

BEFORE THE GOVERNING BOARD
SAN MATEO – FOSTER CITY SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Non-Reemployment of
Certain Certificated Employees

OAH No. 2009031319

PROPOSED DECISION

Administrative Law Judge Steven C. Owyang, State of California, Office of Administrative Hearings, heard this matter in Foster City, California, on April 30, 2009.

Attorney Jonathan A. Pearl, Miller Brown Dannis, represented the San Mateo – Foster City School District. Joan Rosas, Assistant Superintendent, Human Resources, was present as the district's representative.

Attorney Holly K. Herndon, Beeson, Tayer & Bodine, represented respondents Michel Bochow, Rosemary Fernandez, Alexander Kane, Emma Otsuji, and Stephanie Watkins.

The parties resolved all but one issue by stipulation. The only issue still in contention is whether respondent Stephanie Watkins should be classified as probationary or temporary. The district and respondents timely filed post-hearing briefs on May 4, 2009. The district's brief was marked for identification as Exhibit 4. Respondents' brief was marked for identification as Exhibit F. The matter was submitted for decision on May 4, 2009.

FACTUAL FINDINGS

1. District Superintendent Pendency Clark made the accusation in her official capacity.
2. Each of the respondents is a certificated employee of the district.
3. On February 5, 2009, the board adopted skipping and tie-breaking criteria.

4. On February 19, 2009, the district’s governing board adopted Resolution 8/08-09, directing the superintendent to give notices to certificated employees that their services would not be needed for the 2009 – 2010 school year. The board determined that it was necessary to reduce the following particular kinds of services no later than the beginning of the 2009 – 2010 school year:

<u>Services</u>	<u>Number of Full-Time Equivalent (FTE) Positions</u>
*Student Achievement Facilitators and BTSA Coaches	7
*Fifth Grade Instrumental Music	3
*Elementary Counseling program	1
*Newcomer program	2
*Elementary Title I Teachers	4.99
*Elementary Reading Teachers	2.1
*Elementary EL Teachers	1.44
*Elementary Art Teacher	.25
*Middle School EL Teachers	1.36
*Middle School Spanish Teacher	.49
*Middle School Teacher on Special Assignment	1
*Categorically funded Administrators	5.41
TOTAL	30.04 FTE

(*categorically funded positions)

The reduction of particular kinds of services relates solely to the welfare of the district’s schools and pupils within the meaning of Education Code section 44949.

5. On February 19, 2009, the superintendent gave written notice to the board of the recommendation that notice be given to respondents that their services would not be needed for the ensuing school year and stating the reasons therefore.

6. There are no issues or disputes regarding the preliminary layoff notices, requests for hearing, service of the accusation, or the notices of defense in this matter, all of which were properly served and timely.

7. Emma Otsuji is a permanent employee with an October 16, 2006 seniority date. The district will reassign her to a teaching position for the 2009 – 2010 school year and does not seek to subject her to layoff.

8. Rosemary Fernandez (also known as Rosemary Ruiz-Fernandez) is a certificated employee in a categorically funded position. She will be placed on the seniority list with a seniority date of October 20, 2008. She is properly subject to layoff pursuant to

the notice given under Education Code sections 44955 and 44949. The district will rescind the notice of release from temporary employment issued to her.

9. A November 6, 2008 letter from Mary L. Willis, then Assistant Superintendent, Human Resources, to Stephanie Watkins stated:

Dear Stephanie:

THIS LETTER SERVES AS YOUR CONTRACT

I am pleased to offer you a temporary intern middle school music teaching position with the San Mateo-Foster City School District. This offer is contingent upon receiving a California Teaching Credential, NCLB compliant (*sic*) and fingerprint clearance. Please contact Cathy Ennon, principal at Abbott Middle School, for details of your assignment.

Based on your unverified years of experience and completed course work, you will be placed on the salary schedule at Step [1], Column [N/A], MA [N/A]. Actual payment of this salary placement is contingent upon verification of both service and course work credit.

Please confirm your acceptance of this offer by completing the form below.

(The entries shown in brackets were in handwriting.)

Watkins signed the form on November 6, 2008. The form stated:

I accept the District's offer as a temporary intern middle school MUSIC teaching position. This offer is contingent upon **receiving a California Teaching Credential, NCLB compliance and fingerprint clearance. This offer begins on January 12, 2009 and ends on June 25, 2009.**

The letter does not mention Watkins being a "university intern" or that her position was previously taught by Tim Hillborn. It was not shown that a university internship or Hillborn were mentioned in the district's discussions with Watkins.

10. Watkins began teaching music at Abbott Middle School on January 12, 2009. Although she was not aware of it at the time, Tim Hillborn, a permanent teacher, had previously taught in that position. Hillborn took leave from that position around November

2008 to teach in a district-wide fifth grade instrumental music program funded by the district's "for kids!" education foundation.

