

BEFORE THE
GOVERNING BOARD
COLTON JOINT UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

The respondents listed in Appendix "A"

OAH No. 2011030922

PROPOSED DECISION

Roy W. Hewitt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Colton, California on April 25, 2011.

John W. Dietrich, Esq. of Atkinson, Andelson, Loya, Ruud & Romo represented the Colton Joint Unified School District (the District).

All of the respondents who were present at the hearing were represented by Marianne Reinhold, Esq. of Reich, Adell & Cvitan.

All respondents who failed to appear for the hearing were properly noticed of the date, time and place of hearing.

The matter was submitted on April 25, 2011.

FACTUAL FINDINGS

1. Ingrid Munsterman, Assistant Superintendent, Human Resources made and filed the Accusation, dated March 11, 2011, on behalf of Superintendent Jerry Almendarez (the Superintendent), pursuant to delegation of authority. At all times, Ingrid Munsterman and Jerry Almendarez were acting in their official capacities as Assistant Superintendent and Superintendent of the District

2. The 99 respondents¹ slated for potential layoff are certificated District employees.

3. On March 3, 2011, the District’s Governing Board (Board) adopted Resolution No. 11-44², determining that it would be necessary to reduce or discontinue particular kinds of services at the end of the current school year. The Board determined that the particular kinds of services that must be reduced for the 2011-2012 school year were the following full time equivalent (FTE) positions:

<u>Particular Kind of Service (PKS)</u>	<u>Full-Time Equivalent (FTE)</u>
Agriculture Science Teaching Services, High School	2.4
Art Teaching Services, High School	1.0
Biology Teaching Services, High School	2.0
Business Education Teaching Services, High School	1.0
Chemistry Teaching Services, High School	1.0
Counseling Services, Elementary	7.0
Counseling Services, Middle School	5.0
Driver Education Teaching Services, High School	1.0
Elementary (K-6) Classroom Teaching Services	30.0
English/Language Arts Teaching Services, Middle School	2.0
Foreign Language: French Teacher, High School	1.0
Foreign Language: German Teacher, High School	1.0
Geosciences Teaching Services, High School	2.0
Home Economics Teaching Services, High School	1.0
Infant Development (Pregnant Minors) Teaching Services	1.0
Math Teaching Services, Middle School	3.0
P.E. Teaching Services, Middle School	2.0
P.E. Teaching Services, High School	2.0
School Nursing Services	4.0
Science Teaching Services, Middle School	2.0
Social Science Teaching Services, Middle School	2.0
Social Science Teaching Services, High School	2.0
Adult Education Teaching Services	.71
<u>Total FTE’s</u>	<u>76.11</u>

The services listed above are particular kinds of services, which may be reduced or discontinued within the meaning of Education Code section 44955.

1 72 respondents were served with lay off notices and 27 were served with “precautionary” layoff notices.

2 The original resolution called for a 103.11 FTE reduction. Ultimately, the Board amended the resolution reducing the FTE cuts to the 76.11 listed herein.

4. The Board's decision to reduce or discontinue the services listed in Finding 3, above, is neither arbitrary nor capricious; rather, it is due to substantial decreases in the operating budget, and is, therefore, a proper exercise of the Board's discretion. The reduction and discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Board. No particular kinds of services were lowered to levels less than those levels mandated by state or federal law.

5. The Superintendent and District considered all positively assured attrition, including resignations, retirements and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees.

6. On March 11, 2011, the Superintendent timely notified all respondents listed in Appendix "A", except for Heather Sieger (Sieger), pursuant to California Education Code sections 44949 and 44955, of the District's intent not to reemploy them for the upcoming school year. Accordingly, except for Sieger, respondents received written notice, on or before March 15, 2011, notifying them that the Board had recommended they not be re-employed in the upcoming, 2011-2012 school year.

