

**BEFORE THE GOVERNING BOARD OF THE
BEARDSLEY SCHOOL DISTRICT
COUNTY OF KERN, STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

ARIANNE R. NEWMAN,

Respondent.

OAH No. 2010031645

PROPOSED DECISION

This matter came on regularly for hearing on April 7, 2010, in Bakersfield, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Peter C. Carton, Attorney at Law, represented the Beardsley School District (District).

Paul A. Welchans, Attorney at Law, represented Respondent, Arianne R. Newman (Respondent).

The matter was submitted on April 7, 2010.

SUMMARY OF PROPOSED DECISION

The Governing Board of the Beardsley School District (Board) determined to reduce or discontinue particular kinds of services provided by teachers and other certificated employees 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," and breaking ties between employees with the same first dates of paid service. The selection process was in accordance with the requirements of the Education Code.

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FACTUAL FINDINGS

1. Paul Miller made and filed the Accusation in his official capacity as Assistant Superintendent of the Beardsley School District (District).
2. Respondent is a probationary certificated District employee.
3. On or before March 15, 2010, the District personally served on each respondent a written notice that it had been recommended that notice be given to each respondent, pursuant to Education Code sections 44949 and 44955, that his/her services would not be required for the next school year (Notice of Recommendation Not to Reemploy). Each written notice set forth a reason for the recommendation and noted that the Board had passed a Resolution (Board Resolution Number 6) reducing the certificated staff.
4. Respondent timely submitted a written request for a hearing to determine if there is cause for not reemploying her for the ensuing school year.
5. The Assistant Superintendent made and filed an Accusation against Respondent as the sole certificated employee who requested a hearing. The Accusation, with required accompanying documents and a blank Notice of Defense, were timely served on Respondent.
6. On March 26, 2010, a Notice of Defense, pursuant to Government Code section 11506, was timely filed on Respondent's behalf.
7. Board Resolution Number 7, adopted on February 9, 2010, established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. It provided that the order of termination shall be based on the needs of the District and its students.
8. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments and locations, advanced degrees, credentials, and authorizations. Credential and authorization data are obtained from the records of the County Office of Education, at which certificated employees must register such documents.
9. All prehearing jurisdictional requirements were met.

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10. On February 9, 2010, the Board took action to reduce or discontinue the following particular kinds of services for the 2010-2011 school year:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Self-Contained Classroom Instruction, K-6	5
Mild/Moderate	2
P.E. Teacher	0.56
Departmentalized Instruction, Junior High, 7-8:	
Music	0.5
Mild/Moderate	1
Total	9.06

11. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

12. The eliminated services were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The Superintendent’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

13. The 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.

14. Respondent argued that Kelly Zubia was misclassified as a permanent employee of the District, that she should have been classified as a probationary employee, and that Respondent should have been higher on the seniority list than Ms. Zubia because Respondent had an earlier first date of paid service. Respondent based that claim on the testimony of Diane Coble, the District’s secretary who is responsible for the District’s personnel matters.

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15. Ms. Coble testified on direct examination that Ms. Zubia was hired by the District in November 2006, resigned in summer 2008, and returned to the District after the beginning of the 2008-2009 school year, but within 39 months of her resignation. Respondent argued that the District failed to prove that Ms. Zubia taught more than 75 percent of the 2007-2008 school year and therefore, she is not entitled to the protection of Education Code section 44931. However, on cross-examination, Ms. Coble corrected her earlier testimony by stating that Ms. Zubia began her work with the District in November 2005, not November 2006. That testimony was both uncontroverted and credible. Ms. Zubia was correctly classified as a permanent employee.

16. Respondent also argued that her first date of paid service to the District, as reflected on the District's seniority list, is incorrect. She attended an orientation on August 7, 2008, at the request of the District, and that she was paid for her time and service at the orientation.

17. The District typically issued paychecks to its teachers for regular teaching duties on the last day of each month. Payments for services other than regular teaching duties, such as those for attending an orientation, were paid on the 15th of each month. Respondent was paid on September 15, 2008, for her attendance at the orientation. The warrant covered only the amount paid for the orientation. Her regular salary for the previous month was not included in that warrant.

18. The first date of paid service reflected on Respondent's contract with the District is August 14, 2008, the date reflected on the District's seniority list. Respondent attended the orientation before her contract went into effect, and she did so voluntarily. Attendance at the orientation was not required by the District. The District correctly determined Respondent's first date of paid service to be August 14, 2008. Cause does not exist to adjust her first date of paid service on the seniority list.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met.

2. The services identified in Board Resolution Number 6 are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

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3. 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 v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

4. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. The District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued.

5. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

6. 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.) 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.)

ORDER

1. The Accusations against the respondents are sustained. Notice may be given to the respondents that their services will not be required for the 2010-2011 school year because of reduction or discontinuance of particular kinds of services.

2. Notice shall be given in inverse order of seniority.

DATED: April 12, 2010

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings