

BEFORE THE GOVERNING BOARD OF THE  
DOS PALOS-ORO LOMA JOINT UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

KIMBERLY BAKKER, et al.,

OAH No. 2010031244

Respondents.

**PROPOSED DECISION**

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in Dos Palos, California, on April 21, 2010.

Kevin R. Dale, Attorney at Law,<sup>1</sup> represented the complainant, Brian Walker, Ed.D., Superintendent of Schools, Dos Palos – Oro Lomo Joint Unified School District.

There are 11 respondents, and they are listed in exhibit A.

Jenna Hofer, one of the respondents, appeared in propria persona.

Joshua F. Richtel, Attorney at Law,<sup>2</sup> represented the remaining 10 respondents.

The matter was submitted on April 21, 2010.

**FACTUAL FINDINGS**

*GENERAL FINDINGS CONCERNING STATUTORY REQUIREMENTS*

1. Respondents are certificated district employees.
2. Not later than March 15, 2010, in accordance with Education Code sections 44949 and 44955,<sup>3</sup> the superintendent of the school district caused the respondents to be

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<sup>3</sup> All references to the Code are to the Education Code unless otherwise specified.

notified in writing that it was recommended that respondents be notified that the district would not require their services for the ensuing school year. Except as to one of the respondents, the superintendent of the school district caused the governing board to be given a similar written notice. The notice stated the reasons for the recommendation. The recommendation was not related to respondents' competency. Superintendent Walker wrote a memorandum dated March 10, 2010, addressed to the board, and he met with the board on March 10, 2010. In the memorandum, he listed 13 teachers and recommended that regular layoff notices be sent to them. Doreen Castillo was not on the list. When Dr. Walker met with the board, however, it was agreed that the services Ms. Castillo performs should be discontinued and that she should be sent a layoff notice. The board's resolution of March 10, 2010, includes the services Ms. Castillo performs, "Alternative Ed School Classroom Instructional Services," and identifies them as services that should be reduced or discontinued. Code section 44949, subdivision (a), requires that, no later than March 15, the superintendent give the governing board "written notice" that it has been recommended that a layoff notice be given to the employee. The written notice to the board must state the reason for the recommendation. Thus, with regard to Ms. Castillo, Dr. Walker did not satisfy the requirement of subdivision (a) – the requirement that he provide written notice to the board. Code section 44949, subdivision (c)(3), however, provides, in part, "Nonsubstantive procedural errors committed by the school district or governing board . . . shall not constitute cause for dismissing the charges unless the errors are prejudicial errors." It is found that the failure to provide written notice to the board regarding Ms. Castillo was a nonsubstantive procedural error that did not prejudice Ms. Castillo. It is clear that Dr. Walker met with the board before March 15, 2010, and that, at the meeting, he and the board agreed that the services Ms. Castillo performs should be discontinued. Also, there was no delay in notifying Ms. Castillo. A copy of the layoff notice was personally given to her on March 11, 2010, which was substantially before the March 15, 2010, deadline.

3. A notice was delivered to each respondent, either by personal delivery or by depositing the notice in the United States mail, registered, postage prepaid, and addressed to respondent's last known address.

4. The notice advised each respondent of the following: He or she had a right to a hearing. In order to obtain a hearing, he or she had to deliver a request for a hearing in writing to the person sending the notice. The request had to be delivered by a specified date, which was a date that was not less than seven days after the notice of termination was served.<sup>4</sup> And the failure to request a hearing would constitute a waiver of the right to a hearing.

5. All but one of the respondents timely filed written requests for a hearing to determine whether there was cause for not reemploying them for the ensuing year. Celine Castaneda filed a late request. The district waived any objection to Ms. Castaneda's

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<sup>4</sup> Employees must be given at least seven days in which to file a request for a hearing. Education Code section 44949, subdivision (b), provides that the final date for filing a request for a hearing "shall not be less than seven days after the date on which the notice is served upon the employee."

participating in the proceeding as a respondent, and she is one of the respondents listed in exhibit A. An accusation was timely served on respondents. Respondents were given notice that, if they were going to request a hearing, they were required to file a notice of defense within five days after being served with the accusation.<sup>5</sup> Respondents filed timely notices of defense. All prehearing jurisdictional requirements were met.

6. The governing board of the district resolved to reduce or discontinue particular kinds of services. Within the meaning of Code section 44955, the services are “particular kinds of services” that can be reduced or discontinued. The decision to reduce or discontinue these services was not arbitrary or capricious but constituted a proper exercise of discretion.

*SERVICES THE DISTRICT INTENDS TO REDUCE OR DISCONTINUE*

7. The governing board of the district determined that, because particular kinds of services are to be reduced or discontinued, it is necessary to decrease the number of permanent or probationary employees in the district by 14 full time equivalents (FTE).

8. The particular kinds of services the governing board of the district resolved to reduce or discontinue are:

|   |          |
|---|----------|
| <b>Elementary Classroom Instructional Services</b>            |          |
| Multiple Subject Teaching Services - Grades K-5               | 8.00 FTE |
| Intervention Teaching Services - Grades K-5                   | 1.24 FTE |
| <b>Middle School Classroom Instructional Services</b>         |          |
| English/Language Arts - Grades 6-8                            | 1.00 FTE |
| Intervention Teaching Services - Grades 6-8                   | 3.00 FTE |
| <b>High School Classroom Instructional Services</b>           |          |
| Leadership  | .17 FTE  |
| Printed Media and Design                                      | .17 FTE  |
| ROP Business/Marketing  | .33 FTE  |
| ROP Graphics  | .33 FTE  |
| Intervention Teaching Services                                | 1.00 FTE |
| <b>Alternative Ed School Classroom Instructional Services</b> |          |
| Computer Applications   | .56      |

