

BEFORE THE GOVERNING BOARD  
SANTA RITA UNION SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Non-Reemployment of  
10.80 Full Time Equivalent Certificated  
Employees

OAH No. N2005030427

**PROPOSED DECISION**

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Salinas, California, on April 14, 2005.

Daniel A. Ojeda, Attorney at Law, Miller Brown & Dannis, 71 Stevenson Street, Nineteenth Floor, San Francisco, California 94105, represented the Santa Rita Union School District.

Michelle A. Welsh, Attorney at Law, Stoner, Welsh & Schmidt, 413 Forest Avenue, Pacific Grove, California 93950, represented respondents Ronald Bobb, Diane Gehling, Nicole Jensen, Sherry Kefalas, Courtney Toller, Yolanda Virgen, and Heather Zimmerman.

No appearance was made by or on behalf of respondent Victoria Senter.

The record was held open in order to allow the district to submit a brief in response to respondents' brief regarding the district's competency standard. The district's brief was received on April 21, 2005 and was marked as Exhibit 8 for identification. On April 25, 2005, respondents objected that the district's brief had gone beyond its stated purpose and had included argument on evidence that had been submitted at the hearing. Respondents requested that this portion of the brief – page 4, line 15, through page 6, line 16 – be stricken. This request is granted.

The matter was deemed submitted for decision on April 25, 2005.

**FACTUAL FINDINGS**

1. On February 17, 2005, the governing board of the Santa Rita Union School District adopted Resolution No. 05.02.74, in which the board resolved to reduce or eliminate the following particular kinds of services (PKS) no later than the beginning of the 2005-2006 school year and directed the superintendent or his designated representative to send appropriate notice to employees whose positions might be lost by virtue of this action:

PARTICULAR KINDS OF  
SERVICES

NUMBER OF FULL TIME  
EQUIVALENT POSITIONS

Five (5) K-5 self contained classes	5.0	
Elementary Music	0.8	
District School Counselor	1.0	
Coordinator of Intervention Programs	1.0	
Sections in Grades 6-8	3.0	total
Two (2) 6 <sup>th</sup> grade CORE LA/SS sections	.333	
Four (4) 7 <sup>th</sup> grade CORE LA/SS sections	.667	
One (1) 8 <sup>th</sup> grade U.S. History section	.167	
Five (5) Science sections	.830	
Four (4) Exploratory sections	.667	
One (1) Physical Education section	.167	
One (1) Math section	.167	

Total

10.80

2. On March 9, 2005, the superintendent gave written notice to a number of employees, including respondents, that recommendation for their non-reemployment for the 2005-2006 school year was being made under Education Code sections 44949 and 44955. Respondents filed timely requests for hearing.

3. In Resolution No. 05.02.74, the board determined to retain the services in the 2005-2006 school year of certificated employees who possessed the qualifications necessary for, and were currently teaching in, the following programs: Special Education Program, English Language Learners Program, and Middle School Foreign Language Program. The evidence showed that the district's population of special education and non-English speaking students is increasing. The evidence further showed that recruitment and retention of teachers qualified to teach in these programs is difficult. The district has demonstrated a specific need to retain personnel to teach these courses of study. The district's skipping of junior employees who meet the standards set in Resolution No. 05.02.74 is in accordance with applicable statutory and case law. Included among those the district intends to skip are respondents Yolanda Virgen, Heather Zimmerman, and Victoria Senter. While all received layoff notices, the district advised them that these were precautionary notices and that their services would be retained for the 2005-2006 school year.

4. In Resolution No. 05.02.74, the board set forth a standard of competence for bumping purposes: at least one year of teaching experience in the assigned subject matter during the last 10 years. Respondents contend that this standard fails to meet the requirements of Education Code section 44955, subdivision (d), and that it was created to target one employee, respondent Ronald Bobb.

Assistant Superintendent James Fontana testified that he recommended this competency standard to the governing board. His rationale was that an individual who might have a credential to teach a specific subject, but had not actually taught the subject within the past 10 years, would not have the requisite experience in current methodology and would not be familiar with either the district's curriculum or current standards and expectations. At the time Fontana recommended this competency standard, he knew it would affect Bobb. But there was no evidence to suggest that the competency standard was drafted to target Bobb, or that Bobb is the only teacher in the district who would be affected by such a standard.<sup>1</sup> And the district's standard, very similar to one held valid in *Duax v. Kern Community College District*,<sup>2</sup> is found to have a rational and reasonable relationship to the skills and qualifications to teach a particular subject.

5. Bobb holds a multiple subject credential that entitles him to teach in self-contained classes up to grade nine, and a standard secondary credential in music. He has been employed in the district since 1991. From 1991 until the 1993-1994 school year, Bobb taught middle school music. Since then he has taught only elementary school instrumental music. He currently serves in a 0.8 FTE position.

Because he has not served as an elementary school classroom teacher within the past 10 years (and in fact there was no evidence he has ever served in such a position) respondent Bobb is not entitled to bump into a classroom teaching position since he does not meet the district's competency standards.

6. Respondent Diane Gehling is junior to respondent Bobb. Like Bobb, Gehling holds a standard secondary credential in music. She is the district's only middle school music teacher. She teaches instrumental music and chorus and serves as the music director for the band, orchestra, and chorus. She holds a 1.0 FTE position. Bobb contends that he is entitled to bump Gehling for a portion of her full-time position. Citing *Murray v. Sonoma County Office of Education* and *King v. Berkeley Unified School District*,<sup>3</sup> the district asserts that part-time employees are not entitled to bump into full-time positions.

The cases cited by the district are both rehire cases interpreting Education Code section 44956. Thus they are not directly on point. Layoffs are governed by Education Code sections 44949 and 44955. In subdivision (b), the latter section provides that, "the services of no permanent employee may be terminated under the provisions of this section while . . . any other employee with less seniority, is retained to render a service which said permanent

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<sup>1</sup>In Finding 9, below, respondent Nicole Jensen is found not eligible to bump into a science position because she lacks the appropriate credential. But even if she had possessed a science credential, she would not have been qualified for the position because of the board-adopted competency standard.

<sup>2</sup>*Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555.

<sup>3</sup>*Murray v. Sonoma County Office of Education* (1989) 208 Cal.App.3d 456; *King v. Berkeley Unified School District* (1979) 89 Cal.App.3d 1016.

employee is certificated and competent to render." Nothing in section 44955 or in any of the cases interpreting it specifically precludes "partial bumping." As a general proposition, therefore, a senior part-time teacher may bump a junior full-time teacher from a portion of his or her position. But this general proposition does not apply in all circumstances. If splitting a position between two employees would be impractical or inefficient, then the senior employee should not be entitled to partially bump the junior employee. That is precisely the situation here.

Bobb is a 0.8 FTE employee and Gehling occupies a 1.0 FTE position. If Bobb were permitted to bump Gehling, he would be retained for 0.8 FTE of the middle school position and Gehling would be retained for the remaining 0.2 FTE position. As can be seen from the board's resolution, one section at the middle school equals 0.167 FTE. If the middle school teaching position were to be split as Bobb suggests, he would be retained to teach approximately 4.8 sections while Gehling would be retained to teach approximately 1.2 sections. This would clearly be an inefficient and impractical way to run a program. Considering that, it is determined that the district should not be forced to split its middle school music position to accommodate the senior part-time employee. Bobb is not entitled to bump Gehling from a portion of her position.

7. A number of teachers have resigned or retired from the district since February 2005. Some of those resignations/retirements occurred before the board passed Resolution No. 05.02.74, one occurred between the passage of the resolution and the time the district sent the March 9, 2005 non-reemployment letters, and several occurred after those notices were sent. By leaving those positions vacant while laying off employees, respondents argue, the district is attempting an "end run" around the layoff statutes and is effectively eliminating more positions than called for by the board's resolution. For instance, two elementary classroom teachers – Mike Gladwell and Karen Chubbuck – submitted their resignations/retirements to the board about a week before the February 17, 2005 resolution. Two more elementary classroom teachers – Asia Blau and Mary Rose Scott – submitted their resignations/retirements to the board in April 2005. The district intends to leave these four positions vacant for the 2005-2006 school year. Respondents assert that the district is therefore effectively eliminating 9.0 FTE of classroom teaching services, not the 5.0 FTE the board specified in its resolution. Respondents contend that a district may not eliminate any certificated positions, even if no employees will be terminated as a result, unless the board acts in accordance with Education Code section 44955.

Respondents' assertion is rejected. The layoff procedures of Education Code section 44955 come into play only when a district seeks to "terminate the services" of certificated employees because of a reduction or discontinuance of a particular kind of service. No employees are having their services terminated because the district chooses not to fill vacancies created by resignations or retirements. Therefore, the requirements of section 44955 are inapplicable to those vacated positions.

8. Respondents next assert that the four resignations/retirements created vacancies into which some respondents are entitled to be placed, thus avoiding termination.

However, the district argues that the two resignations/retirements that occurred before the board adopted its resolution on February 17 were taken into account in determining how many positions to cut. This argument is supported by Fontana's testimony that although the board was aware of these departures, it still elected to reduce 5.0 FTE of elementary classroom teaching.

The district further argues that while attrition need not be taken into account in a PKS layoff, it has nonetheless effectively done so. Although the board authorized the elimination of 5.0 FTE of elementary classroom teaching, the district sent layoff notices to only three elementary classroom teachers. Two of those teachers – Lisa Dauwalder and Cheri Johnson – did not request hearings. The third elementary classroom teacher who received a layoff notice is respondent Courtney Toller. The district correctly asserts that the post-layoff-notice resignations/retirements of Blau and Scott do not require the district to retain Toller. In effect, two of the five positions being eliminated are accounted for by these two departures. The remaining three positions are accounted for by the termination of three employees, one of whom is respondent Toller. The district is not required to retain her services.

9. Most of the teachers at the district's middle school teach a CORE class plus sections of a particular subject. Respondent Nicole Jensen teaches a 7th grade Language Arts/History CORE and 6th grade Health. (The four "Exploratory" sections specified in the board's resolution are health classes.) Jensen holds a preliminary single subject credential in health sciences. On March 30, 2005, Jensen, who holds a Utah credential that entitles her to teach physical education, submitted through the Monterey County Office of Education an application for a physical education supplementary authorization to her single subject credential. That authorization has not yet been issued. As part of her undergraduate education, Jensen completed 18 units in science. She expects to complete seven more units before the start of the next school year.

After the board's February 17, 2005 resolution, two CORE/Science teachers resigned or retired. Jensen asserts that she is qualified to be placed into one of those positions pursuant to Education Code section 44256, subdivision (a). That section provides that a holder of a single subject credential "who has completed 20 semester hours of coursework or 10 semester hours of upper division or graduate coursework approved by the [Commission on Teacher Credentialing] . . . shall be eligible to have this subject appear on the credential" as a supplementary authorization. Jensen does not yet have the necessary coursework for a supplementary authorization in science. All her science units appear to be undergraduate units. She will not cross the 20-unit threshold until sometime later this year. Even so, section 44256 is not self-implementing. Before a teacher may be considered qualified to teach the supplementary subject she still must first obtain approval from the Commission on Teacher Credentialing. Further, a district need not consider a credential or supplementary authorization not registered prior to the board's PKS resolution.<sup>4</sup> For the same reason,

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<sup>4</sup>*Degener v. Governing Board of Wiseburn School District* (1977) 67 Cal.App.3d 689.

Jensen is not entitled to a physical education position since she has not yet received the authorization for which she has applied.

Finally, Jensen asserts that she is entitled to a CORE/Science position because her units entitle her to teach science under a board waiver. Even if Jensen meets the requirements for such a waiver, the board is not obligated to provide one. It is purely discretionary.<sup>5</sup> The district need not retain Jensen in either a CORE/Science or a PE position.

11. Respondent Sherry Kefalas is the district's only counselor. Her position is being eliminated. For the past two years, the district has contracted with Sun Street Center to provide intervention services. These services were in addition to the counseling functions Kefalas performed. The district plans to continue with the intervention services contract for the 2005-2006 school year, but it will eliminate the counseling services Kefalas is now performing.

Kefalas argues that she is qualified to perform the intervention services being provided by Sun Street Center, and that she should therefore be retained to perform those services rather than to have them contracted out. Kefalas currently coordinates the Tobacco Education Use Prevention and Safe and Drug Free Schools programs. She argues that without her coordination services the district will be unable to attain funding for these programs and will therefore be unable to meet state and federal mandates. Both of Kefalas's arguments are rejected. The evidence showed that counseling services for the 2005-2006 school year will be performed in a different manner than they are now performed. Nothing in the law prohibits a school district from contracting out certain counseling services and the district is not required to retain Kefalas to perform these services. In addition, it was not shown that not having a counselor will leave the district unable to receive funding for the Tobacco Education Use Prevention and Safe and Drug Free Schools programs or that this would result in failure to meet mandated levels of service.

### LEGAL CONCLUSIONS

1. Cause for the elimination of 10.8 FTE positions exists in accordance with Education Code sections 44949 and 44955. Except as set forth below, cause further exists to give respondents notice that their services will not be required for the 2005-2006 school year. This cause relates to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

2. As set forth in Finding 3, the district intends to retain the services of respondents Yolanda Virgen, Heather Zimmerman, and Victoria Senter. Accordingly, notice may not be given them that their services will not be required for the 2005-2006 school year.

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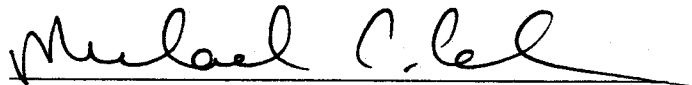
<sup>5</sup>See Education Code section 44256, subdivision (b). (A governing board "may" authorize an employee to teach a subject outside his or her credential.)

3. The middle school music services currently being performed by respondent Diane Gehling are not being reduced. No senior teacher is entitled to bump Gehling from her position. Accordingly, notice may not be given Gehling that her services will not be required for the 2005-2006 school year.

ORDER

Notice may be given respondents Ronald Bobb, Nicole Jensen, Sherry Kefalas, and Courtney Toller that their services will not be required for the 2005-2006 school year.

DATED: April 27, 2005



MICHAEL C. COHN  
Administrative Law Judge  
Office of Administrative Hearings