

BEFORE THE
GOVERNING BOARD
SYLVAN UNION SCHOOL DISTRICT
COUNTY OF STANISLAUS
STATE OF CALIFORNIA

In the Matter of the Non-Reemployment of:

STACEY CAMPBELL, et al.,

Respondents.

OAH No. 2010030578

PROPOSED DECISION

This matter was heard before Administrative Law Judge Dian M. Vorters, Office of Administrative Hearings, State of California, on May 6, 2010, in Modesto, California.

John R. Yeh, Attorney at Law,¹ represented complainant, David Holtz, Assistant Superintendent, Sylvan Union School District.

Eric D. Rouen, Attorney at Law,² represented respondents who are identified in Appendix A.

The matter was submitted on May 6, 2010. The parties previously stipulated to waive time for the filing of a proposed decision until May 20, 2010.

FACTUAL FINDINGS

General Findings Concerning Statutory Requirements

1. Respondents are certificated district employees.
2. On February 9, 2010, the governing board of the district resolved to reduce or discontinue particular kinds of services. To that end, the board adopted Resolution 13 (Layoff Resolution). Within the meaning of Education Code section 44955, the services are

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“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.

3. Not later than March 15, 2009, the superintendent of the district caused the governing board of the district and respondents to be notified in writing of his recommendation that preliminary notice be given to respondents, pursuant to Education Code sections 44949 and 44955, that the district would not require their services for the 2010-2011 school year. The notice stated the reasons for the recommendation. In recommending reductions in certificated staff, the superintendent considered the qualified condition of the district’s budget. The recommendation was not related to respondents’ performance as certificated employees.

4. A Notice of Recommendation That Services Shall Not be Required was delivered to each respondent, either by personal delivery or by certified mail, return receipt requested and addressed to respondents’ last known address.

5. The notice advised each respondent of the following: He/she had a right to a hearing. In order to obtain a hearing, he/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.³ And the failure to request a hearing would constitute a waiver of the right to a hearing.

6. 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.⁴ Respondents filed timely notices of defense. All prehearing jurisdictional requirements were met.

Positively Assured Attrition

7. The board must allow for positively assured attrition such as voluntary resignations and retirements which occur during the “computation period.” (*Santa Clara Federation of Teachers v. Governing Board of Santa Clara Unified School Dist.* (1981) 116 Cal.App.3d 831, 847.) The district must “consider evidence of positively assured attrition, involuntary retirements for the [upcoming] school year which were known to the board when it made its preliminary determination on 15 March ... and when it made its final

³ 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.”

⁴ 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.

determination on 15 May.” (*Lewin v. Bd. of Trustees of Pasadena Unified School Dist.* (1976) 62 Cal.App.3d 977, 983.)

8. The governing board considered all positively assured attrition which has occurred to date, that is, all deaths, resignations, retirements, and additional attrition which may occur before the start of the 2010/2011 school year in reducing these services and but for the attrition already assured and the attrition anticipated would have found it necessary to reduce additional kinds of service.

9. Prior to hearing, the district gave notice to Willora Jordan that her notice (1.0 FTE Special Education) had been rescinded.

Services the District Intends to Reduce or Discontinue

10. The governing board of the district determined, in the Layoff Resolution, that because particular kinds of services were to be reduced or eliminated, it was necessary to decrease the number of permanent employees in the district by 36.0 full-time equivalents (FTE). The particular kinds of services the governing board of the district resolved to reduce or discontinue are multiple subject teaching positions. As a result of the reduction, 14 FTE were bumped or displaced as follows:

Positions Bumped or Displaced

Music	2.0 FTE
Art	2.0 FTE
Librarian	1.0 FTE
Counselor	2.0 FTE
K-5 Assistant Principal	1.0 FTE
K-5 Instructional Facilitators	4.0 FTE
Resource Specialist	2.0 FTE

Use of Tie-Breaking Criteria Based on the Current Needs of the District and Students

11. Pursuant to Education Code section 44955, subdivision (b), the governing board of the district established, in Resolution 14 (Tie-Breaking Resolution), criteria for determining the order of termination as among employees who first rendered paid service on the same day. The board authorized that in the event of a tie in seniority dates, the order of termination will be based solely on the needs of the District and its students. To that end, the district determined to break ties as follows:

1. Breadth of credential(s) – 5 points per current valid California credential which includes appropriate and applicable NCLB “highly qualified” authorization.
2. Random order selection (when all other factors are equal).

