

BEFORE THE
GOVERNING BOARD
MT. DIABLO UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Non-reemployment of
12.63 Full Time Equivalent Certificated
Employees.

OAH No. N2005030493

PROPOSED DECISION

Administrative Law Judge Stewart A. Judson, State of California, Office of Administrative Hearings, heard this matter in Richmond, California, on April 25, 2005.

Daniel A. Ojeda, Esq. represented complainant Gary McHenry, the Superintendent of the Mt. Diablo Unified School District of Contra Costa County, State of California.

Ernest Tuttle, Esq. represented the respondents.

The matter was submitted on April 25, 2005.

FACTUAL FINDINGS

1. Gary McHenry (complainant) is the Superintendent of the Mt. Diablo Unified School District (the District) and made and filed the accusations in his official capacity as said officer.
2. Each of the respondents, all of whom are listed in Complainant's Exhibit 7 and incorporated herein by this reference, is a certificated employee of the District.
3. On January 25, 2005, the Governing Board (the Board) of the District adopted the criteria for establishing the order of termination among respondents who have the same date of first paid probationary service.
4. On March 7, 2005, the Board adopted Resolution No. 04/05-37, set forth in Exhibit 1 and incorporated herein, directing complainant or his designated representative to give notices to certificated employees that their services would not be required for the 2005-06 school year.

5. On March 10, 2005, the Superintendent gave written notice to the Board of his recommendation that notice be given to respondents that their services would not be required for the ensuing school year and stating the reasons therefor.

6. On March 10, 2005, respondents were given written notice of the Superintendent's recommendation that notice be given respondents that their services will be terminated at the close of the current school year and stating the reasons therefor.

7. Respondents timely requested, in writing, a hearing to determine if there is cause for not reemploying them for the ensuing school year.

8. At the hearing, the District announced its withdrawal of notices to the librarians, a total of 4.53 FTE positions, thereby reducing the number of FTE positions affected from 12.63 to 8.10.

INSTRUMENTAL MUSIC¹

9. The District intends to reduce this particular kind of service by 4.60 FTE positions at the fourth grade level. The evidence established that those certificated employees affected by this reduction are, in order of least seniority:

<u>NAME</u>	<u>SR DATE</u>	<u>STATUS</u>	<u>CREDENTIALS</u>
Christian Emigh	8/26/02	Provisional .80 FTE	Emergency Music/German
Brenda Thompson	8/31/98	Provisional 1.0 FTE	Emergency Music
Amanda Smythe	9/27/04	Prob 1 1.0 FTE	Preliminary Music

10. Elaine Bush has a seniority date of September 27, 2004. Her status is a probationary ¹² certificated employee with a clear credential. She did not teach music during the current school year and is retiring effective the end of this school year.

¹ Respondent Courtney, who holds a 1.0 FTE position and teaches instrumental music, sought to challenge his seniority date. The District, however, indicated it was withdrawing his layoff notification. The District represented that this issue is part of a suit now pending in court. Since the District is no longer seeking to terminate Courtney and the issue of his seniority date is being contested in another forum, that matter is deemed moot for the purposes of this proceeding.

² Indicating first year probationary status.

11. Smythe challenges her seniority date. She was employed as a substitute certificated employee on October 13, 2003. She obtained her credential at the beginning of the 2004-05 school year. She started teaching the current school year on September 8, 2004. She attended the new teacher orientation on August 30 and 31, 2004, went to her two school sites on September 1 and on September 2 attended a "vocal" meeting. Smythe was informed that her status at the start of the school year was as a substitute and that she had been registered as one since the prior school year. Although she testified she was never given a contract as a temporary employee, the evidence established that she executed a contract with the District on September 24, 2004, showing her status as a 100% temporary teacher in the District effective September 27, 2004.

