

BEFORE THE GOVERNING BOARD OF THE
SAN MARCOS UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against:

Respondents Listed on Exhibit “A”

OAH No. 2010030217

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Marcos, California on April 21, 2010.

Kerrie E. Taylor Esq., Fagen Friedman & Fulfroest LLP, represented the District.

Jon Y. Vanderpool, Esq., Tosdal Smith Steiner & Wax, represented all Respondents except Respondent Nicholas Dwyer.

There was no appearance by or on behalf of Respondent Nicholas Dwyer.

The matter was submitted on April 21, 2010.

SUMMARY OF PROPOSED DECISION

The Board of Education of the San Marcos Unified School District determined to reduce or discontinue particular kinds of services provided by teachers for budgetary reasons. The decision was not related to the competency and dedication of the individuals whose services are proposed to be reduced or eliminated.

District staff carried out the Board’s decision by using a selection process involving review of credentials and seniority, “bumping,” “skipping” and breaking ties between/among employees with the same first dates of paid service. The selection process was in accordance with the requirements of the Education Code.

FACTUAL FINDINGS

1. Respondents listed on Exhibit “A” (Respondents) are probationary or permanent certificated employees of the San Marcos Unified School District (District).

2. On March 8, 2010, the District’s Governing Board (Board) adopted Resolution No. 32-09/10 and thereby took action to reduce or eliminate particular kinds of services,

commencing the 2010-2011 school year. Further, the Board directed the Superintendent to send appropriate notice to all certificated employees of the District who would be laid off as a result of the reduction of the particular kinds of services.

3. On March 9, 2010, Len Judd, Assistant Superintendent, Human Resources and Development (Assistant Superintendent) served permanent and probationary certificated employees with written notice that he recommended not to re-employ them in the 2010-2011 school year and stated the reasons therefor. In addition, the notice advised Respondents of the right to hearing, that the request for hearing must be delivered to the District's office no later than March 18, 2010, and that the failure to request a hearing would constitute waiver of the right to a hearing.

4. Respondents submitted a timely Request for Hearing to determine if there was cause for not re-employing them for the ensuing school year.

5. On March 2, 2010, Kevin D. Holt, the District's Superintendent (Superintendent), made and filed an Accusation for lay-off of certificated employees. He served each individual who submitted a Request for Hearing with an Accusation, Notice of Defense, Notice of Hearing and related materials.

In response, Respondents submitted a timely Notice of Defense.

6. All prehearing jurisdictional requirements were satisfied.

7. On March 8, 2010, the Board adopted Resolution No. 32-09/10 and thereby took action to reduce or eliminate the following particular kinds of certificated services commencing the 2010-2011 school year:

Type of Service	FTE
Elementary Teaching	28.0
English	4.0
Life Science	1.0
Math	2.0
Social Science	6.0
Physical Science	0.2

The proposed reductions totaled 41.2 full-time equivalent (FTE) positions.

8. The District considered all positively assured attrition in determining the actual number of final layoff notices to be delivered to its certificated employees that occurred prior to March 15, 2010.

The Assistant Superintendent testified that there have been additional resignations or retirements in the District and that the District has not considered this attrition because there is concern that there may be further reductions from the State of California. No evidence was offered to establish when the subsequent retirement or resignation occurred.

Presumably, the attrition referred to by the Assistant Superintendent occurred after March 15, 2010. As such, the District need not consider positively assured attrition that occurs between the date of the preliminary notice and the final notice in determining the number of certificated employees to be reduced. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 631.)

9. The Assistant Superintendent was responsible for implementing the technical aspects of the layoff. The District developed a seniority list. The seniority list for noticed certificated employees contained, among other matters, the teacher's name, seniority date, credential type, English Language Certification (if any), supplemental authorization(s) (if any), assignment, site and application of tie-breaker criteria.

The seniority date was based on the first date of paid service rendered in a probationary position.¹ To assure the accuracy of the District's information, the Assistant Superintendent notified certificated employees of seniority date, credentials and other data on file with the District and provided certificated employees an opportunity to verify, challenge or update this information. The Assistant Superintendent testified that no employee reported an error in the information on file with the District.

10. The Assistant Superintendent testified that the District intends to retain the most senior teacher who is certificated and competent to teach in the District's Teen Parent Program and has experience teaching at risk-students.