Skipping/Bumping/Seniority

12. Skipping describes the process by which the district may deviate from the order of seniority when there is an identified need for a particular type of service, there is a junior employee who is uniquely qualified to provide that service or teach a subject, and there is no senior employee who is certificated and competent to provide the service. (Ed. Code, § 44955, subd. (d)(1).) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.) The district employed skipping to achieve a proper list of employees to receive layoff notices.

The district determined in the Layoff Resolution that it would be necessary to retain the services of certificated employees in the 2010-2011 school year regardless of seniority, who possess the qualifications needed for the following programs:

1. School Psychologist
2. School Principal
3. Middle School Assistant Principal
4. All Middle School Single Subject Teachers in the following areas: Math, Science, English, Social Science
5. All certificated employees holding and teaching under a single subject credential
6. All teachers highly qualified to teach in a middle school assignment under the No Child Left Behind Act as of March 15, 2010
7. Personnel providing special education services (excluding Resource Specialists), including but not limited to the following: Director of Special Education, Speech, Language, and Hearing Pathologist, Learning Handicapped Teacher

13. Bumping describes the process by which the district identifies those employees who are more senior and who are competent to perform a particular kind of service or teach a particular subject. 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 employed bumping to achieve a proper list of employees to receive layoff notices.

14. Seniority is the relationship between the teachers within a school district. Among the teachers credentialed to provide a given service, greater seniority in the district gives a greater legal entitlement to a position. Seniority is defined as the date upon which an employee first rendered paid services in a probationary position. (Ed. Code, § 44845.)

Education Code section 44955, subdivision (b), provides that no senior employee may be terminated while any less senior employee is retained to render a service which the more senior permanent employee is “certificated and competent” to render. “It [is] the district’s obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possess[es] the seniority and qualifications which would entitle him/her to be assigned to another position.” (*Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 137.)

15. David Holtz is Assistant Superintendent of Human Resources. He testified that the district maintains a seniority list of all certificated employees. In December 2009, the district mailed “Intent Forms” to all employees asking them to state their wishes for the next school year and verify their seniority date and credentials. Employees can also access the district’s web site which contains seniority dates and credential information. All valid corrections and updates were incorporated into the final seniority listed that was used to identify teachers for layoff. The final seniority list was adopted by the board on or about March 12, 2010.

Skipping Middle School, Single Subject, and NCLB Qualified Teachers

16. The district determined to reduce multiple subject credentialed employees by 36.0 FTE. (Factual Finding 10.) Within the district, elementary grades are Kindergarten through sixth. Middle school grades are sixth, seventh, and eighth. According to Mr. Holtz, the district typically assigns multiple subject credentialed teachers to elementary schools and single subject credentialed teachers to middle schools.

17. The Layoff Resolution outlines broad skipping criteria to protect, “regardless of seniority,” all employees who possess the qualifications needed for several programs including “all middle school single subject teachers in the areas of math, science, English, and social science; all certificated employees holding a single subject credential; and all teachers highly qualified to teach in a middle school under the NCLB Act as of March 15, 2010.” (Factual Finding 12.)

18. The No Child Left Behind (NCLB) Act of 2002 is a federal act requiring that all teachers be “highly qualified” to teach their assigned subject(s). According to Mr. Holtz, to meet highly qualified status, teachers must either 1) pass a competency test approved by the State of California, 2) have at least 32 units in their single subject area of college study, 3) have a graduate degree in their single subject area, or 4) establish by virtue of their “not new teacher status” having successfully taught in a particular single subject area.

19. The district became motivated to “protect single subject core teachers at the middle school” from layoff, after the 2009 layoff hearings. According to Mr. Holtz, a finding was made in the proposed decision that “a multiple subject teacher with an authorization ... could bump into a single subject position regardless of their NCLB status.” Mr. Holtz stated that the district was “ordered to place that person in a single subject position even though we did not feel we could because NCLB was not met.”

