

BEFORE THE  
GOVERNING BOARD OF THE  
MOUNT DIABLO UNIFIED SCHOOL DISTRICT

In the Matter of:

The Certificated Employees identified in  
Appendix A,

Respondents.

OAH No. 2012030378

**PROPOSED DECISION**

This matter was submitted for decision before Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings.

Gregory Rolen and Deborah A. Cooksey, Attorneys at Law, represented the Mount Diablo Unified School District.

Ernest H. Tuttle, Attorney at Law, represented the respondents identified in Appendix A.

Prior to the hearing that was set for April 18, 2012, the parties agreed to submit the matter on stipulated facts without a hearing. The parties' stipulations, and the exhibits attached thereto, were marked collectively as Exhibit I and admitted into evidence. The record remained open to permit the parties to file simultaneous closing briefs, which were timely filed. The District's brief was marked for identification as Exhibit II and respondents' brief was marked for identification as Exhibit III.

**FACTUAL FINDINGS**

1. Dr. Steven Lawrence made and filed the accusation against respondents in his official capacity as the superintendent of the Mount Diablo Unified School District (District).
2. Respondents are all certificated employees of the District.
3. On March 12, 2012, the Mount Diablo Board of Education (Board) passed a resolution (PKS Resolution) finding it necessary to terminate certain employees due to a reduction or discontinuance of particular kinds of services for the 2012-2013 school year. The PKS Resolution reduces the following 98.855 full-time equivalent (FTE) positions:

**District Wide**

Program Specialist, Categorical Programs, Site Based	1.00 FTE
Coordinator, Student Services 6-8	1.00 FTE
Coordinator, Student/Community Services 9-12	2.80 FTE
Music	.30 FTE
Library Media Teachers	.20 FTE
Resource Specialist	1.00 FTE
Special Day Class	1.00 FTE
Psychologist	.20 FTE

**Elementary Teaching Positions**

K-5 Classroom Teachers (Multiple Subject)	24.675 FTE
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**Middle School Teaching Positions**

Core (Multiple Subject)	5.51 FTE
Reading	1.17 FTE
AIMS	.84 FTE
Geometry	.20 FTE
Social Science	1.17 FTE
PE	.17 FTE
Math	.34 FTE
Science	2.34 FTE
English	.34 FTE
Library Media	.20 FTE

**High School Teaching Positions**

World History	.20 FTE
PE	.20 FTE
Geometry	.60 FTE
Math	9.20 FTE
Algebra	1.20 FTE
Trigonometry	.20 FTE
English	14.80 FTE
Art	2.80 FTE
Social Science	5.00 FTE
Foreign Language: Spanish	2.60 FTE
Foreign Language: French	1.40 FTE
Woodworking	.60 FTE
Work Experience Education (WEE)	.40 FTE
Ceramics	.40 FTE
Earth Science	.60 FTE
Biology	3.40 FTE
Chemistry	2.20 FTE
Music	1.00 FTE
(ROP) Radio Program	.60 FTE
Alternative Education Teacher	2.00 FTE

**Total: 91.855 FTE**

4. The PKS Resolution authorized the superintendent to send appropriate notices to all employees affected by the reduction.

5. On March 13, 2012, the District gave appropriate notice to the affected employees, all of whom requested a hearing. On March 23, 2012, the District timely served accusations on respondents, all of whom filed a notice of defense.<sup>1</sup> All prehearing jurisdictional requirements have been met.

6. On February 6, 2012, the Board passed a resolution (Tie-Breaker Resolution), in which it identified the criteria to be applied to resolve ties in seniority between certificated employees.

The District's employer-employee relations specialist and the president of the District's teachers' union applied the tie-breaking criteria to employees with the same seniority date on February 14, 2012. Ties between teachers with the same seniority date were resolved via lottery.

7. The PKS Resolution provides for skipping employees holding Bilingual Cross-Cultural Language and Academic Development (BCLAD) credentials who will be using that credential in the 2012-2013 school year. Pursuant to the resolution, the District skipped bilingual psychologists and junior teachers with a BCLAD credential who will be assigned to bilingual classrooms in the 2012-2013 school year.

8. Prior to determining the FTE positions to be reduced or eliminated, and again before sending out the layoff notices, the District considered positively assured attrition.

9. In the 2011-2012 school year, the District hired 29.818 FTE employees to work in categorically-funded programs. The District had planned to release all temporary employees, including those in categorically-funded positions prior to the end of the current school year. All of the contracts of the 29.818 employees end June 15, 2012, which is the last day of the school year for the 2011/2012 school year. However, in light of the recent decision in *Stockton Teachers Association CTA/NEA v. Stockton Unified School District* (2012) 204 Cal.App.4th 446, the District will retain these temporary employees. The positions of some of the temporary employees are funded with a combination of general funds and categorical funds. If the funding sources for a temporary employee's position are divided between general fund revenues and categorical funding, the District will release the employee from the portion paid for with general fund revenues. No temporary teachers will be retained in the portion of their positions that is paid for with general fund revenues while a permanent or probationary teacher is laid off.

10. Temporary teachers were informed of their status in writing prior to their first day of service and do not have seniority rights. However, the contracts of the temporary

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<sup>1</sup> Only one of the eight administrators on the layoff list, Tom Lorch, requested a hearing. Lorch subsequently indicated his intention not to attend the hearing or participate in the proceedings.

employees in categorically-funded programs do not specifically state that the employees are employed pursuant to Education Code section 44909, or that their contracts will end upon the expiration of categorical funding.