12. Accordingly, it is found that Smythe's seniority date is as indicated in Exhibit 3, to wit: September 27, 2004.

13. The three most junior certificated employees in the District are respondents Emigh, Thompson and Smythe, totaling 2.8 FTE positions. The balance of the 4.6 FTE positions being eliminated consists of two certificated employees, to wit: Bush and one teacher on leave. The District has agreed to consider these two positions as attrition in its calculations.

14. The District will continue to provide a music program at the fifth grade level and other higher grade levels.

NURSES

15. The District currently has 9.6 FTE positions in its nursing staff. Eight employees each possess one FTE position. Two employees, Taylor-Thompson and Gabe, each hold a .80 FTE position. Celestino, who holds a 1.0 FTE position, is assigned to a separate program than the other nurses. She works a 205-day schedule. The other nurses work a 183-day schedule. The District is seeking to layoff 1.0 FTE position in this latter schedule. As a result, the District will provide the services of 8.6 FTE nurse positions in the ensuing school year.

16. Taylor-Thomas is on a 39-month rehire list and currently is on leave from the District. Celestino's seniority date is September 9, 2003. She is the most junior of the nurses. She holds a preliminary school nurse services credential. During Taylor-Thomas' leave, Celestino will fill Taylor-Thomas' 183-day schedule as a temporary employee until Taylor-Thomas either retires, resigns or returns and her remaining 22 summer days. Respondent Agronow, whose seniority date is January 16, 2001, and whose status is permanent in the 183-day schedule, will bump into the 183 days that Celestino will no longer serve. Agronow is the second most junior nurse in the District.

17. There are 36,000 students enrolled in the District this year. Nurses are expected to serve all students attending schools and program sites. State mandated services include hearing and vision screening for all kindergarten, second, fifth and tenth grade students. Assistants help in kindergarten and second grade. Scoliosis screening is mandated for female students in the seventh grade and male students in the eighth grade. Other mandated nurse services include:

- Reviewing student immunization and first grade CHDP health exam records for compliance.
- Managing the provision of specialized health care procedures.
- Completing student health assessments.
- Providing staff development in areas of blood borne pathogens and universal precautions, specialized health care issues and other health issues as needed.
- Attending Student Study Team, IEP and Section 504 team meetings as needed.
- Assisting school staff in establishing effective practices in administering medication to students.
- Assisting school staff with managing the disposal of medical waste materials.

18. The District, when considering layoffs in its nursing staff, examined all of the services performed by the nurses. To assure that all mandated services will be accomplished, the District will seek to minimize the nursing duties and provide duties above those that are mandated in a different manner. Some duties may be combined. Efforts will be made to perform and combine services more efficiently with the goal being to assure they are rendered more effectively. Health assistants will be used where necessary. While assignments for the ensuing school year have not been finalized, the evidence has established that nursing mandated services will now be rendered with one less FTE position.

19. The services sought to be reduced or discontinued by the District are particular services within the meaning of Education Code section 44955 and will be reduced or discontinued no later than the beginning of the school year 2005-2006.

20. The particular kinds of services to be retained by the District and described in Resolution 04/05-37 (page 2) will be retained for the 2005-2006 school year.

21. No permanent or probationary certificated employee with less seniority is being retained to render a service that respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. Cause for terminating 4.53 FTE librarian positions does not exist as the District has withdrawn the letters of layoff to those respondents.


2. Cause exists under Education Code sections 44949 and 44955 for reducing or discontinuing 4.6 FTE instrumental fourth grade music positions and 1.0 FTE nursing position.

3. Cause for not reemploying respondents Emigh (.80 FTE), Thompson (1.0 FTE) Smythe (1.0 FTE) and Celestino (1.0 FTE) relates solely to the welfare of the schools and the pupils thereof.

ORDER

1. The accusations against all librarians are dismissed.
2. The accusation against respondent Gary Coartney is dismissed.
3. The District may notify respondents Emigh, Thompson, Smythe and Celestino that their services will not be required for the ensuing school year.
4. All other accusations are dismissed.

DATED: April 29, 2005


STEWART A. JUDSON
Administrative Law Judge
Office of Administrative Hearings