In fact, the Administrative Law Judge (ALJ) in the 2009 Layoff hearing found that the district had not articulated NCLB compliance as a requirement to teach at the middle school level. The proposed decision adopted by the board for the 2009-2010 school year stated:

The PKS Resolution does not include any provisions that define the term “competent” or establish competency criteria. It also does not explicitly state that, in order to be retained to teach seventh and eighth grade subjects, certificated employee[s] must not only have appropriate credentials, they must also be NCLB-compliant.... According to Mr. Holtz, if parents notify the District that they do not want their child taught by a non-compliant teacher, the District must transfer their child to a teacher who is NCLB-compliant. ... While Mr. Holtz’s explanation for the District’s NCLB compliance requirement shows that it may be inconvenient for the District to have a non-compliant teacher, it does not demonstrate that NCLB compliance is necessary for an otherwise certificated and competent teacher to teach seventh and eighth grade English in the District.

Hence, the ruling was based on insufficient evidence in support of NCLB as a requirement. Mr. Holtz testified that the district has reached 100 percent compliance with NCLB as of March 2010.

Reduction of Teachers Possessing Multiple Subject Credentials

20. Respondents challenge the district’s skipping criteria as legally impermissible pursuant to Education Code section 44955, subdivision (d)(1). Johanna Dickson, Sherry Chapman, and Susan Harrison currently teach seventh and eighth grades at district middle schools. Richard Smith teaches third grade at a district elementary school but holds a Mathematics authorization that qualifies him to teach at the middle school level. Mr. Holtz stated that all four respondents meet the “highly qualified” requirements of NCLB as of March 15, 2010.

21. Cyndi Jordan bumped Johanna Dickson. Ms. Jordan has a seniority date of August 4, 2005. She holds a multiple subject credential and a history authorization. She currently teaches second grade (1.0 FTE). She will be assigned to teach single subject Social Studies at a district middle school in the 2010-2011 school year. As a result of this bump, the district rescinded Ms. Jordan’s notice of layoff.

Ms. Dickson has a seniority date of August 24, 2006. She holds a single subject credential and a Social Science authorization. She currently teaches seventh and eighth grade Social Science (1.0 FTE).

Ms. Jordan is more senior than Ms. Dickson and is certificated and competent to teach middle school Social Science. No more junior teacher was retained to teach at the middle school in a subject area for which Ms. Dickson is competent to teach.

22. Lisa Bosio bumped Sherry Chapman. Ms. Bosio has a seniority date of August 4, 2006. She holds a multiple subject credential and an English authorization. She currently teaches fourth grade English (1.0 FTE). She will be assigned to teach single subject English at a district middle school in the 2010-2011 school year. As a result of this bump, the district rescinded Ms. Bosio's notice of layoff.

Ms. Chapman has a seniority date of August 24, 2007. She holds a single subject credential and an English authorization. She currently teaches seventh and eighth grade English (1.0 FTE). Ms. Bosio is more senior than Ms. Chapman and is certificated and competent to teach middle school English.

Jennifer Roberts has a seniority date of August 6, 2007. She holds a multiple subject credential and an English authorization. She currently teaches fourth grade. She did not receive a layoff notice. She is assigned to teach single subject English at a district middle school in the 2010-2011 school year. Ms. Roberts is more senior than Ms. Chapman and is certificated and competent to teach middle school English.

23. Koree Dennis-Brughelli bumped Susan Harrison. Ms. Dennis-Brughelli has a seniority date of August 6, 2007. She holds a multiple subject credential, and Science and Physical Education (PE) authorizations. She currently teaches fourth grade (1.0 FTE). She will be assigned to teach single subject Science at a district middle school in the 2010-2011 school year.

Ms. Harrison has a seniority date of August 22, 2008. She holds a multiple subject credential and a Science authorization. She currently teaches seventh and eighth grade Social Science (1.0 FTE). Ms. Dennis-Brughelli is more senior than Ms. Harrison and is competent and to teach middle school Science.

24. Rebecca Martino has a seniority date of September 24, 2007. She holds a multiple subject credential and authorizations in Mathematics and Introduction to Science. She currently teaches seventh and eighth grade Science. She did not receive a layoff notice and will remain in her current assignment for the 2010-2011 school year.

25. Richard Smith received a layoff notice as part of the reduction of multiple subject credentialed employees. He has a seniority date of August 24, 2007. He holds a multiple subject credential and a Mathematics authorization. He currently teaches third grade (1.0 FTE). He is highly qualified to teach Mathematics at the middle school level.

According to Mr. Holtz, the district is not retaining any employee junior to Mr. Smith to teach elementary mathematics.

