

BEFORE THE GOVERNING BOARD OF THE  
FAIRFIELD-SUISUN UNIFIED SCHOOL DISTRICT

In the Matter of the Non-Reemployment of  
Certain Certificated Employees

OAH No. 2009030198

**PROPOSED DECISION**

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Fairfield, California, on April 22, 2009.

Sandra Woliver and Ingrid A. Scherschel, Attorneys at Law, Miller Brown & Dannis, 71 Stevenson Street, Nineteenth Floor, San Francisco, California, represented the Fairfield-Suisun Unified School District.

David Weintraub, Attorney at Law, Beeson, Taylor & Bodine, 1404 Franklin Street, Fifth Floor, Oakland, California, represented all respondents listed on Attachment A except those specified in Factual Finding 3.

The record was held open in order to allow the district to submit a reply to respondents' motion to dismiss. That reply was received on April 29, 2009, and was marked as Exhibit 5 for identification. The matter was deemed submitted for decision on April 29, 2009.

**RULING ON MOTION TO DISMISS**

Respondents move to dismiss the accusations filed against them on the grounds they have been denied statutory due process rights. In particular, respondents contend that the district failed to provide teachers' assignments and titles until two days before the hearing, thereby depriving them of sufficient opportunity to evaluate whether there were available positions into which they could have been assigned. Respondents point out that a number of junior teachers who hold both a Multiple Subject credential and additional authorizations in specific subjects are being retained while senior teachers holding only a Multiple Subject credential are being terminated. Respondents assert they have not been provided sufficient information to determine whether a junior teacher will, in fact, be retained in a position for which a senior teacher is credentialed and competent.

The district maintains it has provided respondents with all information that must be provided pursuant to Education Code sections 44949 and 44955, and that there is no statutory requirement that respondents provide the specific assignments for each retained teacher for the subsequent school year, since much of that information is yet unknown.

Respondents' motion to dismiss is denied. The district has complied with all statutory requirements. It was not shown that respondents have been deprived of their statutory due process rights.

### FACTUAL FINDINGS

1. On March 12, 2009, the governing board of the Fairfield-Suisun Unified School District adopted Resolution No. 27-0809 (Revised), in which the board resolved to reduce or eliminate 286.43 specified particular kinds of services for the 2009-2010 school year and directed the superintendent or his designee to send appropriate notice to employees whose positions might be lost by virtue of this action. Pursuant to subsequent revisions, the district currently intends to reduce or eliminate the following particular kinds of services:

PARTICULAR KINDS OF SERVICES	NUMBER OF FULL TIME EQUIVALENT POSITIONS
K-12 Academic Support Teachers	7.4 FTE
K-12 BTSA/Consulting Teachers	3.0
K-3 Class Size Reduction	26.0
K-6 Classroom Teachers	10.0
K-6 Music	20.5
K-6 Computers	1.0
K-6 Librarians	5.0
K-12 Counselors	9.8
7-12 English	3.4
K-12 P.E. (K-6 P.E. combined with 7-12 P.E.)	22.13
9-12 Business	2.0
9-12 Home Economics	1.0
Teacher School Readiness	0.5
Orientation and Mobility Specialist	0.5
Coordinator of School Readiness	0.5
Coordinator of Curriculum & Assessment	<u>1.0</u>
<b>TOTAL</b>	<b>113.73 FTE</b>

2. By letter dated March 13, 2009, the superintendent's designee gave written notice to approximately 310 certificated employees that, pursuant to Education Code sections 44949 and 44955, it was being recommended that their services would be reduced or eliminated for the 2009-2010 school year.

3. Each of those 310 employees who subsequently filed a timely request for hearing was served with an accusation packet. Some of the employees served with accusations filed notices of defense; others did not. At various points during the process the district rescinded the accusations and/or layoff notices sent numerous employees. Each employee who remained a respondent in this proceeding at the time the hearing commenced is listed in Attachment A.

Except for respondent Jereme Davis, those individuals whose names are preceded on Attachment A by two asterisks did not file notices of defense and were neither present nor represented at the hearing.

The following respondents filed notices of defense but were neither present nor represented at the hearing: Carlo Co, Gail Dubow-Young, Mary Iannerelli, Katie Kilts, Marlene Long, Mireya Lopez, Benjamin Lucchese, Vincent Pituzlo, and Golden Vansant.

Jereme Davis and all remaining respondents were represented by Mr. Weintraub.

4. It was stipulated that all notices were timely and properly served and that all notices and other requirements of Education Code sections 44949 and 44955 have been provided or satisfied.

5. The reductions were based on the district's financial situation. As a result of the state budget crisis, the district is projecting a budget deficit of approximately \$16 million for the 2008-2009 and 2009-2010 school years. Considering this, the reductions are in the interest of the schools and their pupils.

6. During the course of the hearing, the district rescinded the layoff notices and accusations sent to respondents Clayton Hughes, Stinn McDaniel, Jeannie Mena, Tamara Moore, Sarah Parker, Brian Swetland, Kelly Thomsen, Raymond Stuckey, and Joseph Waddles. Each of these employees will be retained for the 2009-2010 school year.

7. A number of respondents who possess only a Multiple Subject credential and who are currently assigned to teach elementary school contend that a number of junior elementary school teachers are being improperly retained over them. Those junior teachers each hold both a Multiple Subject credential and an additional authorization in another subject such as English, History, Science, or Social Science. However, each of the junior teachers will be reassigned to teach within their additional authorizations at middle school. None will be assigned to teach elementary school. Those junior teachers are properly being skipped.

8. Respondent Victoria Vance-Toet is shown on the district's seniority list as a Prob 1 employee with a seniority date of October 27, 2008. It was stipulated that Vance-Toet's correct seniority date is October 23, 2007, and that she is properly classified as a Prob 2 employee.

9. Respondent Michael Wang-Belt challenges his seniority date of February 11, 2009. Wang-Belt was employed under a temporary contract from August 14, 2008, through December 19, 2008. He was subsequently employed as a long-term substitute from January 5, 2009, until February 11, 2009, when he was hired as a probationary employee to serve in the classroom in which he had been a long-term substitute.

Education Code section 44918 provides that a temporary or substitute employee who serves for at least 75 percent of a school year shall be deemed to have served a complete year as a probationary employee if s/he is employed as a probationary employee for the following school year. While conceding the literal language of section 44918 does not apply to him since all his service has been within a single school year, Wang-Belt argues his situation is analogous to that described in section 44918 and that he should therefore be given a seniority date of August 14, 2008.

Neither section 44918 nor any other provision of the Education Code supports Wang-Belt's theory of "tacking" temporary and substitute service to probationary service within a single school year. His seniority date is correctly determined to be February 11, 2009, his first date of paid service as a probationary employee.

10. A number of respondents assert that they are entitled to earlier seniority dates than shown on the district's seniority list either because they were required to report on an earlier date or because they attended "mandatory" training prior to the date shown on the seniority list. The parties have agreed that these issues will be resolved by asking the employees' principals if the employees were required to report on an earlier date. If an employee's principal agrees this was the case the employee will be entitled to an earlier seniority date. If the principal does not agree, the issue will be resolved through a joint committee of the district and the teachers' union. Because this issue affects only rehire rights, the process need not be concluded before the board's final action in this proceeding.

11. Respondent Cris Shupin is an Orientation and Mobility Specialist, teaching blind and visually impaired students pursuant to their Individualized Education Programs. Shupin holds a Clinical Rehabilitation Services credential. Although her credential does not entitle her to teach in Special Education classes, the students she serves are in the district's Special Education program. Shupin is the district's least senior Orientation and Mobility Specialist. Her position is being reduced from 1.0 to 0.5 FTE.

The board's Resolution No. 27-0809 (Revised) provides that in effecting the specified reductions in services, the district is entitled to skip employees who possess the training, experience or competency "necessary to teach specific courses or courses of study or to provide specific services, which others with more seniority do not possess[.]" One of the groups of employees to be skipped was identified as "Special Education."

Shupin asserts she was the only Special Education teacher not to be skipped, and that this occurred because she is “a victim of retaliation.” Shupin maintains that during the past year she has had conflicts with her supervisor over the way she has been permitted to do her job, over other employees she believes are not doing their jobs, and because of her belief that the Special Education Department is not creating guidelines for blind and visually impaired students. Shupin also asserts that under the holding in the recent case of *Hildebrandt v. St. Helena Unified School District* (2009) 172Cal.App.4th 334, a district is not permitted to reduce a 1.0 FTE position to a partial position; it can only cut an entire position.

The district maintains that the board’s authorization to skip teachers qualified in the Special Education program does not preclude the district from cutting specified services within the program, that respondent is not entitled to be retained as a Special Education teacher since she does not have a credential entitling her to such a position, that respondent has failed to demonstrate she is a victim of retaliation, and that *Hildebrandt* does not preclude a district from making a partial cut in a position.

Shupin’s assertions are rejected. While Shupin may have had some conflicts with her supervisor, there is insufficient evidence to show her position is being reduced out of retaliation. As to skipping, even if a district generally skips employees qualified to provide Special Education services this does not stop the district from reducing or eliminating a specific service or services within the program. And if an employee who loses his or her position as a result of that reduction is not credentialed and competent to provide another service then that employee need not be skipped. Finally, the court in *Hildebrandt* did not hold that a district cannot reduce a position to less than 1.0 FTE. The question in that case was whether a part-time employee subject to layoff was entitled to “bump” into a portion of a junior full-time employee’s position. The court held that a district could reasonably define a particular service as a full-time position and that if it did so the part-time employee did not have the right to force the district to divide the position. But nothing in the court’s holding indicated that a district could not choose to reduce a full-time position to a part-time one.

12. Any contentions raised by respondents and not discussed above are found to be without merit and are hereby rejected.

13. No junior employee is being retained to render a service that any of the respondents are certificated and competent to provide.

## LEGAL CONCLUSIONS

Cause for the elimination of 113.73 FTE positions exists in accordance with Education Code sections 44949 and 44955. Except as to those employees listed in Factual Finding 6, cause further exists to give respondents notice that, to the extent shown in the layoff notices sent them, their services will not be required for the 2009-2010 school year.

This cause relates to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

ORDER

1. Notice may not be given respondents Clayton Hughes, Stinn McDaniel, Jeannie Mena, Tamara Moore, Sarah Parker, Brian Swetland, Kelly Thomsen, Raymond Stuckey, and Joseph Waddles that their services will not be required for the 2009-2010 school year.

2. Notice may be given the remaining respondents that, to the extent shown in the layoff notices sent them, their services will not be required for the 2009-2010 school year.

DATED: \_\_\_\_\_

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MICHAEL C. COHN  
Administrative Law Judge  
Office of Administrative Hearings