

BEFORE THE
GOVERNING BOARD OF THE
LIVERMORE VALLEY JOINT UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Certificated Employees,

Respondents.

OAH No. 2010030038

PROPOSED DECISION

Administrative Law Judge Cheryl R. Tompkin, State of California, Office of Administrative Hearings, heard this matter on April 29, 2010, in Livermore, California.

Jacqueline S. McHaney, Attorney at Law, represented the Livermore Valley Joint Unified School District.

Sarah Sandford-Smith, Attorney at Law, represented all respondents except Monika Becker, Susan Johnston, Dean McNair, Laura Miller and Luann Zeterberg. None of the respondents individually named above appeared at the hearing or were otherwise represented.

The matter was submitted for decision on April 29, 2010.

FACTUAL FINDINGS

1. Michael Martinez made and filed the accusation against respondents, those individuals listed on Exhibit A hereto, in his official capacity as the Superintendent (Superintendent) of the Livermore Valley Joint Unified School District (District).

2. Respondents are all certificated employees of the District.

3. On March 2, 2010, the Superintendent recommended to the Governing Board (Board) that District reduce programs and services for the 2010-2011 school year.¹

¹ District is currently experiencing declining enrollment and revenue, and is in a deficit spending mode. It had an \$8.8 million deficit for the 2009-2010 school year, and is projecting a \$4.2 million deficit for the 2010-2011 school year and a \$3.7 million deficit for the 2011-2012 school year.

4. On March 2, 2010, the Governing Board of District adopted Resolution No. 019-09/10, reducing or eliminating the following particular kinds of services for the 2010-2011 school year and directing the Superintendent or his designee to send appropriate notice to employees whose positions might be lost by virtue of this action:

Particular Kinds of Services	Number of Full-Time (F.T.E.) Equivalent Positions
I. Elementary School Program:	
Class Size Reduction (Grades K-3) Teachers	12.00
Multiple Subject	17.00
Music Teachers	2.00
Elementary Science Specialist	1.00
II. Middle School Program	
Core	2.65
Science	0.67
Physical Education	0.34
Math	1.34
Spanish	0.50
Art	0.50
III. High School Program	
English	3.00
Physical Education	2.00
Math	2.00
History/Social Science	3.00
Science	2.00
Foreign Language-Spanish (Grades 9-12)	0.67
Foreign Language-German (Grades 9-12)	0.84
Foreign Language-French (Grades 9-12)	0.25
Music	1.34
Agriculture	0.25
Business	0.25

American Sign Language	0.25
Consumer Family Studies	1.25
Industrial Technology	1.50
IV. Other Programs	
Counselors (Grades 6-12)	4.25
V. Alternative Education	
History/Social Science	1.00
VI. Administrative	
Vice Principal	3.50
Principal	1.00
Program Specialist	<u>1.00</u>
Total Full Time Equivalents	67.35

5. On February 16, 2010, the Board had previously adopted a resolution approving criteria for determining the relative order of seniority of certificated employees with the same first date of paid service.

6. On or before March 15, 2010, the Superintendent gave written notice to respondents that, pursuant to Education Code sections 44949 and 44955, it was being recommended that their services be reduced or eliminated for the ensuing 2010-2011 school year. The written notice set forth the reasons for the recommendation.

7. Respondents each made a timely request in writing for a hearing to determine if cause existed for not reemploying them for the 2010-2011 school year.

8. Accusations were timely served on all respondents who requested a hearing, and each respondent filed a timely Notice of Defense except respondents Monika Becker, Alfred Garcia, Susan Johnston, Dean McNair, Laura Miller and Luann Zeterberg. None of the respondents, except Alfred Garcia, who failed to file a timely Notice of Defense was present at hearing or sought relief from this failure. Respondents Monika Becker, Susan Johnston, Dean McNair, Laura Miller and Luann Zeterberg have therefore waived their right to a hearing. (Ed. Code, § 44949.)