Application of Skipping Criteria to Respondent Teachers

26. Respondents argue that they meet one or more of the skipping criteria outlined in the Layoff Resolution. Respondents Johanna Dickson, Sherry Chapman, and Susan Harrison, fall into two to three categories of employees to be skipped. Richard Smith falls into one category of employees to be skipped. As such, respondents contend that they should be “skipped” over for purposes of layoff.

27. Education Code section 44955, subdivision (d)(1), authorizes a district to deviate from terminating a certificated employee on order of seniority when:

The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, 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.

28. “Junior employees may be given retention priority over senior employees only if they possess special skills or capabilities which their more senior counterparts lack.” (*Max Poppers v. Tampais Union High School Dist.* (1986) 184 Cal.App.3d 399, 405.) “[A] district may move up-ward from the bottom of the seniority list, ‘skipping’ over and retaining junior employees who are certified and competent to render services which more senior employees are not.” (*Alexander v. Delano Joint Union High School Dist.* (1983) 139 Cal.App.3d 567, 571.)

29. Ms. Harrison has a seniority date of August 22, 2008, is NCLB compliant and “highly qualified” in Science instruction. There are no more junior teachers being retained to teach Science at the middle school level. As such, she was a proper recipient of a layoff notice.

30. Mr. Smith has a seniority date of August 24, 2007, is NCLB compliant and “highly qualified” in Mathematics instruction. There are no more junior teachers being retained to teach Mathematics at the middle school level. As such, he was a proper recipient of a layoff notice.

31. Ms. Dickson has a seniority date of August 24, 2006, is NCLB compliant and “highly qualified” in Social Science instruction. There are no more junior teachers being retained to teach Social Science at the middle school level. As such, she was a proper recipient of a layoff notice.

32. Ms. Chapman has a seniority date of August 24, 2007, is NCLB compliant, and “highly qualified” in English instruction. There are no more junior teachers being retained to teach English at the middle school level. As such, she was a proper recipient of a layoff notice.

33. The language of the district’s skipping criteria is expansive. It was broadly drafted to protect employees at the middle school level who meet NCLB highly qualified status. Skipping does not mean that all employees who match the criteria must be retained. It means they will be retained in lieu of more senior teachers who do not meet the skipping criteria during the selection process. The board has discretion to layoff up to 36.0 FTE and until that number is reached, teachers with the lowest seniority, even within the class of those meeting skipping criteria, are proper recipients of layoff notices.

34. Any other assertions put forth by respondents at the hearing and not addressed above are found to be without merit and are rejected.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists pursuant to Education Code sections 44949 and 44955. All notices and jurisdictional prerequisites required by those sections were satisfied.

2. The services the district seeks to eliminate in this matter, as set forth in the Layoff Resolution, are particular kinds of service that may 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 the board’s discretion. Pursuant to Education Code sections 44949 and 44955, legal cause exists for the district to reduce or discontinue the particular kinds of services set forth in the Layoff Resolution. The reduction or discontinuance of these identified particular kinds of services relates solely to the welfare of the district and its pupils.

3. No certificated employee with less seniority than any respondent is being retained to render a service that any respondent is certificated and competent to render. Legal cause exists pursuant to Education Code sections 44949 and 44955 to give respondents final notice that their services will not be required for the 2010-2011 school year.

RECOMMENDATION

1. The Sylvan Unified School District’s action to reduce or eliminate the particular kinds of services identified in Layoff Resolution 13, for the 2010-2011 school year is **AFFIRMED**.

2. The Accusation against respondents is SUSTAINED. The Sylvan Unified School District may give final notices to respondents that their services will not be required for the 2010-2011 school year. Notices shall be given in inverse order of seniority.

DATED: May 17, 2010

DIAN M. VORTERS
Administrative Law Judge
Office of Administrative Hearings

Appendix A

2010 Sylvan Union School District – List of Respondents

	Last Name	First Name	Status
1	Campbell	Stacey	
2	Chapman	Sherry	
3	Collins	Erin	
4	Dickson	Johanna	
5	Ellerson	Anna	
6	Engel	Mindy	
7	Hake	Sonya	
8	Harrison	Susan	
9	Jordan	Willora	Notice Rescinded
10	Kirkpatrick	Christina	
11	Naravage	Nicole	
12	Ousley-Swank	Renee	
13	Quilici	Michael	
14	Semple	Karen	
15	Smith	Richard	
16	Yang	Chong	