11. The District did not issue precautionary layoff notices to temporary employees who are filling in for teachers on leave, because those temporary employees will be released at the end of the current school year.

12. No certificated employee junior to any respondent is being retained to perform services which any respondent is certificated and competent to render.

13. The reduction or discontinuance of services is related solely to the general welfare of the schools and the pupils thereof.

### LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955.<sup>2</sup> All notices and jurisdictional requirements contained in those sections were satisfied. (Factual Finding 5.)

2. Respondents contend that pursuant to the *Stockton* decision, the employees hired to fill positions in categorically-funded programs must be classified as probationary employees because their contracts do not state that they are employed pursuant to section 44909, or that their contracts will end upon the expiration of categorical funding. This argument is unpersuasive for several reasons. First, issues concerning the appropriate classification of temporary employees who have not received a layoff notice and are not respondents herein, cannot be determined in this proceeding.<sup>3</sup> Moreover, in *Stockton*, the court held that if an individual employed in a categorical program is terminated prior to the expiration of the funding, that employee must be treated as a probationary employee. However, employees who are terminated upon the expiration of categorical funding can be treated as temporary employees. In this case, there is no evidence that the temporary employees will be released prior to the expiration of categorical funding. Finally, as will be discussed below, the reclassification of the temporary employees would serve to expand their rights, but would not affect respondents' rights to move into the positions created by categorical funding.

3. The real issue in this case is whether permanent or probationary certificated employees, who have been noticed for layoff, must be allowed to displace temporary employees in categorically-funded positions. The District contends that the noticed employees cannot "bump" into these positions because it is permitted by section 44909 and existing case law, including the recent *Stockton* decision, to retain temporary employees in categorically-funded positions until the funding expires. Respondents argue that the

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<sup>2</sup> All further statutory citations are to the Education Code.

<sup>3</sup> Mandamus is the appropriate remedy for a temporary teacher seeking reclassification. (*Campbell v. Graham-Armstrong* (1973) 9 Cal.3d 482, 485.)

employees in categorically-funded positions, whether classified as probationary or temporary, have less seniority than permanent employees noticed for layoff, and that pursuant to section 44955, the more senior noticed employees cannot be laid off while more junior employees are retained in the categorically-funded positions. Respondents reason that by retaining the employees in categorically-funded positions, the temporary employees are being given rights superior to those of permanent and probationary teachers with more seniority.

4. Section 44955<sup>4</sup> authorizes a permanent or probationary employee to displace a less senior employee who holds a position that the senior employee is certificated and competent to perform. However, section 44955 limits those rights “as otherwise provided by statute.”

5. Section 44909 authorizes a school district to employ certificated employees to fill its short range needs. (*Haase v. San Diego Community College Dist.*, *supra*, 113 Cal.App.3d 913, 917-918; *Zalac v. Governing Board of the Ferndale Unified School District*, *supra*, 98 Cal.App.4th 838.) It gives a school district the flexibility to employ persons possessing an appropriate credential to perform in projects which are financed outside of the base revenue limit for the duration of the categorical funding. (*Stockton*, *supra*; *Haase v. San Diego Community College Dist.*, *supra*, 113 Cal.App.3d 913, 917-918; *Zalac v. Governing Board of the Ferndale Unified School District*, *supra*, 98 Cal.App.4th 838.)

6. In enacting section 44909, the Legislature provided for a separate employment structure for certificated employees hired to perform in categorically-funded positions. Employment in a categorically-funded position does not grant the employee any credit toward classification as a permanent employee unless certain conditions are met. There is no evidence those conditions have been met in this case. Since temporary employees have no seniority rights, and no entitlement to their positions upon expiration of the categorical funding, they do not have rights superior to those of permanent or probationary employees.

7. In *Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, the court held that certificated employees could not bump into the children’s center employees’ positions because the statutory grounds permitting termination of the two types of employees were different. Similarly, in *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831, the court held that because certificated employees who work at the children’s center may be laid off for lack of work or lack of funds without notice and hearing, permanent and probationary employees could not bump into those positions because employment rights in two structures were different. The same reasoning applies here. The employment rights governing employees hired pursuant to section 44909 are different from

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<sup>4</sup> Section 44955, subdivision (b), provides in pertinent part:

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.

those governing permanent and probationary employees. Respondents cannot displace the employees hired to fill positions created for the duration of categorical funding because the employment structures are different. Therefore, the District is not required to permit permanent or probationary employees to bump into categorically-funded positions.

8. The services referenced in the PKS Resolution in Factual Finding 4 are the kind which may be reduced or discontinued in accordance with applicable statutes and case law. (See Ed. Code § 44955; *Campbell Elem. Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.) The decision to reduce or discontinue the services is neither arbitrary nor capricious but rather a proper exercise of the District's discretion.

9. Cause exists because of the reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955 to give notice to 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 thereof within the meaning of Education Code section 44949.

#### ORDER

Notice may be given to respondents occupying up to 98.855 full-time equivalent positions that their services will not be required for the 2012-2013 school year because of the reduction of particular kinds of services.

DATED: \_\_\_\_\_

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JILL SCHLICHTMANN  
Administrative Law Judge  
Office of Administrative Hearings