9. Respondent Alfred Garcia appeared at hearing and was represented by counsel. He sought and was granted relief from his failure to file a timely Notice of Defense. Garcia was permitted to participate in the hearing.²

10. All prehearing jurisdictional requirements have been met.

11. At hearing the parties stipulated as follows:

a. Candace Bolar's seniority date will be changed from August 21, 2007, to August 20, 2007.

b. Eric Kishis's seniority date will be changed from August 23, 2007, to August 20, 2007.

c. Christina Pomykal's seniority date will be changed from August 21, 2008, to August 19, 2008.

d. Deborah Zimmerman's seniority date will be changed from August 23, 2007, to August 21, 2006.

e. Dianne Russell's seniority date will be changed from August 21, 2006, to August 26, 2002.

f. Denise Watson-Lum's seniority date will be changed from August 21, 2006, to August 22, 2005. Because of the change in her seniority date, Watson-Lum's layoff notice will be rescinded. Watson-Lum was not served with an accusation because of the seniority date change.

g. Michael Woods's seniority date will be changed from August 23, 2007, to October 12, 2006. Because of the change in his seniority date Woods's layoff notice will be rescinded, and the accusation against him dismissed.

f. Donielle Machi's seniority date will be changed from August 23, 2007, to August 20, 2007, making her eligible to bump into an English position. Machi is certificated and competent to serve in an English position and will be employed by district for the 2010-2011 school year in either an English or an elementary position. Because of the change in her seniority date, Machi's layoff notice will be rescinded and the accusation against her dismissed.

² District refused to waive the untimely filing of the Notice of Defense by Garcia and objected to his participation in the hearing. After considering the evidence and the argument of counsel, it was determined that Garcia should be allowed to participate. Garcia filed the initial request for hearing, therefore District had notice he wanted a hearing, and there was no evidence of any prejudice to District by the untimely filing.

12. Respondent Alfred Garcia holds a Multiple Subject Credential and a Crosscultural, Language and Academic Development Certificate (CLAD). District has assigned Garcia a seniority date of August 21, 2006. Garcia was first employed by District on September 14, 2005, as a long term substitute to teach Spanish. On March 26, 2006, he was forced to relinquish his position with District after he was hit by a truck and broke his neck. Garcia was rehired by District for the 2006-2007 school year and given a full-time temporary employee contract. Garcia taught history and English Language Development (ELD) core courses. Garcia was reemployed by District as a Probationary Employee II for the 2007-2008 school year, and worked for District during the 2008-2009 and 2009-2010 school years. He is now a tenured employee of District. Garcia runs the ELD program. He teaches four levels of ELD courses, including the basic level course which requires bilingual capabilities. He also serves as chair of the ELD program, is on the English Language Advisory Committee (ELAC), serves as the liaison between District and Spanish speaking parents, and has put together programs designed to increase the parental involvement of the migrant population. Garcia estimates that 20 percent of District is English Language Learners (ELL) and that 85 percent of the ELLs are Hispanic. Garcia is one of only two or three individuals at District who speak Spanish.

13. Garcia's seniority date of August 21, 2006, reflects Garcia's first date of paid service as a temporary employee during the 2006-2007 school year. Garcia believes his service as a long term substitute during the 2005-2006 school year should be included when calculating his seniority and that his seniority date should be September 14, 2005. Garcia is mistaken. He is not entitled to credit for his service as a long term substitute during the 2005-2006 school year.

Education Code section 44918 provides in pertinent part:

(a) Any employee classified as a substitute or temporary employee who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee the following school year.

Garcia was employed by District for less than 75 percent of the 2005-2006 school year and therefore is not entitled to credit for his service as a long term substitute during that school year.

Garcia also believes that he should be retained because his position is critical to serving the Spanish speaking population. However, Garcia concedes that the only requirements for his position are CLAD certification and a multiple subject credential. There

are certificated employees of District who are senior to Garcia who hold the necessary credential and certification.

