

BEFORE THE GOVERNING BOARD OF THE
HOLLISTER SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against
Certificated Employees:

OAH No. 2009030581

CHRISTOPHER BERRY, et al.,

Respondents.

PROPOSED DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Hollister, California, on April 20, 2009.

Janae Novotny, Attorney at Law, Burke, Williams & Sorensen, LLP, 545 Middlefield Road, Suite 180, Menlo Park, California, represented the Hollister School District.

Michelle Welsh, Attorney at Law, Stoner, Welsh & Schmidt, 413 Forest Avenue, Pacific Grove, California, represented all respondents except Dawn Daughtery and Glenda Nelson. No appearance was made by or on behalf of either of those respondents. A complete list of respondents is found on Appendix A, attached.

The matter was deemed submitted for decision on April 20, 2009.

FACTUAL FINDINGS

1. On March 10, 2009, the governing board of the Hollister School District adopted Resolution No. 17:08-08 in which the board resolved to reduce or eliminate the following particular kinds of services for the 2009-2010 school year and directed the superintendent to send appropriate notice to the employees affected by this action:

<u>Services to be Reduced</u>	<u>FTE</u>
Administrative Services – Elementary Vice Principal	4.0
Administrative Services – Coordinator	1.0
Kindergarten Teacher	3.0
First Grade Teacher	4.0
Second Grade Teacher	5.0
Third Grade Teacher	5.0

Fourth Grade Teacher.....	3.0
Fifth Grade Teacher	3.0
Sixth Grade Teacher.....	3.0
Language, Speech and Hearing Specialist	1.0
Math Teacher.....	1.0
Physical Education Teacher	1.0
Resource Specialist	1.0
Resource Teacher	4.0
School Counselor	0.6
School Psychologist	1.0
Social Studies Teacher	1.0
<u>Teacher on Special Assignment</u>	<u>1.0</u>
Total FTEs	42.6

The resolution further provided:

THE BOARD FURTHER RESOLVES that it will be necessary to retain the services of certificated employees in the 2009-2010 school year regardless of seniority, who possess qualification needed for the following programs:

1. Middle School Math
2. Middle School Science
3. Music
4. Spanish Two-Way Dual Immersion Instruction
5. Special Education

2. The reductions were based on the district’s financial situation. As a result of the state budget crisis, the district is projecting a budget shortfall that has recently grown from \$2.9 million to \$3.9 million. Considering this, the reductions are in the interest of the schools and their pupils.

3. On or about March 11, 2009, the superintendent gave written notice to all respondents except Jeannine Ostoja 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. All respondents, including Ostoja, filed timely requests for hearing.

4. The March 11 notices were hand-delivered by Assistant Superintendent Dennis D. Kurtz to all respondents except Ostoja. Ostoja was on maternity leave, so the notice was mailed to her. However, the district concedes that, although Ostoja’s correct address is on record with the district, the notice was sent to the wrong address. On Friday, March 13, Ostoja called her principal to see if she was on the layoff list. Ostoja got a return call on Monday, March 16, informing her that she was. Ostoja filed a written request for hearing on the following day.

While conceding Ostoja did not timely receive written notice of the recommendation that her services would be eliminated for the following school year, the district argues that she was not prejudiced by that lack of notice; Ostoja learned of her inclusion on the layoff list by no later than March 16, she timely filed a request for hearing, she was served with an accusation, she timely filed a notice of defense, and she appeared at the hearing with representation.

“Nonsubstantive procedural errors committed by the school district . . . shall not constitute cause for dismissing the charges unless the errors are prejudicial errors.” (Ed. Code, § 44949, subd. (c)(3).) However, failure to provide written notice of the layoff recommendation on or before March 15 cannot be considered an excusable nonsubstantive procedural error. The language of subdivision (a) of section 44949 is mandatory: “the employee shall be given written notice” no later than March 15. Further, Education Code section 44955, subdivision (c), provides, “In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.” (Emphasis added.) Receipt of written notice on or before March 15 is jurisdictional. Without such notice, an employee may not be dismissed. Ostoja must be retained for the 2009-2010 school year.

5. On January 27, 2009, the governing board adopted Resolution No. 13:08-09. The resolution set forth seven criteria “not in order of priority,” to be used in determining the order of termination of certificated employees first rendering paid service to the district on the same date:

- 1) Breadth of credential authorization
 - Multiple credentials, allowing flexibility of assignment and ability to undertake multiple assignments as District’s needs change
- 2) No Child Left Behind highly qualified teacher status for current assignment
- 3) Authorization from California Commission on Teacher Credentialing to teach English language learner students.
- 4) Advanced degrees in current assignment or credential-related subject areas
- 5) Greatest number of post-BA accredited college units on file with the District in current assignment or credential-related areas
- 6) Teaching experience in multiple subjects or grade level areas of anticipated need.

- 7) Greatest number of years teaching in California public elementary and secondary schools outside the District

The resolution directed the superintendent or his designee to apply “the adopted criteria to the affected employees to determine order of termination as related to the needs of the District and its students.”

6. On February 2, 2009, Assistant Superintendent Kurtz sent to teachers potentially impacted by the tie-breaking criteria a letter explaining the procedure for applying the criteria. The letter set forth point values to be assigned to the seven tie-breaking criteria adopted by the board:

Column 1: Breadth of Credential – For every credential, certificate or authorization *from the CCTC*, you receive 50,000 points. Certificates earned at workshops, and credentials that are not from California do not count. [Emphasis in original.]

Column 2: NCLB HQT status – Most teachers are Highly Qualified, and receive 1000 points. If you are assigned in a subject area not requiring you to be ‘Highly Qualified’, then you receive 750 points. Only teachers who should have HQT status, but for some reason do not, receive 0 points.

Column 3: English Learners Authorization – Teachers receive 10,000 points for possessing CCTC authorization to teach English language learners. If you do not have EL authorization, you will receive 0 points.

Column 4: Advanced Degrees – For every Masters or Doctorate from an accredited university that we had on file as of September 10, 2008, you receive 500 points. (HESTA contract § 11.9.3)

Column 5: # of Post-Baccalaureate Accredited College Units – For each semester unit, you receive 10 points. The Baccalaureate can be either a BA or BS; transcripts had to have been on file in the District Office as of September 10, 2008. (HESTA contract § 11.9.3)

Column 6: Teaching Experience in multiple subjects/grade levels – This one is complicated. The intent is to give greater credit to those teachers who have taught at more than one grade level, or in more than one subject area at the middle school level. For every different such assignment *in the Hollister*

School District, you receive 2 points, provided you taught in that assignment for a year or more (1 point for half a year or for a semester). So, some examples; if you have taught the same grade level for 5 years, you receive 2 points. If you have taught for 5 years – 2 years at 2nd grade and 3 years at 1st grade – you receive 4 points. If you started in Kindergarten, and then changed mid-year for some reason to 1st grade, followed by an entire year in 1st grade, then you receive 3 points (1 for Kinder and 2 for 1st grade). Combination classes count double, so a year of teaching a K/1 combo receives 4 points. In Middle School, for example, a teacher teaching both Language Arts and Social Science in the 7th and 8th grades for a year receives 4 points. SDC and RSP teachers teach students at multiple grades; they receive 6 points for each assignment. [Emphasis in original.]

Column 7: # of Years teaching in California public schools –
You receive 0.1 point per year for every year taught in California, whether in Hollister or not, but only for public school service.

7. Respondents contend that the district had no authority to apply the tie-breaking criteria by using a point system that was not included in the board’s resolution. However, the board was aware that the district intended to utilize this point system at the time it adopted the tie-breaking criteria. A draft of Kurtz’s February 2, 2009 letter to teachers explaining how the criteria would be implemented had been provided to the board prior to its adoption of the criteria. The board therefore at least tacitly approved the process. Even if it had not, the means to implement the tie-breaking criteria was within the district’s discretion.

8. Respondents also contend that criterion number 2, “No Child Left Behind highly qualified teacher status for current assignment,” is unfair because it penalizes teachers who are deemed highly qualified under the No Child Left Behind Act under their primary credential, but have been assigned by the district to teach in another area. For instance, respondents Christopher Berry, Michelle Talavera, Roxane Lino and Nicole Griffin all have Multiple Subject credentials and are considered highly qualified under NCLB to teach elementary school. However, all three are assigned to teach math and/or science in middle school. None of them have credentials for those subjects. They are all teaching under board waivers. Therefore, they are not considered highly qualified teachers under NCLB in their current assignments.

The district, which was already considered a Program Improvement district because of deficiencies in meeting NCLB requirements, was notified in January 2009 that it had been placed into Level C of the Compliance, Monitoring, Interventions, and Sanctions Program. Under this level of compliance, the district is required to ensure that a highly

qualified teacher teaches in every classroom. Failure to meet this requirement could result in sanctions. This establishes a rational basis for criterion number 2 and use of it is not an abuse of discretion. While the criterion might seem unfair on its face, it should be noted that none of the teachers was involuntarily transferred into a board waiver position and that in the layoff hearings a year ago the same criterion was in effect. Teachers were therefore on notice that working in a board waiver position would not afford them highly qualified status in the tie-breaking criteria.

9. Respondents Christopher Berry, Michelle Talavera, Roxane Lino and Nicole Griffin are not entitled to additional tie-breaking points under criterion number 2.

10. It was stipulated that respondent Cami St. John does meet the NCLB highly qualified teacher requirements and is entitled to an additional 1000 tie-breaking points.

11. Respondent Paula Jacob has completed the requirements to obtain an English language learner authorization. She has applied to the Commission on Teacher Credentialing for issuance of the authorization and to the Monterey County Office of Education for issuance of a temporary certification. Neither has yet been issued but Jacob seeks an additional 10,000 tie-breaking points under criterion number 3, "Authorization from California Commission on Teacher Credentialing to teach English language learner students." Until she actually receives the authorization, Jacob is not entitled to additional tie-breaking points.

12. Robert Lincoln holds a Multiple Subject credential with a supplemental authorization in math. He is not subject to layoff in this proceeding as the district will retain him to teach middle school math. Respondents Nicole Griffin, Michelle Talavera and Roxane Lino, all of whom are currently assigned to teach math, are senior to Lincoln and assert they should be retained over him. However, none of these senior teachers possesses a math credential. Each is teaching under a board waiver. Therefore, because they cannot be considered NCLB highly qualified math teachers, the district is entitled to skip and retain Lincoln over Griffin, Talavera and Lino.

13. Respondent Julie Fontaine also asserts she is entitled to be skipped and retained over Lincoln. Fontaine holds a Multiple Subject credential. She is a fifth grade teacher. She has completed the requirements for a supplemental authorization in math and applied to the Commission on Teacher Credentialing for issuance of the authorization in December 2008. But she has yet to receive the authorization. Until she receives it or a temporary certification from the Monterey County Office of Education, Fontaine is not entitled to be skipped.

14. Respondent Jose Rivera is a third grade teacher. He holds a Multiple Subject credential and a BCLAD certification. Rivera contends his BCLAD certification qualifies him to teach in the district's Two-Way Dual Immersion Program, and that he should therefore be skipped and retained for that program.

Under district-established criteria, teachers are deemed qualified to teach in the dual immersion program if they possess a BCLAD certification and have received training in dual immersion programs provided either by the district or by the California Association of Bilingual Education. While Rivera has a BCLAD and taught a third grade class in Spanish for three years in another district, he has not received specific dual immersion training. He is not therefore “certificated and competent” to be retained for the dual immersion program.

15. Timothy Peters is an eighth grade language arts teacher. He holds a Multiple Subject Internship credential. He is classified on the district’s seniority list as an intern. Peters maintains he completed his internship requirements in May 2008 but has yet to receive any documentation or a credential from the Commission on Teacher Credentialing. Peters asserts he has been teaching this year under a non-internship credential and should be classified as a probationary employee. In addition, because he worked the prior school year as a long-term substitute, he asserts he should be considered a second year probationary employee. He contends he should be retained over a number of teachers junior to him who hold Multiple Subject credentials.

Peters does not hold any credential other than an internship credential. There is no evidence he is teaching under any other form of credential. Peters is not entitled to probationary status. He is not entitled to be retained over any of the junior teachers.

16. Prior to March 10, 2009, the board was aware of six teachers with Multiple Subject credentials who will retire at the end of the school year, and two who will resign. The district need not use these vacancies to reduce the number of teachers who will be laid off. All of these vacancies occurred before the board’s decision to reduce or eliminate services.

On March 27, 2009, one additional elementary school teacher notified the district of her intent to resign at the end of the school year. The district is not required to reduce the number of layoffs because of this resignation either. Board Resolution No. 17:08-08 calls for the reduction of 31 FTE positions requiring only a Multiple Subject credential. Because the district has noticed only 30 Multiple Subject teachers for layoff, this post-notice attrition does not require a reduction in the number of employees laid off.

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

18. 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 42.6 FTE positions exists in accordance with Education Code sections 44949 and 44955. Except as to Jeannine Ostoja, 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

Respondent Cami St. John shall be given an additional 1000 tie-breaking points. Her position on the seniority list shall be reordered in accordance with her new ranking.

Notice may not be given respondent Jeannine Ostoja that her services will not be required for the 2009-2010 school year.

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: _____

MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings

APPENDIX A

Hollister School District
Teacher Layoff Hearing
OAH Case No. 2009030581

Alphabetical List Of Teachers Served With
Accusations

Christopher	Berry
Summer	Chamblin
Dawn	Daughtery
William	Deacon
Julie	Fontaine
Nicole	Griffin
Robin	Horne
Matthew	Hudson
Paula	Jacob
Nancy	Kerl
Roxane	Lino
Marcia	Littleton
Morgan	Marquez
Glenda	Nelson
Jeannine	Ostoja
Timothy	Peters
Jose	Rivera
Cami	St. John
Gabriel	Talavera
Michelle	Talavera

