

BEFORE THE
COUNTY SUPERINTENDENT OF SCHOOLS
SAN DIEGO COUNTY OFFICE OF EDUCATION
STATE OF CALIFORNIA

In the Matter of the Layoff/Accusation
Against:

OAH No. 2009030208

27 CERTIFICATED EMPLOYEES,

Respondents.

PROPOSED DECISION

This matter came on regularly for hearing before Roy W. Hewitt, Administrative Law Judge, at San Diego, California on April 10, 2009.

Ricardo J. Soto, Esq. and Eran M. Bermudez, Esq. of the Law Offices of Best, Best & Krieger represented the San Diego County Office of Education (the Office of Education).

During the course of the hearing the Office of Education withdrew the preliminary layoff notices served on Elma Vigilia and Silva Cristobal.

Of the 49 certificated employees served with Preliminary (March 15th) Notices of Layoff, the following 27 certificated employees (respondents) requested a hearing and filed Notices of Defense:

- | | |
|------------------------|------------------------|
| 1. Jason Beedle | 15. Scott Kreinberg |
| 2. Pamela Berlinguette | 16. Matheno Landers |
| 3. Nancy Black | 17. Jose Lopez |
| 4. David Crockee | 18. Cheryl Lynch |
| 5. Clifton Davis | 19. Dionne Marijana |
| 6. Roberto Diaz Jr. | 20. Charles Muhammad |
| 7. Valentin Escanuela | 21. Jennifer Pierno |
| 8. Michael Fenick | 22. Natalie Priester |
| 9. Valentina Franco | 23. Aimee Trevino |
| 10. Nathan Head | 24. Petia Tuisalogo |
| 11. Damien Hembree | 25. Gladly Whitehead |
| 12. Stephen Keiley | 26. Stephen Williams |
| 13. Daniel Khameelah | 27. Denise-Renee Young |
| 14. Tim Kobayahsi | |

Fern M. Steiner, Esq. of Tosdal, Smith, Steiner & Wax, represented 26 of the 27 respondents who filed Notices of Defense. One of the 27 respondents, Nancy Black, represented herself.

Oral and documentary evidence was received and the matter was submitted on April 10, 2009.

FACTUAL FINDINGS

1. On March 4, 2009, the County Superintendent of Schools received the Assistant Superintendent's recommendation, with regard to the ensuing school year, that the Superintendent reduce or eliminate particular kinds of services (PKS) provided by the Office of Education for the 2009-2010 school year.

2. On March 4, 2009, the County Superintendent of Schools adopted Executive Order number 02-08-09, determining that it would be necessary to reduce or discontinue PKS at the end of the current school year. The County Superintendent of Schools determined that the PKS that must be reduced for the 2009-2010 school year were the following full time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
Juvenile Court and Community School Programs	
Teacher	25
Resource Teacher	5
Reading Specialist	1
Principal	8
Vice-Principal	2
Coordinator	3
Director	1
Sr. Director	2
Outdoor Education Program	
Teacher	1
Principal	1
Migrant Education Program	
Teacher	0.49

CTAP-IVIE Awards Program

Resource Teacher	1
Total FTE positions to be reduced or eliminated	<hr/> 50.49

The parties do not dispute the fact that the services listed above are PKS, which may be reduced or discontinued within the meaning of Education Code section 44955.

3. The recommendation and the decision to reduce or discontinue the services listed in Finding 2, above, were neither arbitrary nor capricious; rather, the recommendation and decision were due to budget shortfalls and deficits that are projected to equal \$2.66 million dollars for the 2009-2010 school year (Exh. 20). Thus, the Superintendent's decision represents a proper exercise of his discretion.

4. The reduction and discontinuation of services is related to the welfare of the Office of Education and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Superintendent.

5. The Superintendent designated the respondents, permanent or probationary teachers employed by the Office of Education, by creating a seniority list, first selecting teachers to be laid off in the inverse of the order in which they were employed, then assigning and reassigning employment in such a manner that all employees to be retained will be retained so as to render any service which their seniority and qualifications entitle them to render.

6. By March 15, 2009, all respondents affected by the layoffs received written notice notifying them that pursuant to Education Code sections 44949 and 44955, "their services will not be required for the 2009-10 school year." (Exh. 8.) Along with the written layoff notices, respondents were also served with a blank "Request for Hearing." Additionally, the layoff notices advised respondents that they must file their requests for hearing with the Executive Director of the Department of Human Resources "no later than ten (10) days from the date of this preliminary notice," and that, "If you fail to request a hearing in a timely manner, your failure to do so shall constitute a waiver of your right to a hearing." (Exh. 8.)

7. On March 30, 2009, the Executive Director of the Department of Human Resources, San Diego County Office of Education, made and filed an accusation in her official capacity. That same date, the accusation, a blank notice of defense, a notice of hearing and copies of Education Code sections 44949 and 44955 and Government Code sections 11505, 11506, 11507.5, 11507.6, and 11507.7 were served on respondents.

8. The 27 respondents whose names are listed in the introductory portion of this Proposed Decision timely submitted their notices of defense requesting a hearing to determine if cause exists for not re-employing them for the ensuing year.

9. Each respondent who requested a hearing and filed a Notice of Defense was properly noticed of the date, time and place of the instant hearing.
10. All prehearing jurisdictional requirements were met.
11. Respondents are certificated employees of the Office of Education.
12. As part of the overall reduction in PKS, the Office of Education is releasing its temporary certificated employees. As a general rule, the Office of Education releases all temporary certificated employees prior to releasing probationary or permanent certificated employees.
13. The following concerns were raised during the hearing:
 - a. “There is an issue as to whether the [Office of Education] properly classified some of the named Respondents as temporary employees pursuant to Education Code §1294.1” and “The misclassification would affect their status and seniority date;” and,
 - b. Two employees who were “skipped” pursuant to Education Code section 44955, subdivision (d) should not have been skipped because there are other more senior employees who are qualified and willing to teach the Outdoor Education Program these less senior employees are currently teaching.

In connection with these concerns:

- a. The Office of Education did employ temporary employees pursuant to Education Code section 1294.1. Education Code section 1294.1 provides, in pertinent part:
 - “(a) Notwithstanding any other provision of this code, a county superintendent of schools may employ substitute or temporary employees in a position requiring certification requirements to serve for periods of less than one year to provide instructional and related educational services in county community schools operated pursuant to Chapter 6.5 (commencing with Section 1980) of Part 2 and juvenile court schools operated pursuant to Article 2.5 b (commencing with Section 48645) of Chapter 4 of Part 27 if a temporary increase in enrollment exists.
 - (b) The number of employees hired under this section shall not exceed the number necessary to accommodate the temporary increase in enrollment and shall not increase established class size or pupil-to-teacher ratios, or both.

* * *

(e) For purposes of this section, a temporary increase in enrollment exists when the number of pupils enrolled is more than the average enrollment of the preceding two fiscal years prior to the year in which the substitute or temporary employee was hired under this section.”

Respondents contend that:

“The Office has hired employees pursuant to section 1294.1 for periods equal to or more than one year. Additionally, it does not appear that the Office had a temporary increase in enrollment on occasion[s] when it hired employees pursuant to section 1294.1 in the 2004-2005, 2007-2008 and 2008-2009 school years. Accordingly, any employee hired when the provisions of section 1294.1 were not met, was improperly classified as a substitute or temporary employee rather than probationary or permanent employee. The seniority dates would be affected by the misclassification. (Exhibit 22.)”

However, whether there was an increase in *enrollment* was not established. There was evidence that there was a decline in Average Daily Attendance (ADA); however, there was testimony that there is not a direct correlation/relationship between ADA and enrollment. Therefore, the evidence of a decline in ADA is insufficient to establish a corresponding decline in enrollment.

Even assuming *arguendo* that respondents are correct, an adjustment in seniority dates to reflect credit for temporary employment would not allow any respondents who are impacted by the correction to avoid being laid off as a result of these proceedings. All of the employees who are impacted by the 1294.1 issue teach in the Juvenile Court and Community School (JCCS) Program. If an adjustment in seniority dates were made based on respondents’ 1294.1 contention, then the most senior of the employees impacted by the corrections, Stephen Keily, would have his seniority date changed from 10/2/2002 to 7/1/2002. The lay off list, however, cuts deeper than 7/1/2002. The most senior employee on the JCCS Program lay off list, Silva Cristobal, has a seniority date of 6/13/2002. Consequently, although the Office of Education may want to revisit this classification issue in the future, the issue does not impact the lay offs in the instant proceedings.

b. Two employees, Scott Riddick and Susanne Beattie, who are certificated personnel currently assigned to the Outdoor Education Program were “skipped” pursuant to Education Code section 44955, subdivision (d) based on the following “skipping” criteria:

“6. It will be necessary to retain certificated employees who possess special training and competency that other certificated employees with more seniority might not possess, including but not limited to the following:

* * *

c. Certificated personnel who are currently assigned to the Outdoor Education Program, and who will be assigned to the Outdoor Education Program for the 2009-2010 school year;" (Exhibit 4)

The Outdoor Education Program is offered to fifth and sixth grade elementary students, and consists of the following activities: Ecology awareness, life sciences (plant and animal studies); earth science (geology, weather, and astronomy); outdoor skills (orienting, survival, and Native American Lore); and crafts (wood, rock, miniature forest). Students who participate in the program "become amateur scientists when exploring, discovering, collecting, recognizing problems, planning, cooperating, testing, investigating and evaluating." (Exh. 26.)