No particular credential is required to provide service in the Teen Parent Program. The California Commission on Teacher Credentialing requires that teachers in independent studies programs demonstrate subject matter competence in all core academic subjects that they teach. Core academic subjects include Math, Science, History, Government, English and Geography. Teachers can demonstrate competency by establishing that they are highly qualified in the subject area under the No Child Left Behind Act (NCLB).

Students who participate in the Parent Teen Program are mothers or fathers who have babies and may bring their children to school. Typically, they are at risk for dropping out of school for different reasons; these students have the responsibilities of being a parent; some have deficiencies in high school credits; others have been out of school for a period of time; and, all are at different places on their schedule to graduation.

The District identified Lori Hollis (Hollis) as the most senior teacher who satisfies its competency. Her seniority date is August 13, 2007. She holds a single subject credential in History and a supplemental authorization in Introduction to English. She is highly qualified under NCLB in all core subject areas. She has 15 years experience (12 years outside the District) teaching at risk students.

¹ Education Code section 44845

Respondent Claudia Hernandez (Respondent Hernandez) asserts that she is competent to bump Hollis. Her seniority date is August 9, 2007, and she holds a single subject social sciences credential; Respondent Hernandez is assigned to Twin Oaks High School and teaches in the District's alternative education program. She has been assigned to this site for three years. Hernandez teaches Independent Studies, Social Science, Government, U.S. History, World History, Geography and Economics. She is NCLB compliant (highly qualified) in all Social Studies. She is not highly qualified in Math or English.

The District established that it has a need for a teacher who is competent to teach in its Teen Parent Program. Despite being senior to Hollis, Hernandez did not establish that she satisfies the District's competency criteria to teach in the Teen Parent Program. According to the evidence in the record, Hollis is the most senior certificated and competent teacher to teach in the Teen Parent Program. Respondent Hernandez is not entitled to bump Hollis, and the District properly retained Hollis.

11. Between the employees who first rendered paid service to the District on the same date, the Board determined their order of termination solely on the basis of needs of the District and its students. The Board adopted specific criteria and provided clear instructions for implementation of the criteria. The order of termination was based on the needs of the District and its students.

12. In reducing or eliminating particular kinds of services, the services of no permanent employee may be terminated while retaining any employee with less seniority to render a service that said permanent employee is certificated and competent to render.

13. The services that the District proposed to reduce were "particular kinds of services" that can 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.

14. The District's reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

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

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in these sections are satisfied.

2. A District may reduce services within the meaning of 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 vs. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. The District need not consider positively assured attrition that occurs between the date of the preliminary notice and the final notice in determining the number of certificated employees to be reduced. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 631.)

4. Cause exists under Education Code sections 44949 and 44955 for the San Marcos Unified School District to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuance of particular kinds of services is related solely to the welfare of the schools and the pupils thereof.

5. A senior teacher whose position is discontinued has the right to transfer to a continuing position that he/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 vs. Richmond Unified School District* (1975) 13 Cal. 3d 469.)

6. The District has the discretion to determine whether teachers are certificated and competent to hold the position for which said teachers have been skipped and retained. (*King v. Berkeley Unified School District* (1979) 89 Cal.App.3d 1016) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities that their more senior counterparts lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831)

7. No employee with less seniority than any Respondent is being retained to perform a service that any Respondent is certificated and competent to render.

8. All arguments not addressed herein are not supported by the evidence and/or the law and therefore rejected.

ORDER

The Accusation served on Respondents listed on Exhibit "A" is sustained. Notice shall be given to Respondents listed on Exhibit "A" before May 15, 2010 that their services will not be required for the 2010-2011 school year because of the reduction or discontinuance of particular kinds of services.

DATED: _____

VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

SAN MARCOS UNIFIED SCHOOL DISTRICT
RESPONDENTS
EXHIBIT “A”

1. Altieri, Malia
2. Beiss, Heather
3. Bordonaro, Kirsten
4. Collier, Jamie
5. Contreras, Alyssa
6. Dwyer, Nicholas
7. Jeremy Ferebee
8. Fodor Delaney
9. Jennifer Gutierrez
10. Hernandez, Claudia
11. McLeod, Mara
12. Medina, Kelly
13. Murphy, Aarika
14. Vasconcellos, Stephanie
15. Walsh, Meghan
16. Yoder, Allison