11. The district's seniority list includes "district interns" and one "university intern." Watkins does not appear anywhere on the district's seniority list, presumably because it considers her a temporary employee.

12. Joan Rosas became the Assistant Superintendent, Human Resources, in January 2009. She was not the author of the November 6, 2008 letter to Watkins. She is not familiar with the university intern program. At hearing, she referred to Watkins as a "university intern," but the record as a whole did not show whether Watkins was hired as a university intern under the Teacher Education Internship Act of 1967, Education Code section 44450 et seq.

LEGAL CONCLUSIONS

1. The district will reassign Emma Otsuji to a teaching position in the 2009 – 2010 school year and does not seek to subject her to layoff. The accusation against Otsuji will be dismissed.

2. Cause exists in accordance with Education Code sections 44949 and 44955 for the elimination of particular kinds of services in accordance with district Resolution 8/08-09. Further, cause exists to give notice to respondents representing up to an equal number of positions that their services will not be required for the 2009 – 2010 school year. This cause relates solely to the welfare of the schools and pupils within the meaning of section 44949.¹

3. The only issue in dispute is whether respondent Stephanie Watkins should be classified as a probationary or a temporary employee. The parties acknowledge that whether Watkins is probationary or temporary, her employment relationship with the district may be ended; her reemployment rights may, however, be affected by the resolution of this issue.

The district asserts that Watkins is properly classified as temporary. It notes that the November 6, 2008 letter states in two places that Watkins was offered a "temporary" position, and that the letter indicated the temporary duration of her employment (January 12 to June 25, 2009). The district further notes that Watkins is properly classified as temporary because she replaced Tim Hillborn, who was on leave to serve in the "for kids!" funded fifth grade music program. (The evidence did not show, however, that the district informed Watkins that she had been hired to replace Hillborn, or that Hillborn might return to teach music at Abbott Middle School.)

¹ Unless otherwise noted, all statutory references are to the Education Code.

Respondents assert that Watkins, as a university intern, must be classified as probationary and that school districts have no discretion to classify interns as temporary. Respondents note that section 44885.5 requires that “district interns” be classified as probationary. They cite *Peoples v. San Diego Unified School Dist.* (2006) 138 Cal.App.4th 463 and *Welch v. Oakland Unified School Dist.* (2001) 91 Cal.App.4th 1421 in support of the contention that “university interns” such as Watkins should also be classified as probationary.

The university intern program was created and is governed by the Teacher Education Internship Act of 1967, section 44450 et seq. The evidence did not show that the district hired Watkins pursuant to this program. The November 6, 2008 letter refers to a “temporary intern” position, not a university internship. And while Assistant Superintendent Rosas referred to Watkins as a university intern, she was unfamiliar with the program and considered Watkins a temporary employee filling in for Tim Hillborn. On the existing record it has not been shown that Watkins is a university intern within the meaning of sections 44450 et seq. The parties will be directed to review their records to determine if Watkins is in fact a university intern.

Even if Watkins is a university intern for purposes of sections 44450 et seq., it is not clear that those sections require that a university intern be classified as probationary. Apparently to the contrary, section 44466 provides:

An intern shall not acquire tenure while serving on an internship credential. A person who, after completing a teaching internship program authorized pursuant to this article, is employed for at least one complete school year in a position requiring certification qualifications by the school district that employed the person as an intern during the immediately preceding school year and is reelected for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year, acquire tenure.

Section 44466 contemplates that a university intern gains probationary credit toward tenure after meeting specified requirements. It does not require that university interns receive probationary classification when first employed.

It is not necessary to reach respondents’ contentions regarding *Peoples v. San Diego Unified School Dist.*, *supra*, 138 Cal.App.4th 463 and *Welch v. Oakland Unified School Dist.*, *supra*, 91 Cal.App.4th 1421. Those contentions may be for another forum to resolve.

By its terms (“THIS LETTER SERVES AS YOUR CONTRACT.” “I am pleased to offer you a temporary intern middle school music teaching position . . .” “I accept the District’s offer . . .”), the November 6, 2008 letter is the employment contract between the

district and Watkins. There is no mention of Watkins being a university intern or of Watkins having probationary status. On the existing record, the district properly classified Watkins as a temporary employee.

ORDER

1. The accusation against Emma Otsuji is dismissed.
2. The district and Stephanie Watkins shall review their records to determine if Watkins is a university intern within the meaning of sections 44450 et seq.
3. The district need not provide notice, pursuant to sections 44955 and 44949, to Stephanie Watkins that her services will not be required for the 2009 – 2010 school year.
4. Notice may be given to the remaining respondents that, in accordance with district Resolution 8/08-09, their services will not be required for the 2009 – 2010 school year.

DATED: _____

STEVEN C. OWYANG
Administrative Law Judge
Office of Administrative Hearings