7. On March 11, 2011, except for Sieger³, the respondents listed in Appendix "A" were properly served with a copy of the Accusation, a blank Notice of Defense, a Notice of Hearing and other related materials.

8. Of the 99 respondents served with layoff notices and "precautionary" layoff notices, 70 respondents timely requested a hearing, 11 respondents did not timely request a hearing, and 18 respondents failed to request a hearing. The instant hearing for the 70 respondents who timely requested a hearing ensued.

9. All of the respondents were properly noticed of the date, time and place of the instant hearing.

10. All prehearing jurisdictional requirements have been met.

11. Respondents have been selected for notice of layoff pursuant to their seniority date, which is based on the first day of paid service of each respondent in a probationary position. Respondents were ranked for layoff in the inverse order of their seniority dates.

12. The uncontested testimony of the Coordinator for Human Resources, Susan Reed, established that two teachers, Victoria Sexton and Idalia Smith should appear on the "regular RIF list, not the precautionary list." Those names have been added to Appendix "B."

³ The District dismissed the Accusation as to Sieger during the hearing.

ISSUES RAISED DURING THE HEARING

13. Respondent Michael Walling (Walling) testified that he believes he has the qualifications to teach English and Geography because he taught English and Geography at “Options for You.” Therefore, he should be able to “bump” less senior teachers in areas where his English and Geography teaching experience allow. In pertinent part, the “competency” criteria established by the Board for purposes of bumping require “one year of full-time experience in the relevant subject matter area. Walling’s English and Geography teaching experience is not reflected in his personnel file and Walling failed to notify the District of that experience in a pre-layoff “Verification of Personnel Information” form he signed on January 18, 2011. The form informed Walling, “In the event of a layoff, the foregoing information may be used by the District to determine which employees are affected.” In the form Walling checked the “No” answer to the following question: “Have you completed academic training *and* one year of full-time experience in another specialized (subject) area to which the District would be able to assign you?” The District relied on the information Walling provided in the form in designating teachers for potential layoff and Walling is now estopped from arguing that his undisclosed English and Geography teaching experience qualify him to bump a less senior teacher.

14. Respondent Molly Green (Green) testified that she has student teaching experience teaching Social Science and that over the past couple years she has requested to be assigned to teach Social Science. However, due to the need of the District for French teachers the District has not been able to assign her to teach Social Science. Consequently, Green does not have the requisite “one year of full-time experience” teaching Social Science necessary to qualify her to bump into a Social Science teaching position.

15. The District has an “Opportunity Program” at Washington High School, an alternative high school where alternative education programs are provided to students with social and emotional issues. The Opportunity Program teachers receive specialized, ongoing/continuous training in the “Boys Town Behavioral Modification” methodology used to teach the challenging youths participating in the Opportunity Program. Two respondents, Steven Boone (Boone) and Elizabeth Elliott (Elliott) testified that they wished to bump into an Opportunity Program position. The evidence revealed that Boone lacked the necessary one-year experience criterion to bump into an Opportunity Program position; however, Elliott does possess the necessary teaching experience. Elliott has been teaching students who have “aged out” of the District’s Opportunity Program⁴ at Slover Mountain High School. He has over two years of full-time teaching of the alternative program at Slover. Elliott has taught approximately “80 ‘challenging’ students” who “aged out” of the District’s Opportunity Program. Consequently, Elliott should have been allowed to bump one of

³ Once youths turn 16 years of age they are transferred out of the Washington Opportunity Program into a similar program at Slover High School.

the less senior Opportunity Program teachers⁵; thus, the Accusation is dismissed as to Elliott.

16. Two School Nurses, respondent Christine Whitmyer (Whitmyer) and respondent Angela Coaston (Coaston) testified that they were concerned about the District's ability to provide necessary nursing services if Nursing Services are cut by 4.0 FTE's. While their concern is understandable, it is not within the jurisdiction of the Office of Administrative Hearings to second guess the wisdom of the District's choice of programs to cut or eliminate as long as the District can continue to operate pursuant to Federal and State minimum education requirements. Cutting 4.0 FTE's out of the 8.0 FTE's of Nursing Services provided by the District does not violate any Federal or State educational requirements and is not fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. Accordingly, the District's decision to cut Nursing Services by 4.0 FTE's was an appropriate exercise of the District's discretion.

