 1 through 3.

ORDER

1. The Accusation is sustained in part with respect to Respondent Curtis, and she may be notified that her services will not be needed during the 2009-2010 school year due to the reduction of particular kinds of services, but only if Willis has a seniority date of August 24, 2007. Absent a commensurate change in Willis' seniority date, Respondent Curtis shall be retained for the 2009-2010 school year.

2. The Accusation is sustained and the District may notify Respondents Erik Amerikaner, DJ Cook, Michael Davis, Ty De Long, Debi Fries, Caitlin Fowler, Julie Heeney, Frances Hermosillo, Allan Hunt, Matt Kracht, Dianne Large, Elana Levine, Monica Mirras, Dan O'Brien, Ken Paulson, Brenda Pasqua, and Barbara Wechter that their services, or some of their services, will not be needed during the 2009-2010 school year due to the reduction of particular kinds of services.

DATED: _____

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings