

BEFORE THE
GOVERNING BOARD OF THE
SAN JACINTO UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:
Respondents Listed on Exhibit "A."

OAH No. 2009030528

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Jacinto, California on April 23, 2009.

Mark W. Thompson, Esq., Atkinson, Andelson, Loya, Ruud & Romo, represented Complainant, Diane Perez, Assistant Superintendent, Personnel Services.

Carlos R. Perez, Esq., Reich, Adell & Cvitan, represented Respondents listed on Exhibit "A" except Respondents Barbara McNeilly, Linda Thiel, Gabriel Vigil and David Vollmer.

There was no appearance by or on behalf of Respondents Barbara McNeilly, Linda Thiel, Gabriel Vigil and/or David Vollmar.

The matter was submitted on April 23, 2009.

SUMMARY OF PROPOSED DECISION

The Governing Board of the San Jacinto Unified School District determined to reduce or discontinue particular kinds of services provided by teachers and other certificated employees for budgetary reasons. The decision was not related to the competency and dedication of the individuals whose services are 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, "bumping" and breaking ties between/among employees with the same first dates of paid service. Overall, the selection process was in accordance with the requirements of the Education Code.

FACTUAL FINDINGS

1. Diane Perez made and filed Accusation, dated March 3, 2009, against Respondents listed on Exhibit "A," in her official capacity as Assistant Superintendent (Assistant Superintendent), San Jacinto Unified School District (District).
2. Respondents are probationary or permanent certificated employees of the District.
3. By memorandum, dated February 27, 2009, Shari L. Fox, the District's Superintendent, notified the Governing Board of San Jacinto Unified School District (Board) and Respondents that she recommended that notice be given to Respondents that their services would not be required for the 2009-2010 school year.

On February 27, 2009, the Board adopted Resolution number 08-09-38 that reduced or eliminated particular kinds of services for the ensuing school year and established "competency" criteria.

Respondents were served on or before March 15, 2009.

The written notice of termination stated that Respondents' services would not be required for the 2009-2010 school year and set forth the reasons for the recommendation. The recommendation that Respondents be terminated from employment was not related to competency. In addition, the notice advised Respondents of the right to hearing, that the request for hearing must be delivered to the Superintendent's office no later than March 16, 2009, and that the failure to request a hearing would constitute waiver of the right to a hearing.

Respondents filed a timely Request for Hearing and Notice of Defense.

Among other things, an Accusation, a copy of relevant sections of Government and Education Codes and a blank Notice of Defense and Notice of Hearing were served on Respondents in a timely manner.

Respondents filed a timely Request for Hearing and Notice of Defense.

4. All prehearing jurisdictional requirements were satisfied.
5. There was no appearance by or on behalf of Respondents Barbara McNeilly, Linda Thiel, Gabriel Vigil and/or Susan Lopez.
6. Prior to hearing, the District modified the number of the proposed reductions; as a result, the District rescinded notices issued to Respondents David Vollmar, Susan Lopez, Linda Thiel, Fidel Salcedo, Gabriel Vigil, Kelly Tysen-Stokes and Jessica Long.

7. On February 27, 2009, the Board adopted Resolution number 08-09-38 and thereby took action to reduce or eliminate the following particular kinds of certificated services commencing the 2009-2010 school year as follows:

K-5 Elementary Teaching Services	20	F.T.E.
Elementary Categorical Intervention Services	5	F.T.E.
Teacher on Special Assignment Services	7	F.T.E.
Middle School English/Language Arts Teaching Services	1	F.T.E.
Middle School Computer Science Teaching Services	1	F.T.E.
Middle School Core Teaching Services	3	F.T.E.
Middle School In School Suspension Teaching Services	1	F.T.E.
Middle School Physical Education Teaching Services	1	F.T.E.
Middle School Social Studies Teaching Services	1	F.T.E.
Middle School Science Teaching Services	1	F.T.E.
High School Math Teaching Services	2	F.T.E.
High School English/Language Arts Teaching Services	2	F.T.E.
High School Social Studies Teaching Services	2	F.T.E.
High School Science Teaching Services	1	F.T.E.
Special Education Teaching Services	3	F.T.E.
School Psychologist Services	1	F.T.E.
School Counseling Services	2	F.T.E.
School Nursing Services	1	F.T.E.
High School Assistant Principal Services	1	F.T.E.
Middle School Assistant Principal Services	1	F.T.E.
TOTAL CERTIFICATED POSITIONS	57	F.T.E.

The proposed reductions total 57.0 full-time equivalent (FTE) positions.

8. The services were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The Board’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious but constituted a proper exercise of discretion.

9. The reduction or discontinuance of particular kinds of services related to the welfare of the schools and its pupils and was necessary to decrease the number of certificated employees of the District, as determined by the Board.

10. The District has considered all known attrition, including resignations and retirements, in determining the actual number of necessary layoff notices to be delivered to its employees.

11. The Assistant Superintendent was responsible for implementing the technical aspects of the layoff. The District developed a seniority list that contained, among other matters, the teacher's name, status, site assignment, position, grade, credentials and ELD.

The seniority date was based on the first date of paid service rendered.¹ A teacher hired as a probationary employee who worked as a substitute or temporary employee for at least 75 percent of the school days during the previous year and who had performed the duties normally required of a certificated employee of the school district was deemed to have served a complete school year as a probationary employee if that individual was employed as a probationary employee for the following school year. The individual was entitled to have that earlier year counted as a year of probationary service. The prior year was "tacked" on for seniority purposes but only one year could be tacked.²

12. Respondent Angela Rose (Respondent Rose) argued that she improperly received a layoff notice because a more junior employee has been retained to perform services that she is certificated and competent to render.

Respondent Rose is a permanent employee of the District, and her seniority date is December 14, 2006. During the 2008 – 2009 school year, she has been teaching core math and science to sixth graders at Monte Vista Middle School. She holds a Clear Multiple Subject credential and a Supplemental Authorization in Math which authorizes her to teach Pre-Algebra to seventh and eighth grade students. During the 2006 – 2007 and 2007 – 2008 school years, Respondent Rose taught Pre-Algebra in the District.

LeAnn Stephens (Stephens) is a probationary teacher with the District whose seniority date is August 20, 2007. She holds a Provisional Internship Permit (PIP) and a single subject credential in Math. During the 2008 – 2009 school year, she has been assigned to teach Pre-Algebra to seventh grade students at North Mt. Middle School. Stephens did not receive a layoff notice.

No evidence was offered to explain or justify retaining a more junior employee (Stephens) to provide services that a more senior employee (Respondent Rose) is certificated and competent to render.

Given the facts in Finding 12, the District improperly issued a layoff notice to Respondent Rose.

13. Respondent Diane Cariseo (Respondent Cariseo) disputed the seniority date reported by the District and asserted that it should be July 3, 2006; the District argued that Respondent Cariseo's seniority date should be August 4, 2006.

¹ Education Code section 44845.

² Education Code section 44918.

Respondent Cariseo commenced employment with the District in 1998. She left for four years and returned in 2006. By the terms of her contract with the District for the 2006 – 2007 school year, her “report date” was July 1, 2006, and she was paid in 12 equal payments. Respondent Cariseo testified that, on July 3, 2006, she attended a general meeting with teachers because she would be teaching a grade and in a school that she had not previously taught; she wanted to set up her classroom and learn the curriculum.

During the 2006 – 2007 school year, the District had four tracks, described as A, B, C and D. The first date of paid service for teachers on tracks A, B and C was July 3, 2006; the first date that teachers assigned to track D were required to provide service was August 4, 2006. Respondent Cariseo was assigned to track D and voluntarily attended the meeting on July 3, 2006.

Given the facts in the facts in the foregoing paragraphs of Finding 13, the District properly determined Respondent Cariseo’s seniority date as August 4, 2006.

14. The District used the seniority list and its “competency” criteria to develop a proposed layoff and “bumping” list to determine the least senior employees currently assigned in the various services being reduced. The District then determined whether the least senior employees held credentials and competency in another area that would entitle him or her to “bump” other junior employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials and competency of affected individuals and whether they could “bump” other employees.

15. In Section D of Resolution number 08-09-38, pursuant to Education Code section 44955, subdivision (d), the Board defined “competency” criteria for bumping, to wit:

“ . . . possession of a valid credential in the relevant subject matter area, “highly qualified” status under the No Child Left Behind Act, appropriate EL authorization (if required by the position), special training and experience to teach AVID classes, special training and experience to teach Advanced Placement classes, special training and experience to teach Theater classes, special training and experience, as required by the job description, to serve as a Teacher on Special Assignment, and special training and experience, as required by the job description, to teach Independent Study classes.”

16. In compliance with Education Code section 44955, subdivision (b), by adoption of Resolution No. 08-09-36, dated February 24, 2009, the Board adopted tie-breaker criteria to determine the order of termination of employees with the same seniority date as follows:

“

1. Highly Qualified Status under No Child Left Behind (NCLB) in area of assignment.

2. Possession of a Bilingual Cross Cultural Language and Academic Development (BCLAD), Bilingual Specialist Credential, or Bilingual Certificate of Competence (BCC).

3. Possession of any of the following authorizations to teach English Language Learners:

Cross Cultural Language and Academic Development (CLAD), Multiple or Single Subject SB 2042 Credential, SB 1969 or SB 395 Certificates, Multiple or Single Subject Credential with AB 1059 English Learner content, Language Development Specialist Certificate (LDS), Supplemental Authorization in English as a Second Language, Specially Designated Academic Instruction in English (SDAIE), and other appropriate English Learner Authorization certificates. This excludes Waivers, Emergencies, Provisional Internship Permits (PIPs) and Short Term Staff Permits (STSPs).

4. Credential status in area of assignment, in order of priority:

- a. Clear, Life, Standard Secondary and General Credentials
- b. Preliminary
- c. Intern
- d. Limited Assignment
- e. Provisional Internship Permit
- f. Short Term Staff Permit (STSP)
- g. Waiver

5. Possession of a Clear, Preliminary Single Subject or Education Specialist credential in the following areas, in order of priority:

- a. Math
- b. Science
- c. Special Education
- d. English

6. Possession of a subject matter authorization to teach in the following areas, in order of priority:

- a. Math
- b. Science
- c. English

7. Possession of a Masters Degree relevant to your assignment, earliest date prevails.

8. Possession of a supplemental authorization to teach in the following areas, in order of priority:
 - a. Math
 - b. Science
 - c. English
9. Total number of Clear or Preliminary credentials in different subject areas.
10. Total number of subject matter authorizations in different subject areas.
11. Total number of supplementary authorizations in different subject areas.
12. Total number of years of certificated Educational Services as reported on the most recent CBEDS filed by the District.
13. Total number of years of certificated service to San Jacinto Unified School District (excludes substituting).
14. If ties cannot be broken by using the above criteria then order of seniority shall be determined by a random drawing among employees in the individual tie.”

17. The District’s reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

18. With the exception of Respondent Rose, no certificated employee junior to any Respondent was retained to perform any services which any Respondent was certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in these sections are satisfied.

2. A District may reduce services within the meaning of section 44955, subdivision (b), “either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may ‘reduce services’ by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.” (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. Cause exists under Education Code sections 44949 and 44955 for the San Jacinto Unified School District to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuance of particular kinds of services is related solely to the welfare of the schools and the pupils thereof.

4. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he/she is certificated and competent to fill. In doing so, the senior employee may displace or “bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.)

5. With the exception of Respondent Rose, no employee with less seniority than any Respondent is being retained to render a service which any Respondent is certificated and competent to render.

6. Any factual and legal argument not addressed herein is not supported by the facts and/or law and therefore rejected.

ORDER

1. The Notice of Layoff issued to Respondents David Vollmar, Susan Lopez, Linda Thiel, Fidel Salcedo, Gabriel Vigil, Kelly Tysen-Stokes and Jessica Long is rescinded. The Accusation against David Vollmar, Susan Lopez, Linda Thiel, Fidel Salcedo, Gabriel Vigil, Kelly Tysen-Stokes and Jessica Long is dismissed.

2. The notice of layoff issued to Respondent Angela Rose is rescinded. The Accusation against Respondent Angela Rose is dismissed.

3. Except as provided in Paragraphs 1 and 2 of this Order, the Accusation served on remaining Respondents listed on Exhibit “A” is sustained. Notice shall be given before May 15, 2009 that their services will not be required for the 2009-10 school year because of the reduction or discontinuance of particular kinds of services as indicated.

Notice shall be given in inverse order of seniority.

DATED: _____

VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings