

BEFORE THE BOARD OF TRUSTEES OF THE
FULLERTON SCHOOL DISTRICT

In the Matter of the Accusation Against:

EVA ARREOLA, et al.,

Respondents.

OAH Case No. 2009030110

PROPOSED DECISION

Daniel Juárez, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on April 16, 2009, in Fullerton, California.

David C. Larsen, Attorney at Law, Rutan & Tucker, represented the Fullerton School District (FSD).

Marianne Reinhold, Attorney at Law, Reich, Adell, Crost & Cvitan, represented all Respondents, except those identified directly below.

The following Respondents represented themselves but were not present at the hearing, though properly served with the Notice of Hearing and other jurisdictional documents: Donnau Cooper, Kyle Myer, and Thomas Sullivan.

All Respondents originally served with the Accusation at issue in this proceeding are listed in Appendix I.

The parties submitted the matter for decision, pending the submission of certain documents, as discussed in Factual Finding 15. Those documents were received on April 21, 2009. The matter was deemed submitted on that date.

FACTUAL FINDINGS

1. Mark Douglas, Assistant Superintendent, Personnel Services, filed the Accusations in his official capacity. FSD served the Accusations on all Respondents timely.

2(a). The parties stipulated to certain paragraphs in the Accusations served on all Respondents. The stipulation included the following facts:

2(b). Respondents are employed by FSD as probationary or permanent certificated employees.

2(c). On February 24, 2009, the Board of Trustees (the Board) determined to reduce and/or discontinue certain services within the school district, and directed the Assistant Superintendent to give notice to those employees who might be affected by that determination.

2(d). Pursuant to the Board's resolution, and by March 15, 2009, the Superintendent's designee notified the Board and Respondents, in writing, that it was the Superintendent's recommendation that Respondents be notified Respondents' services would not be required for the 2009-2010 school year. The written notice stated the reasons for the lay-off and informed each Respondent of his or her right to request an administrative hearing.

2(e). Respondents requested administrative hearings to determine if there was cause for not reemploying them for the 2009-2010 school year.

3. According to the documentary evidence FSD offered at hearing, not all Respondents requested administrative hearings after being served with the written notice described in Factual Finding 2(d), however, FSD proceeded against all Respondents identified in Appendix I as if they had. As to those unrepresented Respondents that failed to appear at the hearing (Donnau Cooper, Kyle Myer, and Thomas Sullivan), FSD sought to proceed by default judgment.

4. FSD dismissed the Accusation as to the following Respondents: Tricia Hyun, Abigail Moran, Monah Chung, Lindsey Rutherford, Catherine Flores, and Jodi Lagman.

5. The recommendation that Respondents be terminated from employment was not related to their competency as teachers.

6. The Board's resolution number 08/09-10 proposed a layoff of 101.9 full-time equivalent (FTE) positions. However, at hearing, FSD confirmed that it took steps thereafter to minimize the number of positions for layoff. An itemization of those services or programs to be eliminated or reduced established an amended number of FTE positions at issue in this proceeding: 50.4.

7. The services at issue were "particular kinds of services" that could be reduced or discontinued within the meaning of Education Code section 44955. The Board's decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

8. The reduction or discontinuation of particular kinds of services related to the welfare of FSD and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of FSD, as determined by the Board.

9. The Board considered all known attrition, resignations, retirements, and requests for transfer, at the time, in determining the actual number of necessary layoff notices to be delivered to its employees.

10. FSD maintains a seniority list that contains employees' seniority dates (first date of paid service), current assignments and locations, advanced degrees, credentials, and authorizations.

11. FSD amended Respondent Juliana Nam's (Respondent Nam) status on the seniority list (and the flow chart described in Factual Finding 12) as follows: her status was originally noted as probationary, but it was amended to permanent.

12. FSD used the seniority list to develop flowcharts of the least senior employees currently assigned in the various services it seeks to reduce. FSD determined whether the least senior employees held credentials in another area and were entitled to "bump" other employees. In determining who would be laid off for each kind of service reduced, FSD counted the number of reductions not covered by known vacancies, and determined the impact on incumbent staff in inverse order of seniority. FSD then checked Respondents' credentials to determine whether they could "bump" other employees.

13. The Board's resolution number 08/09-10 established tie breaker criteria (23 distinct criteria) as between certificated employees who first rendered service in a probationary position to the District on the same date. In developing and approving the tie breaker criteria, the Board determined that these criteria best served the needs of FSD and its students.

14. Though Respondent Jenny Trujillo (Respondent Trujillo) did not submit a request for hearing, FSD conceded that, due to a resignation by another special education teacher, FSD was not seeking to lay-off Respondent Trujillo, as her services would still be needed.

15. The parties stipulated that Respondent Emily Chiu (Respondent Chiu) would have 20 days from the date of hearing to submit documentation that might amend the total semester credits she has earned at an accredited institution of higher education. That data constitutes information used in one of the 23 tie breaker criteria referenced in Factual Finding 13. The parties further stipulated that while this data (to be potentially submitted by Respondent Chiu) could modify her qualifications in regard to the tie breaker criteria, the submission of such data would have no effect on her lay-off. On April 21, 2009, FSD's counsel confirmed that Respondent Chiu had submitted such records and provided the Administrative Law Judge with a revised copy of Exhibit 9. Exhibit 9 is a chart setting forth the application of the tie breaker criteria to Respondents. Based on Respondent Chiu's post-hearing submission, her total semester credits changed from 60 1/3, to 186 2/3 credits. As stipulated, that change has no effect on her lay-off, but with no objection from Respondents, the revised Exhibit 9 was marked as Exhibit 9A and admitted into the record. Respondent Chiu's total semester credits are now 186 and two thirds.

16. The parties stipulated that Respondent Eva Arreola's date of hire (originally noted as March 12, 2007) was amended to correctly read as February 5, 2005. The parties further stipulated that this change in her date of hire would have no effect on her lay-off.

17. Respondent Nicole Heimer (Respondent Heimer) argued that her seniority date (August 29, 2006) was inaccurate. She argued that her seniority date ought to be August 15, 2006. She based her argument on her assertion that the principal, at the school where she originally began teaching, required her to attend a training, described to her as mandatory, on August 15, 21, and 22, 2006. The evidence established that she was paid a flat stipend of \$125 for her attendance on August 15, 2006. The evidence further established that, on January 29, 2009, she signed a Verification and Update of Personnel Information form that confirmed her first day of paid service in a classroom teaching position at FSD was August 29, 2006. Respondent Heimer believed her training was a condition of her employment.

18. Respondent Valerie Cardenas (Respondent Cardenas) also argued that her seniority date (August 29, 2006) was inaccurate. She argued that her seniority date ought to be June 21, 2006. Similarly to Respondent Heimer, she based her argument on her assertion that the principal, at the school where she began teaching, required her to attend a mandatory training on June 21, 22, and 23, 2006. Respondent Cardenas proffered a letter from the principal (Jackie Pearce), dated April 12, 2009, wherein the principal confirmed that during her interview of Respondent Cardenas in May 2006, Jackie Pearce (Pearce) told Respondent Cardenas "that if she were hired, she would be required to attend a mandatory . . . training on June 21-23, 2006. It was a condition of her employment for the position." The principal involved in Respondent Cardenas's circumstances, Pearce, was the same principal identified in Respondent Heimer's circumstances described in Factual Finding 17. The evidence established that Respondent Cardenas was paid a flat stipend of \$125 per day for each day of the training. The evidence further established that, on February 6, 2009, she signed a Verification and Update of Personnel Information form that confirmed her first day of paid service in a classroom teaching position at FSD was August 29, 2006. Her original offer of employment also established a hire date of August 29, 2006.

19. According to the Assistant Superintendent of Student Services, a principal cannot mandate training of the type Respondents Heimer and Cardenas argue was required of them. However, he conceded that a newly hired teacher would not likely be aware that a principal would not have that authority.

20. Respondent Patricia Miller (Respondent Miller) argued that her seniority date (August 29, 2006) was inaccurate. She argued that she was hired in June 2006 to assist fifth grade planning consultants for the upcoming year and to teach summer school. The evidence established that, on January 30, 2009, she signed a Verification and Update of Personnel Information form that confirmed her first day of paid service in a classroom teaching position at FSD was August 29, 2006. Her original offer of employment also established a hire date of August 29, 2006.

21. Respondent Rebecca Voeltz (Respondent Voeltz) argued that her seniority date (November 14, 2005) was inaccurate. She argued that her initial date of hire should be September 1, 2005. On that date in September 2005, Respondent Voeltz was paid as a long-term substitute teacher, helping prepare a fourth grade classroom until that classroom teacher returned. She worked in that capacity until September 11, 2005. On November 14, 2005, she began working at FSD as a 60 percent kindergarten teacher until the winter break. Thereafter, she began to work as a full-time first grade teacher.

22. FSD clarified that, presuming Respondent Voeltz's argument was not successful, FSD would not seek to lay-off Respondents Nam and Katie Burney. If Respondent Voeltz's argument was successful, then FSD would not seek to lay-off Respondents Nam and Voeltz.