17. Respondent Elizabeth Talbert (Talbert) was served with a precautionary layoff notice and testified that due to her English Language Development (ELD) teaching experience, *if she is chosen for layoff*, she should be allowed to bump a less senior ELD teacher. Talbert teaches in the Opportunity Program and has a seniority date of 8/23/2004. There is no indication she will be subjected to layoff in these proceedings or that the District will not allow her to bump into an ELD position if she is considered for layoff; therefore, her argument is not ripe for consideration.

18. Respondent Edrina Fraijo (Fraijo), a Physical Education (PE) teacher believes she should be allowed to bump into the Athletic Director (AD) position. The evidence, however, established that the AD position differs from that of a PE teacher and that Fraijo does not have the requisite one-year experience necessary to bump into the AD position.

19. Respondent Shannon Sharp (Sharp) would like to bump into an ELD assignment; however, the Certificated Employee Coordinator for Human Resources testified that even if Sharp met the bumping criteria there is no less senior teacher teaching in an ELD position.

20. Except for Elliott, no certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

4 Elliott testified that she is ready and willing to sign the consent form necessary to teach the Opportunity Program.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. 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.)

3. Pursuant to section 44995, 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)

The District has an obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. (*Bledsoe v. Biggs Unified School Dist., supra.* at 136-137.)

4. The decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. It is within the governing authority’s discretion to determine the amount by which a particular kind of service will be reduced or discontinued as long as the District does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.) A school district has wide discretion in setting its budget and a layoff decision will be upheld unless it was fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. (*California Sch. Employees Assn. v. Pasadena Unified Sch. Dist.* (1977) 71 Cal.App.3d 318, 322.)

5. With regard to the well-established doctrine of equitable estoppel, “The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.” (*Seymour v. Oelrichs* (1909) 156 Cal. 782, 795, quoted in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488.)

6. “Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the

facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury" (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305-306.)

7. The services listed in Factual Finding 3 are each determined to be a particular kind of service within the meaning of Education Code section 44955.

8. Based on the Factual Findings, considered in their entirety, cause exists to reduce the number of certified employees of the District for budgetary reasons.

9. Cause to reduce or discontinue services relates solely to the welfare of the District and its pupils within the meaning of Education Code section 44949.

10. "Precautionary" respondents Victoria Sexton and Idalia Smith are added to Appendix "B."

11. Cause exists to give all respondents listed in Appendix "B" that their services are not needed for the ensuing, 2011-2012, school year.

ADVISORY DETERMINATION

The following advisory determination is made:

Prior to May 15, 2011, notice shall be given to the respondents listed in Appendix "B" that their services will not be required for the ensuing school year due to the budget deficit and the resulting need to reduce and/or discontinue certain services.

The Accusation is dismissed as to respondents Heather Sieger and Elizabeth Elliott and the layoff notices are rescinded.

DATED: April 28, 2011.

ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings

APPENDIX "A"

