

BEFORE THE  
GOVERNING BOARD OF THE  
LOS BANOS UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

AMANDA SMITH, et al.,

Respondents.

OAH No. 2010031245

**PROPOSED DECISION**

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

Kevin R. Dale, Attorney at law,<sup>1</sup> represented the complainant, Dr. Steve Tietjen, Superintendent, Los Banos Unified School District.

Joshua F. Richtel, Attorney at Law,<sup>2</sup> represented the respondents. There are 35 respondents, and they are listed in exhibit A.

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 governing board of the district and respondents to be notified in writing that it was recommended that respondents be notified that the district would not require their services for the ensuing

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

school year. The notice stated the reasons for the recommendation. The recommendation was not related to respondents' competency.

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. Respondents timely filed written requests for a hearing to determine whether there was cause for not reemploying them for the ensuing year. 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 50 full time equivalents (FTE).

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

Middle school multiple subject classes in grades 7 and 8: 1 FTE  
Elementary multiple subject classes in grades K through 6: 49 FTE

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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."

<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.

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

9. 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*

10. 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.

11. The district served precautionary notices on Jason Bretz and Larry Borelli because of a concern that a more senior teacher might assert a right to bump into a position held by one of them. There was no proof, however, that any teacher has a right to bump into either of those positions.

*SUMMARY OF FINDINGS REGARDING RETENTION OF EMPLOYEES*

12. 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.

13. 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>

14. 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>

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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."

*STIPULATION TO RESCIND TWO NOTICES*

15. Complainant stipulated that, in the event no one proved that he or she has a right to bump into the position of either Mr. Bretz or Mr. Borelli, the notices served on Mr. Bretz and Mr. Borelli should be rescinded.

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 notices served on Mr. Bretz and Mr. Borelli 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 33 respondents 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 notices served on Mr. Bretz and Mr. Borelli are rescinded.
2. The district may give notice to the remaining 33 respondents that the district will not require their services for the ensuing school year.

Dated: April 26, 2010

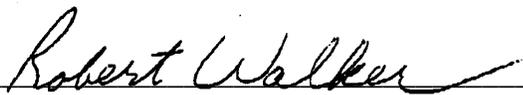
  
ROBERT WALKER  
Administrative Law Judge  
Office of Administrative Hearings

EXHIBIT A  
LIST OF RESPONDENTS

Amparan, Lisa
Avila, Danielle
Borelli, Larry
Bracey, Michael
Bretz, Jason
Castaneda, Chamroeun
Chheuth, Serey
Clarke-Weidman, Denise
Gamino, Juventina
Henley, Erin
Kocher, Lisa
Kruger, Carole
Landon, Megan
Lewis, Patty
Locarnini, Stefanie
Lowery, Ana
Merrill, Deanna
Miranda, Angelica
Mouro, Nicole
Nicholson, Megan
Perdomo, Monica
Pierce, Leanna
Ramirez, Cynthia
Rivas, Lupita
Rocha, Dawn
Rola, Audrey
Romero, Wendy
Sanghera, Gurpreet
Silva, Jaclyn
Singh, Michael
Smith, Amanda
Smith, Jennifer
Windecker, Brianne
Wolfsen, Leigh Ann
Yang, Mai