23. No certificated employee junior to any Respondent was retained to perform any services that any Respondent was certificated and competent to render.

LEGAL CONCLUSIONS

1. The parties met all notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945.

2. Cause exists to sustain FSD's action to reduce or discontinue 50.4 full-time equivalent positions, pursuant to Education Code sections 44949 and 44955, as set forth in Factual Findings 1-23, and Legal Conclusions 3-10.

3. Education Code section 44955 states, in pertinent part:

[¶] . . . [¶]

(b) whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or . . . when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. 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.

[¶] . . . [¶]

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render.

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study . . . and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

4. Education Code section 44949 states, in pertinent part:

(a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

[¶] . . . [¶]

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

[¶] . . . [¶]

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition.

5. The services identified in the Board's resolution number 08/09-10 are particular kinds of services that the Board can reduce or discontinue under Education Code section 44955. The Board's decision to reduce or discontinue the identified services was not arbitrary or capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of FSD's schools and pupils within the meaning of Education Code section 44949. FSD identified the certificated employees providing the particular kinds of services that the Board directed to be reduced or discontinued.

6. A school district may reduce services within the meaning of Education Code 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.)

7. The evidence did not support the arguments proffered by Respondents Miller and Voeltz; they provided insufficient evidence to support their claims.

8. As to Respondents Heimer and Cardenas, the evidence established that, despite being paid a stipend, and recently verifying August 29, 2006, as their first day of paid service in a classroom teaching position, their first date of paid service and their seniority dates are August 15, 2006, and June 21, 2006, respectively. The principal informed both teachers, upon hiring, that attendance at their respective earlier trainings was mandatory. Pearce, the principal at issue, confirmed this by the letter Respondent Cardenas proffered at hearing. While Pearce provided no such letter regarding Respondent Heimer, Respondent Heimer provided credible testimony that Pearce had made the same assertion to her. Given that the training was considered, in Pearce's own words, "a condition of employment," and

as each was paid to attend each training, it is reasonable to conclude that the earlier trainings for each Respondent constituted the first dates of paid service. Thus, it is appropriate to modify Respondent Heimer's seniority date from August 29, 2006, to August 15, 2006, and Respondent Cardenas's seniority date from August 29, 2006 to June 21, 2006. These modifications do not impact the lay-off of either Respondent.

9. No junior certificated employee is scheduled to be retained to perform services that a more senior employee is certificated and competent to render.

10. As Respondents Donnau Cooper, Kyle Myer, and Thomas Sullivan failed to appear, although they were properly served with all jurisdictional documents, they are in default, pursuant to Government Code section 11520 and FSD may proceed against them as pled. (See Factual Finding 3.)

ORDER

1(a). The Accusation served on Respondents (those Respondents identified in Appendix I), is sustained, with the exception, as discussed above, of Respondents Tricia Hyun, Abigail Moran, Jenny Trujillo, Juliana Nam, Katie Burney, Monah Chung, Lindsey Rutherford, Catherine Flores, and Jodi Lagman.

1(b). Notice shall be given to Respondents, as required by law, other than those excepted above, that their services will be terminated at the close of the 2008-2009 academic year. Notice shall be given in inverse order of seniority.

Dated: April 27, 2009

DANIEL JUAREZ
Administrative Law Judge
Office of Administrative Hearings

APPENDIX I
RESPONDENTS IN OAH CASE NO. 2009030110, BY ALPHABETICAL ORDER

Arreola	Eva
Barr	Kimberly
Barruga	Stephanie
Beleber	Judith
Boughter	Douglas
Brantzeg	Michelle
Burney	Katie
Cardenas	Valerie
Chiu	Emily
Chant	Marcella
Chung	Monah
Cooper	Donnau
De Grazia	David
Diaz	Pablo
Ettinger	Julianne
Flessing	Heather
Flores	Catherine
Fotinakes	Irene
Graham	Julie
Gyurina	Tracy
Heimer	Nicole

Hyun	Tricia
Joo	Angela
Keverian	Teena
Lagman	Jodi
Lam	Devi
Lee	Angela
Levine	Blair
Licona	Shalimar
Mankiewicz	Mathew
Miller	Patricia
Moran	Abigail
Myers	Kyle
Myers	Marsha
Nam	Juliana
Rabenston	Steve
Rasheed-Khan	Arshiya
Rutherford	Lindsey
Sarvis	Jennifer
Sotolongo	Amy
Sullivan	Thomas
Tirado	Dalila
Trujillo	Jenny

Uys MaryLouise

Voeltz Rebecca

Wilson Anthony