

BEFORE THE
GOVERNING BOARD OF THE
SOQUEL UNION ELEMENTARY SCHOOL DISTRICT

In the Matter of the Accusation Against:

23.5 Full-Time Equivalent Certificated
Employees,

Respondents.

OAH No. 2009030730

PROPOSED DECISION

Administrative Law Judge Mary-Margaret Anderson, State of California, Office of Administrative Hearings, heard this matter in Soquel, California, on April 27, 2009.

Keith Breon, Attorney at Law with Breon & Shaeffer, represented the Soquel Union Elementary School District.

Michelle Welsh, Attorney at Law with Stoner, Welsh & Schmidt, represented all of the Respondents.¹

The record closed on April 27, 2009.

SUMMARY

The Governing Board of the Soquel Union Elementary School District decided to reduce or discontinue particular kinds of services provided by teachers and other certificated employees for the 2009-2010 school year for budgetary reasons. The decision was not related to the competency and dedication of those whose services were 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, breaking ties between employees with the same first dates of paid service, and "skipping" teachers with specific qualifications.

The selection process complied with Education Code requirements.

¹ Respondents are listed on Appendix A and Appendix B, attached.

FACTUAL FINDINGS

1. Kathleen Howard filed the Accusation in her official capacity as Superintendent of the Soquel Union Elementary School District (District).
2. Respondents are certificated employees of the District.
3. Beginning in November 2008, Superintendent Howard and her staff began to analyze what cuts and reductions for the 2009-2010 school year would be necessary given the effect on the District of the state budget crisis. One action they took was to publish the District's Seniority List to allow employees to correct any errors.
4. On February 18, 2009,² Superintendent Howard proposed to the Governing Board of the District criteria that would be used, if necessary, to break ties between employees with the same first date of paid service. After extensive discussion, the criteria were approved by unanimous vote of the Board. The Minutes of the meeting state:

The numerically prioritized criteri[a] approved was as follows:

1. Cross-Cultural Language and Academic Development (CLAD), Bilingual Cross-Cultural Language and Academic Development (BCLAD) or ELL Authorization or the equivalent
2. Certificated experience at a variety of grade levels or subjects taught
3. Years of teaching experience
4. Years of teaching experience in the District.

5. On March 2 the Board adopted Resolution No. 9/2008-09, in which the Board resolved to decrease the number of certificated employees due to a planned reduction and discontinuance of programs and services for the 2009-2010 school year. The Resolution states that the District is reducing its classroom teaching staff as follows:

K-3 Class Size Reduction	16.0
K-5 Physical Education	.6
K-5 Music	1.4
6-8 Music	1.0
K-5 Intervention Teacher	1.0
6-8 Counselor	1.0
6-8 Physical Education	.4
6-8 Drama	1.0
6-8 electives	.6
Resource Specialist	<u>.5</u>
Total	23.5 Full-time equivalents

² All dates are in 2009 unless stated otherwise.

6. The Resolution also stated the Board's intention to retain certain certificated employees, regardless of seniority:

who possess qualifications needed for the following programs:
Single Subject Math and Science Credentials or Authorizations,
Special Day Class, Adaptive Physical Education, Speech Therapy,
Resource Specialist Program except .50 FTE, Psychologists, and
Nurses.

These "skipping criteria" were chosen because of the difficulty the District has experienced in the past in employing and retaining those with the described credentials or qualifications.

7. Superintendent Howard used the Seniority List to determine who would be sent a notice of layoff. She skipped teachers who possessed credentials specified in the Board's skipping criteria. All of the 13 skipped teachers will be retained and employed in existing programs in 2009-2010 that require the qualifications for which they were skipped.

8. It was necessary to break a tie between two teachers in order to determine which employees to notice for layoff. Superintendent Howard did this by applying the Board's tiebreaking criteria as she understood the Board intended: in numerical order until the tie was broken.

9. The District employs certificated staff classified as temporary to fill in for staff members who are on leave or loan and to serve in categorical programs for which the funding is uncertain from year to year. By letter dated February 25, Superintendent Howard notified ten temporary employees that they were released from employment at the end of this school year. A second letter dated March 10 stated in pertinent part:

The District believes you are properly classified as a temporary employee pursuant to relevant Education Code sections. Therefore, you already have received a release from the employment [¶] Even so, you may not agree with the District as to your classification. Therefore, out of an abundance of caution, we are also sending you the layoff documents utilized to initiate the layoff of probationary or permanent employees. [¶] If you fill out and return the enclosed Request for Hearing, you then will be able to participate in the layoff hearing process to determine if the District has properly classified you as temporary.

10. On March 6 written notice of the recommendation that their services will not be required for the 2009-2010 school year was served personally or by certified mail on all of the Respondents. Each notice contained the reasons for it. Those Respondents deemed

temporary employees by the District were served with some additional information because of that status.

All Respondents filed timely requests for hearing to determine if there is cause not to reemploy them. Accordingly, an Accusation was filed and served. Each Respondent filed a timely notice of defense and this hearing followed.³

Temporary Employees

11. Superintendent Howard decided to notice certain temporary employees for layoff in part because of a letter dated March 2 that the District received from Susan Midori-Jones, a California Teachers Association staff member. It was later learned that the letter, which addressed the consequences of misclassifying teachers as temporary, was sent to all the districts, and that CTA was not asserting that the District had violated Education Code provisions concerning teacher classification. In the meantime, however, Superintendent Howard felt it prudent to notice certain temporary teachers.

Specific Reductions

12. In her testimony, Superintendent Howard acknowledged that, if it is necessary to reduce class size reduction teachers, this would be a “horrible event.” She also acknowledged that the state assesses penalties for such reductions. The penalties, however, would cost the District less than the salaries of the teachers. Similarly, the District must plan for cuts to drama, music, and some physical education instruction, because of anticipated cuts in revenue previously used to fund such classes. Some of these programs are funded to some extent by donations and grants, and it is unknown at this time whether the District will be able to offer the programs. Almost all of the District’s categorically-funded programs have been cut by at least 20 percent.

Objections of Particular Teachers:

—*Amanda Drake*

13. Amanda Drake teaches eighth grade humanities. Her date of hire on the District’s Seniority List is August 29, 2005. This date is incorrect. Drake began working for the District as a temporary teacher on August 30, 2004, and was retained in the following year, pursuant to a probationary contract, for the same position. Pursuant to Education Code section 44918, her correct date of hire is therefore August 30, 2004.

³ The following employees were noticed but did not request a hearing: Heath Fontes, Jolee Gies, Patricia Niehuser, and Maura Rae.

—*Kathleen Kelly-Skinner*

14. Kathleen Kelly-Skinner teaches sixth grade math and science. Her date of hire on the District’s Seniority List is August 29, 2005. This date is incorrect. Kelly-Skinner began working for the District as a temporary teacher on August 30, 2004, and was retained in the following year, pursuant to a probationary contract, for the same position. Pursuant to Education Code section 44918, her correct date of hire is therefore August 30, 2004.

15. In addition, Kelly-Skinner has taught more grade levels than is reflected on the District’s tiebreaker criteria grid. In addition to fifth and sixth grades, she has also taught third, seventh, eighth, and Intervention seventh and eighth grades.

—*Colleen Logan*

16. The Parties stipulated that Colleen Logan’s correct hire date is August 27, 2002, and the Seniority List will be corrected accordingly.

—*Donna-Renee Martin*

17. Donna-Renee Martin teaches Kindergarten. Martin shares the seniority date of August 27, 1998, with Laura Chiorello. Superintendent Howard applied the tiebreaking criteria to break the tie. Both teachers met criterion number one, so she proceeded to criterion number two: grade levels taught. Using District records, on the tiebreaker criteria grid, Howard recorded under Grade Levels Taught, the following for Chiorello: “4, 6, 7, Intervention, District Mentor.” For Martin, Howard recorded “K, Intervention” in the same category. Accordingly, Howard placed Chiorello above Martin on the Seniority List and Chiorello was not noticed for layoff.

Martin testified that the information concerning her record is incomplete. She has also taught first grade in a K-1 class, and was an Intervention teacher in grades 1, 2, 3, 4, and 5. She has also been the 504 Coordinator for her school site for the last five years.

It is unclear how “District Mentor,” which Choriello was given credit for, qualifies as a “grade level taught.” It is therefore determined that Martin should receive credit for her position as a 504 Coordinator. Even if Martin’s score is corrected by adding additional points for 504 Coordinator and first grade (4 points), her score is less than Chiorello’s (5 points).

—*Ilo McCoy*

18. Ilo McCoy holds a Multiple Subject Clear credential and is bilingual certified in Spanish. She has worked in various capacities in the District and holds a seniority date of October 30, 2000. She worked as a speech therapist for the District in the 2006-2007 and 2007-2008 school years pursuant to a waiver. McCoy contends that she was improperly laid off in that employees who are junior to her were retained. She also notes that her Spanish

skills are useful to the District in that she is able to conduct assessments in that language. It is determined that the skipping criteria were correctly applied. The District may employ a speech therapist with a waiver only if a credentialed speech therapist cannot be obtained, and that is not the case here. The junior employees are credentialed speech therapists.

—*Sherry Talmage*

19. Sherry Talmage has worked continuously for the District as a counselor at New Brighton Middle School since 1994. She is the one counselor employed by the District, and the Resolution reduces counseling by one full-time equivalent position. She has therefore been noticed for layoff. Talmage asserts that there is no other person as qualified as she to work with the students concerning their emotional struggles. No grounds exist to exempt her from layoff.

—*Chris Carey-Stronck, Laurie Patton, Christina Plank, and Melissa Walding*

20. The District has classified Carey-Stronck, Patton, Plank, and Walding as temporary teachers but served them with layoff notices despite this classification. Each testified concerning their individual circumstances and requested that they be reclassified as probationary. The evidence did not support their requests.

21. No permanent or probationary employee with less seniority is being retained to render a service which any Respondent is certificated and competent to render.

LEGAL CONCLUSIONS

1. All notices and other requirements of Education Code sections 44949 and 44955 have been provided as required. The District has therefore established jurisdiction for this proceeding as to Respondents listed on Appendix A.

2. The teachers listed on Appendix B are temporary teachers and they lack standing to participate in this proceeding. The fact that they were served with notices of layoff did not confer rights they are not otherwise entitled to. (See *CTA v. Mendocino Unified School District* (2001) 92 Cal.App. 4th 522.)⁴

3. Cause was established as required by Education Code section 44955 to reduce the number of certificated employees in 23.5 full-time equivalent positions due to the reduction and discontinuation of particular kinds of services. The Board's decision to

⁴ It is unclear whether jurisdiction exists to determine the classification of the temporary teachers in this proceeding. Recent case law confirms that mandamus is a means by which a teacher may challenge a school district's classification of the teacher as temporary. (*Vasquez v. Happy Valley Union School District* (2008) 159 Cal.App.4th 969.)

reduce or discontinue the identified services was made solely on the basis of needs of the District and its students.

4. Education Code section 44955, subdivision (d)(1), allows a school district to deviate from seniority order in terminating a certificated employee when:

. . . the district demonstrates a specific need for personnel to teach a specific course or course of study or to provide services authorized by a services credential with a specialization in . . . pupil personnel services . . . and that the certificated employee has special training or experience necessary to teach that course or course of study or to provide those services . . . which others with more seniority do not possess.

The preference given to employees with special training and certification to teach math, science, physical education, special education or to provide psychology services was reasonable and appropriate based upon the matters set forth in Findings 6 and 7. The evidence demonstrated that the skipped teachers will be assigned to positions next year that require the specific training and certification for which they were skipped.

5. Education Code section 44955 states:

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of the needs of the district and the students thereof.

Based upon the matters set forth in Finding 8, the criteria for breaking ties between teachers with the same hire dates related solely to the welfare of the District's schools and students. The criteria were clearly set out by the Board. The fact that the Board did not provide more direction in the criteria document as to how the criteria should be applied did not invalidate the system in this instance. There was no evidence that the criteria were applied in an arbitrary or capricious manner. Rather, Superintendent Howard applied the criteria in a systematic and rational manner based upon her understanding of the Board's wishes and concerns.

Nonetheless, the information for Kelly-Skinner and Martin was incomplete and District records concerning those teachers must be corrected as described in Findings 15 and 17.

6. All contentions made by Respondents not specifically addressed herein are found to be without merit and are rejected.

ORDER

1. Notice may be given to Respondents in 23.5 full-time equivalent positions that their services will not be required for the 2009-2010 school year because of the reduction or discontinuation of particular kinds of services.

2. Corrections of the District's records shall be made as to the following employees consistent with the Factual Findings: Amanda Drake, Kathleen Kelly-Skinner, Colleen Logan, and Donna-Renee Martin.

DATED: _____

MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings

**APPENDIX A: RESPONDENTS WHO ARE CLASSIFIED AS PROBATIONARY
OR PERMANENT**

Barker, Laura
Bell Michelle
Bridi Milligan, Marie-Angela
Della Pietra, Christopher
Drake, Amanda
Patrick Foster
Gammino, Lisa
Yvette Garcia
Kelley-Skinner, Kathleen
Logan, Colleen
Lyon, Callie
Makita, Lorraine
Martin, Donna Rene
McCoy, Ilo
McGooden, Megan
Talmage, Sherry

APPENDIX B: RESPONDENTS WHO ARE CLASSIFIED AS TEMPORARY

Akin, Erica
Carey-Stronck, Chris
Dupre, Lydia
Edgar, Autumn
Harrington, Katie
Lowe, Ilana
Patton, Laurie
Christina Plank
Podesta, Andrea
Walding, Melissa