1. Adame, Cheryllyn
2. Anderson, Brittany
3. Arriaza, Melissa
4. Boone, Stephen
5. Booth, Carol
6. Borja, Miriam
7. Boswell, Michelle
8. Bowers, Stephanie
9. Castleman, Derek
10. Cervantes, Cathy
11. Clevinger, Faith
12. Coaston, Angela
13. Collins, Anna
14. Davis, Jr., Anthony
15. DeBord, Jason
16. D'Silva, Naomi
17. Elliott, Elizabeth
18. Esparza, Rosalba
19. Esquivel, Michael
20. Fraijo, Edrina
21. Galbreath, Kate
22. Garcia, Terry
23. Gaytan, Gabriel
24. Gonzalez, Patricia
25. Green, Molly
26. Griffith, Kristin
27. Harper, Laura
28. Heusterberg, Robyne
29. Hochevar, Andrea
30. Hoss, April
31. Hunt, Andrew
32. Johnson, Matthew
33. Johnston, Maybelle
34. Kennebrew, Cynthia
35. Leach, Geraldine J.
36. Linek, Erin
37. Lyles, Melinda
38. Matthews, Gerald
39. McGuffee, Adriana
40. Miller, Rosemary
41. Moore, Brandon
42. Morales, Liza
43. Morales, Victor
44. Murillo, Maria
45. Paez-Herrera, Azucena
46. Park, Lynn
47. Perez, Ana
48. Ramirez, Tania
49. Rasouli Javaheri, Sima
50. Richardson, Ronald
51. Rivera, Sara
52. Rodriguez, Krissee
53. Ruiz, Jesus
54. Salazar, Celia
55. Salehpour, Yesenia
56. Sandoval, Mark
57. Sharp, Shannon
58. Sieger, Heather
59. Sotelo, Michelle
60. Taylor, Deirdre
61. Torres, Jannet
62. Trapp, Desiree
63. Treff, Star
64. Valencia, Lydia
65. Vasquez, Sandra
66. Vergara, Omar
67. Vizcaino, Jeanne
68. Walker, Katelyn
69. Walling, Michael
70. Washburn, Benjamin
71. Whitmyer, Christine
72. Zumfelde, Charme

PRECAUTIONARY NOTICES

1. Benavente-Barrera, Christine
2. Bihlmeier, Sharon
3. Boyd, Amanda
4. Castro, Benjamin
5. Crow, Joei
6. Davila, Gabriel
7. DeJongh, Yvonne
8. Dumke, Patricia
9. Hoang, John
10. Jensen, Andrea
11. Junio, Sherwin
12. Ladd, Sarah
13. Martinez, Jr., Jose
14. Martinez, Mark
15. Portillo, Lucy
16. Ramos, Michelle
17. Sanchez, Jr., Rodolfo
18. Schmitt, Hillary
19. Scribner, Michelle
20. Sexton, Victoria
21. Sivertsen, Francesca
22. Smith, Idalia
23. Sutherland, Seth
24. Talbert, Elizabeth
25. Wang, David
26. Ward, Wendy
27. Yang, Sharon

APPENDIX "B"

1. Adame, Cheryllyn
2. Anderson, Brittany
3. Arriaza, Melissa
4. Boone, Stephen
5. Booth, Carol
6. Borja, Miriam
7. Boswell, Michelle
8. Bowers, Stephanie
9. Castleman, Derek
10. Cervantes, Cathy
11. Clevinger, Faith
12. Coaston, Angela
13. Collins, Anna
14. Davis, Jr., Anthony
15. DeBord, Jason
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41. Morales, Liza
42. Morales, Victor
43. Murillo, Maria
44. Paez-Herrera, Azucena
45. Park, Lynn
46. Perez, Ana
47. Ramirez, Tania
48. Rasouli Javaheri, Sima
49. Richardson, Ronald
50. Rivera, Sara
51. Rodriguez, Krissee
52. Ruiz, Jesus
53. Salazar, Celia
54. Salehpour, Yesenia
55. Sandoval, Mark
56. Sexton, Victoria
57. Sharp, Shannon
58. Smith, Idalia
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60. Taylor, Deirdre
61. Torres, Jannet
62. Trapp, Desiree
63. Treff, Star
64. Valencia, Lydia
65. Vasquez, Sandra
66. Vergara, Omar
67. Vizcaino, Jeanne
68. Walker, Katelyn
69. Walling, Michael
70. Washburn, Benjamin
71. Whitmyer, Christine
72. Zumfelde, Charme