14. Valerie Talley is a temporary employee of District. She teaches a first and second grade combination class. Talley was first hired by District on September 10, 1997, as a probationary employee. She worked for District from 1997 to December 2003, when she took a one year leave of absence to relocate to another state due to her husband's employment. Talley was a permanent employee when she left District. In December 2004 Tally asked District if she could extend her leave of absence. She was told that she could not. Talley therefore resigned effective December 2004. Talley subsequently returned to California and in the spring of 2007 applied for a position with District. She did not receive a response. In August 2008 Talley was hired by District as a temporary employee for the 2008-2009 school year. She was rehired as a temporary employee for the 2009-2010 school year. Tally asked to be hired as a permanent employee for both the 2008-2009 and 2009-2010 school years but was told by District personnel that District could not hire her as a permanent employee because there were too many teachers on leave. Talley believes that she should be classified as a permanent employee and that her tenure date should relate back to when she was first hired in 1997 because District did not advise her when she resigned that she could "get her tenure back" if she were reemployed by District within 39 months of her resignation.³

15. District's failure to advise Talley of her reemployment rights did not prejudice her seniority rights and Talley is not entitled to a 1997 seniority date. When a permanent certificated employee resigns and is reemployed within 39 months, reemployment restores all of the individual rights, benefits and burdens of a permanent employee (i.e., the employee retains his or her permanent status); however, for seniority purposes, an employee does not regain his or her original hire date. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 641.) The date of employment or hire date of a certificated employee who resigns and is thereafter reemployed is the date on which the employee first renders paid service after reemployment. (Ed. Code, § 44848.) Thus, even if Tally had returned to District employment within 39 months of her resignation (which she did not), she would not have been entitled to a 1997 hire date. Her hire date would have been the date on which she first rendered paid service to District following reemployment, in this case August 2008. Nor is Talley entitled to classification as a permanent employee since she was not reemployed by District until August 2008, which was more than 39 months after her resignation. Talley was

³ Talley failed to cite specific legal authority for her position, but appears to rely on Education Code section 44931, which states in pertinent part:

Whenever any certificated employee of any school district who, at the time of his or her resignation, was classified as permanent, is reemployed within 39 months after his or her last day of paid service, the governing board of the district shall, disregarding the break in service, classify him or her as, and restore to him or her all of the rights, benefits and burdens of, a permanent employee, except as otherwise provided in this code.

hired by District as a temporary employee for the 2010-2011 school year and District acted properly in classifying her as a temporary employee in this proceeding.

16. The individuals listed on Exhibit B are all temporary employees. Although District contends these temporary employees do not have the right to a hearing, all were issued “precautionary” layoff notices. With the exception of Valerie Talley, none of the listed temporary employees contested their temporary status or their hire dates. Temporary teachers are not entitled to the Education Code section 44949/44955 rights afforded permanent and probationary teachers and generally may be summarily released. (*Taylor v. Bd. of Trustees* (1984) 36 Cal.3d 500, 505; Ed. Code, § 44954.) Those individuals listed on Exhibit B are therefore not entitled to a hearing with respect to their non-reemployment by District.

17. All contentions raised by respondents at the hearing that were not specifically discussed above are found to be without merit and rejected.

18. The evidence established that District will be reducing services for the ensuing school year.

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

20. The reduction or discontinuance of services is related to the welfare of District and its pupils.

LEGAL CONCLUSIONS

1. Each of the services set forth in Finding 4 is a kind which may be reduced or discontinued in accordance with applicable statutes and case law. (See Ed. Code, § 44955; *Campbell v. Abbott* (1978) 76 Cal.App.3d 796; *Degener v. Governing Bd.* (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.

2. Cause exists to reduce the number of certificated employees at Livermore Valley Joint Unified School District due to the reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955. The cause relates solely to the welfare of the school and the pupils thereof within the meaning of Education Code section 44949.

ORDER

Notice may be given to respondents occupying up to 67.35 F.T.E. positions that their services will not be required for the 2010-2011 school year because of the reduction or discontinuation of particular kinds of services.

DATED: _____

CHERYL R. TOMPKIN
Administrative Law Judge
Office of Administrative Hearings