<sup>5</sup> Pursuant to Government Code section 11506, a party on whom an accusation is served must file a notice of defense in order to obtain a hearing. Education Code section 44949, subdivision (c)(1), provides that, in teacher termination cases, the notice of defense must be filed within five days after service of the accusation.

|                                   |                  |
|-----------------------------------|------------------|
| P.E.                              | .15              |
| Art                               | .15              |
| Math Intervention                 | .14              |
|                                   |                  |
| <b>Counselor Positions</b>        |                  |
| Counselor - Grades 9-12           | 1.00 FTE         |
| Counselor – Alternative Education | 1.00 FTE         |
|                                   |                  |
| <b>Other Positions</b>            |                  |
| Library Media Services            | 1.00 FTE         |
|                                   |                  |
| <b>Total:</b>                     | <b>19.24 FTE</b> |

9. The 19.24 FTEs the district identified as being reduced or discontinued include 5.24 FTEs of services provided by temporary employees. The district is not reemploying those temporary employees. Thus, the reduction or discontinuations connected with layoffs total only 14 FTEs. The district delivered regular layoff notices to 14 teachers. Ten of those requested a hearing. As noted above, Ms. Castaneda, one of those ten, filed her request late. The district served a precautionary notice on Ms. Hofer because of a concern that a teacher senior to her might prove that he or she had a right to bump onto Ms. Hofer’s position. The ten teachers and Ms. Hofer constitute the eleven respondents.

*RIGHT TO BE RETAINED ACCORDING TO SENIORITY AND QUALIFICATIONS – DATE OF HIRE*

10. Job security is not inherent in seniority. The Legislature chose to provide teachers with limited job security according to their seniority.

*RIGHT TO BE RETAINED ACCORDING TO SENIORITY AND QUALIFICATIONS – BUMPING*

11. The second paragraph of section 44955, subdivision (c), does not add to teachers’ seniority rights. It does, however, make it clear that governing boards must make assignments in such a way as to protect seniority rights. Employees must be retained to render any service their *seniority* and qualifications entitle them to render. Thus, if a senior teacher whose regular assignment is being eliminated is certificated and competent to teach a junior teacher’s courses, the district must retain the senior teacher and reassign him or her to render that service. This is commonly referred to as bumping. The district must either reassign or terminate the junior employee.

12. The district adopted competency criteria that teachers must satisfy in order to bump into a position held by another teacher. The competency criteria are as follows:

[F]or purpose of implementing this Resolution, a more senior employee is defined as “competent” for reassignment into a

position currently held by a more junior employee if the employee currently possesses a preliminary or clear credential authorizing the subject(s) and grade level(s) to which the employee will be assigned at the beginning of the 2010-2011 school year, and has taught in the subject area . . . to which he/she will be assigned at the beginning of the 2010-2011 school year for at least one (1) year in the preceding three (3) years.

*CLARK DOES NOT HAVE A RIGHT TO BUMP INTO THE POSITION HELD BY SOARES*

13. Brenda Clark is a library media teacher. That position is one of the services being discontinued. Kelly Soares is a social science teacher teaching history in the high school. Ms. Clark is senior to Ms. Soares and is certificated to teach the subjects Ms. Soares teaches. Ms. Clark has taught history part of the time. She, however, has not taught history for at least one year in the preceding three years. Thus, she does not satisfy the competency criteria and, therefore, has no right to bump into the position Ms. Soares holds.

*SUMMARY OF FINDINGS REGARDING RETENTION OF EMPLOYEES*

14. With regard to respondents who are permanent employees, the district is not retaining any probationary employee to render a service that such a respondent is certificated and competent to render.

15. With regard to respondents who are permanent employees, the district is not retaining any employee with less seniority than such a respondent has to render a service that the respondent is certificated and competent to render.<sup>6</sup>

16. With regard to respondents who are either permanent or probationary employees, the district is not retaining any employee with less seniority than such a respondent has to render a service that the respondent's qualifications entitle him or her to render.<sup>7</sup>

*STIPULATION TO RESCIND ONE NOTICE*

17. Complainant stipulated that, in the event no one proved that he or she has a right to bump into the position Ms. Hofer holds, the notice served on her should be rescinded. There was no evidence that anyone has a right to bump into the position Ms. Hofer holds.

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<sup>6</sup> Code section 44955, subdivision (b), provides seniority protection for a *permanent* employee in terms of the services the employee is "*certificated and competent to render.*"

<sup>7</sup> Code section 44955, subdivision (c), provides seniority protection for both *permanent and probationary* employees in terms of the services an employee's "qualifications entitle [him or her] to render."

## LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Code sections 44949 and 44955. All notice and jurisdictional requirements contained in those sections were satisfied.
2. The notice served on Ms. Hofer should be rescinded.
3. Within the terms of Code sections 44949 and 44955, the district has cause to reduce or discontinue particular kinds of services and to give notices to all of the respondents other than Ms. Hofer that their services will not be required for the ensuing school year. The cause relates solely to the welfare of the schools and the pupils.

## ORDER

1. The district may give notice to all of the respondents other than Ms. Hofer that the district will not require their services for the ensuing school year.
2. The notice served on Ms. Hofer is rescinded.

Dated: April 27, 2010

  
ROBERT WALKER  
Administrative Law Judge  
Office of Administrative Hearings

EXHIBIT A  
RESPONDENTS

Kimberly Bakker  
Klytia Burcham  
Celine Castaneda  
Doreen Castillo  
Brenda Clark  
Allison Dossetti  
Anna Fimbrez  
Jenna Hofer  
April Hogue  
Marta Stencil  
Michelle Worrell