Testimony during the hearing established that a Multiple Subject Teaching Credential is necessary to teach the Outdoor Education Program. Additionally, employees who teach the Outdoor Education Program must have experience with the "outdoor environment and teaching elementary age school children" in an outdoor environment. The job announcement for the position of Outdoor Education Teacher with the Office of Education states that the program consists of "several science outreach programs that include the outdoor school program, marine science floating lab, splash science mobile lab and 'green machine' mobile classroom." (Exh. 24.) Applicants for the position "must have the ability to: write and teach effective outdoor education lesson plans to elementary students; design and implement effective pre and post testing materials to confirm curriculum is designed and delivered effectively; conduct periodic in-service training for classified staff to improve/develop instructional skills; implement appropriate disciplinary procedures; communicate effectively orally and in writing; work with students from diverse ethnic backgrounds. Applicants must be physically capable of leading extended mountain hikes. Ability to work evenings and overnight." (Exh. 24.)

Testimony further established that certain multiple subject certificated respondents with more seniority than one of the "skipped" Outdoor Education Program teachers, Scott Riddick (seniority date: 8/27/2008), were not asked about their experience to teach elementary school children in an outdoor environment. Those respondents, who expressed an interest in teaching the Outdoor Education Program, were as follows: Matheno Landers (seniority date: 9/19/2006); Khameelah Daniel (seniority date: 2/9/2005); Denise-Renee Young (seniority date: 11/8/2004); and Charles Muhammad (seniority date: 9/15/2003).¹ Consequently, the decision to skip Scott Riddick is problematic. If any of the four respondents listed above have the necessary outdoor/environmental experience, in addition to their multiple subject certifications, to teach the Outdoor Education Program they can properly "bump" the less senior Riddick. At this stage of the proceedings, it is not known if any of the above-listed four more senior employees are competent to "bump" Riddick; therefore, the four listed employees cannot be served final notices.

¹ None of these respondents is more senior than the other "skipped" employee, Susanne Beattie (seniority date: 8/15/2002). Consequently, Susanne Beattie was properly "skipped."

14. With the exception of the four respondents listed in Finding 13, above, the services of no permanent employee are being terminated while any probationary employee, or any permanent employee with less seniority, is being retained to render services which such permanent employee is certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the instant proceedings exists pursuant to Education Code sections 44949 and 44955, and all notices and other requirements of those sections have been provided, as required.

2. The services listed in Factual Finding 2 are PKS that can be reduced or discontinued under Education Code section 44955. The Office of Education's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

3. Based on the Factual Findings, considered in their entirety, cause exists to reduce the number of certificated employees of the Office of Education by 50.49 FTE positions, due to the budget crisis described in Factual Finding 3.

4. Cause to reduce or discontinue services relates solely to the welfare of the Office of Education's schools and pupils within the meaning of Education Code section 44949.

5. With the exception of respondents Matheno Landers, Daniel Khameelah, Denise-Renee Young, and Charles Muhammad, no junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

6. Based on Factual Finding 13, subdivision (b), and Legal Conclusion 5, the respondents listed in Finding 13 and Conclusion 5 may not be notified that their services will not be needed during the 2009-2010 school year.

7. As set forth in the introductory portion of this proposed decision, the Office of Education withdrew the preliminary layoff notices served on Elma Vigilia and Silva Cristobal.

8. Based on the clarification set forth in Legal Conclusion 5 and the modification set forth in Legal Conclusion 6, above, cause exists to notify the remaining respondents that their services will not be needed during the 2009-2010 school year due to reduction or discontinuance of PKS.

ADVISORY DETERMINATION

WHEREFORE, THE FOLLOWING ADVISORY DETERMINATION is hereby made:

1. The Accusation is sustained, in part. The Office of Education shall notify the following 23 respondents that their services will not be needed during the 2009-2010 school year due to lack of funds and the resulting need to reduce or discontinue PKS:

- | | |
|------------------------|----------------------|
| 1. Jason Beedle | 13. Tim Kobayahsi |
| 2. Pamela Berlinguette | 14. Scott Kreinberg |
| 3. Nancy Black | 15. Jose Lopez |
| 4. David Crockee | 16. Cheryl Lynch |
| 5. Clifton Davis | 17. Dionne Marijana |
| 6. Roberto Diaz Jr. | 18. Jennifer Pierno |
| 7. Valentin Escanuela | 19. Natalie Priester |
| 8. Michael Fenick | 20. Aimee Trevino |
| 9. Valentina Franco | 21. Petia Tuisalogo |
| 10. Nathan Head | 22. Gladly Whitehead |
| 11. Damien Hembree | 23. Stephen Williams |
| 12. Stephen Keiley | |

2. The Accusation is dismissed as to respondents Matheno Landers, Daniel Khameelah, Denise-Renee Young, and Charles Muhammad, and the Office of Education may not notify them that their services will not be needed during the 2009-2010 school year.

DATED: April ____, 2009

ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings