

BEFORE THE
GOVERNING BOARD OF THE
SANTA BARBARA SCHOOL DISTRICTS
STATE OF CALIFORNIA

In the Matter of the Accusations Against:

OAH No. 2009031290

Certain Certificated Employees of the Santa
Barbara School Districts,

Respondents.

PROPOSED DECISION

David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 4, 2009, at the Santa Barbara School Districts, in Santa Barbara, California.

Liebert Cassidy Whitmore, by Mary Dowell and Siobhan Cullen, Attorneys at Law, represented the Santa Barbara School Districts (Districts).

Hathaway, Perrett, Webster, Powers, Chrisman & Gutierrez, by Robert Bartosh and Adam Acevedo, Attorneys at Law, represented Respondent teachers. A list of Respondents is attached as Attachment A and incorporated by reference. Factual Finding 7 explains which Respondents were present at the hearing.

Evidence was received by way of stipulation, testimony and documents. The record was closed and the matter was submitted for decision on May 4, 2009.

This matter was originally set for hearing on April 30, 2009, and, at the request of the Districts, was continued to May 4, 2009. Therefore, by operation of Education Code section 44949, subdivision (e), all time periods of that statute are extended by four days.

SUMMARY OF PROPOSED DECISION

The Governing Board of these two Districts (Board) determined to reduce or discontinue particular kinds of services provided by certificated teachers for budgetary reasons. The decision was not related to the professionalism 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. The selection process was in accordance with the requirements of the Education Code. The Board may proceed as indicated herein.

FACTUAL FINDINGS

Jurisdiction and Parties

1. The Districts are a combination of the Santa Barbara Elementary School District and the Santa Barbara Secondary School District, operated in conjunction by virtue of a joint powers agreement. The Santa Barbara Elementary School District provides educational services for students in grades kindergarten through eight at 11 school sites. The Santa Barbara Secondary School District provides educational services for students in grades nine through twelve at eight school sites. The Districts employ certificated staff in permanent or probationary positions, as well as substitute and temporary positions.

2. J. Brian Sarvis, Ed.D., is the Superintendent of the Districts and Eric Smith is the Deputy Superintendent and Chief Financial Officer of the Districts. Their actions were taken in those official capacities, and their staff was responsible for implementation of the technical aspects of the layoff.

3. Before March 15, 2009, the Districts served 63 teachers, including Respondents, by personal service and/or certified mail, with a written notice (layoff notice) that it had been recommended that notice be given to them pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year. Each layoff notice set forth the reasons for the recommendation and noted that the Board had passed a resolution reducing the certificated staff by the full-time equivalent (FTE) positions set forth in the layoff notice, which was a total of 64.9 FTE positions.

4. Thirty-nine certificated employees, referred to as Respondents, submitted timely written requests for a hearing to determine if there is cause for not reemploying them for the ensuing school year.

5. The Superintendent made and filed Accusations against each of the Respondents. On April 14, 2009, the Districts served Respondents either in person or by certified mail with an Accusation along with required accompanying documents and blank Notices of Defense.

6. Respondents completed Notices of Defense that were served on the Districts.

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7. Attachment A is incorporated by reference. Forty-one names are listed. The Districts agreed that Patricia Hague was a temporary employee, that she had been given a notice of non-reelection for the 2009-2010 school year, and that the layoff notice could be rescinded and her Accusation withdrawn. Although there are some discrepancies in the evidence about who was served with certain documents and/or submitted certain requests or notices, Mr. Bartosh stated that he represented all remaining Respondent and certain stipulations were entered with respect to all remaining Respondents.¹ Notices of Defense were submitted on behalf of all Respondents. On Attachment A, the letter “a” indicates Respondents who were present at the hearing, and the letter “b” indicates the Districts stipulated that its notices and Accusations were rescinded as to Ms. Hague.

8. Respondents in this proceeding are probationary or permanent certificated employees of the Districts.

The Board and the Layoff Resolution

9. On March 10, 2009, the Board was given notice of the Superintendent’s recommendation that certificated employees in 64.9 FTE positions be given notice that their services would not be required for the next school year and stating the reasons therefore.

10. Board Resolution number 08/09-28, adopted on March 10, 2009 (Resolution), proposed a layoff of certificated employees in 64.9 FTE positions. Specifically, the Resolution provided for the reduction or elimination of the following particular kinds of services:

- Elementary (41.0 FTE)
- Child Dev (2.5 FTE)
- Spanish (0.6 FTE)
- French (0.2 FTE)
- Social Science (1.6 FTE)
- Health (0.2 FTE)
- PE (0.8 FTE)
- Math (2.8 FTE)
- Science (1.4 FTE)
- English (8.8 FTE)
- ESL (0.2 FTE)

¹ For example, although Jennifer Churlen (number 6) appears on Attachment A, she is not listed in Exhibit 16, a compilation of employees who were served with layoff notices and/or Accusations and Respondents who requested a hearing and/or served a Notice of Defense. She has submitted a Request for Hearing (see Exhibit 3), but was not listed on the District’s Notice of Hearing (Exhibit 6). Other discrepancies exist. However, based upon the statement of Mr. Bartosh that he represented all Respondents and that the Stipulation (Exhibit 17) was submitted with respect to all Respondents, these discrepancies do not affect the jurisdiction or validity of these proceedings.

Music (0.4 FTE)
Art (0.6 FTE)
Theater (0.2 FTE)
7/8 Core Program (0.2 FTE)
Jr. High Core Knowledge (0.2 FTE)
Industrial Tech (0.2 FTE)
Counselors (3.0 FTE)

11. The Resolution was required by the Districts' fiscal crisis and need to reduce services to balance their budgets for the welfare of students. More specifically, for school year 2009-2010, the Board needed to reduce the budget by approximately \$4 million to cover its costs and to maintain the legally required reserve fund.

12. The decision to reduce services was not related to the professionalism and dedication of the individuals whose services are proposed to be reduced or eliminated.

13. On February 12, 2008, the Board enacted Resolution number 07/08-23, which established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. It provided that the order of termination shall be according to the criteria stated therein. More specifically, the tie-breaker criteria provide for a priority order for, among other things, certain credentials, and experience in the discipline. In the event of a tie after reference to all listed criteria, a lottery would be held. Resolution number 07/08-23 also established competency criteria by referencing certain credentials and certifications, authorizations, compliances, degrees, experience and training.

The Seniority List and the Layoffs

14. The Districts maintain separate seniority lists which contain employees' seniority dates (first date of paid service) and credentials.

15. The Districts used the seniority lists to develop proposed layoff lists of the least senior employees currently assigned in the various services being reduced. In determining who would be laid off for each kind of service reduced, the Districts counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority.

16. The Districts used information from the seniority lists and personnel files to apply the tie-breaker criteria of Resolution number 07/08-23.

17. The services identified in the Resolution are particular kinds of services that can be reduced or discontinued under Education Code section 44955. The Board's decisions to reduce or discontinue the identified services were neither arbitrary nor capricious, and were a proper exercise of its discretion. The decisions were based on the welfare of the Districts and their pupils.

18. The Districts identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

Respondents' Contentions and Other Relevant Information

19. Respondents contend that some of them may be qualified to teach in positions held by someone with less seniority.

20. With respect to this contention, the following evidence was submitted and findings are made.

(a) The Resolution identifies several programs that the Districts seek to have exempted from the usual seniority order of layoffs, including "Head Teachers/Dir., Child Development." Respondents submit that Rosalyn Tomblin² was skipped due to this exemption, and that the Districts did not consider whether some Respondents with Multiple Subject credentials and earlier seniority dates were competent to serve in her position and, therefore, should have been retained. Ms. Tomblin is included in the list of Elementary District teachers skipped from receiving layoff notices (Exhibit 10), which indicates that she is assigned as a child development teacher. In the Districts' evidence of who received layoff notices (Exhibit 14), there are separate lists for the Elementary District, the Secondary District, and the Child Development Program.

(b) Although several Respondents contended that more senior teachers in the Elementary District who hold appropriate credentials should bump less senior teachers in the Secondary District who have been retained, this contention was withdrawn in light of the evidence that the Districts are separate entities and that the seniority lists must be treated separately. Therefore, teachers on one District's seniority list cannot bump teachers on the other District's seniority list.

LEGAL CONCLUSIONS AND DISCUSSION

1. Education Code³ section 44949, subdivision (a), states in pertinent part:

"No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written

² Ms. Tomblin is found on the Elementary District seniority list (Exhibit 8): date July 1, 2008; Multiple Subject credential, EL Authorization, Supplemental authorization in Geography.

³ All citations are to the Education Code.

notice by the superintendent of the district or his or her designee . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor.”

2. Section 44955 provides, in pertinent part:

“(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

“(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, . . . and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

“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 needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish . . . a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. . . .

“(c) [S]ervices of such employees shall be shall be terminated in the reverse order in which they were employed, as determined by the board in accordance with Sections 44844 and 44845. 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.

“The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. . . .

“(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

“(1) The district demonstrates a specific need for personnel to teach a specific course or course of study . . . and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services,

which others with more seniority do not possess.”

3. Sections 44949 and 44955 establish jurisdiction for this proceeding, and the notice and jurisdictional requirements set forth therein were met. (Factual Findings 3 through 8.)

4. 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.)

5. Cause exists to reduce the number of certificated employees of the Districts due to the reduction and discontinuation of particular kinds of services. Cause for the reduction or discontinuation of services relates solely to the welfare of the Districts’ schools and pupils within the meaning of section 44949. (Factual Findings 9 through 13.)

6. The services at issue have been recognized as particular kinds of services subject to layoff proceedings. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627; *Campbell v. Abbott* (1978) 76 Cal.App.3d 796; *Zalac v. Governing Board of the Ferndale Unified School District* (2002) 98 Cal.App.4th 838.)

7. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or 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.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.)

8. The Districts established that they were able to exempt, or skip, Rosalyn Tomblin in the layoff of teachers found on the Elementary District seniority list. Under section 8366, the child development program is separate from the Elementary District and, therefore, teachers in the Elementary District cannot bump teachers in the child development program. In *Rutherford v. Board of Trustees of the Bellflower Unified School District* (1976) 64 Cal.App.3d 167, the court rejected the contention of school nurses that they could bump into the positions of less senior nurses in the Head Start program.⁴ The court recognized the differences in the procedures to layoff certificated employees, such as Respondents herein, and staff of the Head Start program, similar to the child development program herein. Because the statutory grounds permitting termination of the two different types of employees are different, Respondents cannot bump into Ms. Tomblin’s position. (Factual Finding 20.)

⁴ Although the decision analyzes the predecessors to present sections 44955 and 8366, the operative language of each was substantially similar to the present law.

ORDER

1. Notice may be given to employees occupying 64.9 full-time equivalent certificated positions that their services will not be required for the 2009-2010 school year because of the reduction and discontinuance of particular kinds of services, except as set forth below. Such notices may be given to the Respondents listed in Attachment A, except for those designated with the letter “b” for whom the District has rescinded its notice of intent of non-reemployment.

2. Notice shall be given in inverse order of seniority.

DATED: May 7, 2009.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings

SANTA BARBARA SCHOOL DISTRICTS

(a) Patricia Aguilar
Verity Allen
Dee Carter
Brown Patty
(a) Jo Carmean
Brenda Carroll
Jennifer Churlen
Lani Cordero
(a) Pamela Corner
(a) Starene Cruse
Shannon Curtis
(a) Lynn Davis
(a) Brian Eisen
(a) Andrea Ferrero
Krista Finlay
Dru Frick
Ann Marie Galbraith
(a) Susan Green
Kate Hagenah
(b) Patricia Hague
Chalice Ippolito-Harkey
(a) Jacqueline Kelemen
Lisa Kirwan
(a) Brian Malcheski
(a) Lovennea Marchetti
(a) Heather Marshall
Heather McBurnie
Lindsay Merrill
(a) Theresa O'Donnell
Katherine Osborn
Yolanda Pandolfi-Hopkins
Lisa Peterson-Ayala
(a) Maynard Pilapil
Courtney Preston
(a) Jessica Rapp
Susan Remik
Tracy Schiffers
(a) Christine Shaw
Ann Silva
Lauren Thal
(a) Kelly Thrasher
Jim Wright

KEY: a = present at the hearing
b = Districts rescinded Accusation

ATTACHMENT A