

BEFORE THE
BOARD OF EDUCATION
FARMERSVILLE UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of
Certificated Staff of the:

FARMERSVILLE UNIFIED SCHOOL
DISTRICT,

Respondents.

OAH No. 2011030466

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, on April 7, 2011, in Farmersville, California.

Salvador O. Holguin, Jr., Attorney at Law, represented the Farmersville Unified School District (District).

Ernest Tuttle, III, Attorney at Law, represented respondents identified in Attachment A attached hereto and incorporated herein by reference.

Evidence was received, and the record remained open for submission of written closing argument. District's and respondents' opening briefs were received on April 11, 2011, and marked respectively as Exhibits 15 and H for identification. District's reply brief were received on April 12, 2011, and marked as Exhibits 16 for identification. Respondents did not file a reply brief. The case was submitted for decision on April 13, 2011.

FACTUAL FINDINGS

1. Janet Jones is the Superintendent of the District. The actions of Ms. Jones in making and filing the Accusation were taken in her official capacity.

2. Ms. Jones noted that there is uncertainty over District funding for the 2011 – 2012 school year, especially if current sales tax rates are not extended. The District has projected funding cuts from the State, leading to declines in the amount the District is reimbursed for average daily attendance. The Superintendent has recommended that certain

District programs and services be reduced and/or eliminated to address the anticipated budget deficit.

3. The Superintendent recommended to the Board that particular kinds of services being offered by the District be discontinued or reduced. The Superintendent stated the reasons for the recommendation. The Board approved the recommendations and, following the adoption of the Resolution set forth below, directed the Superintendent or designee to implement the recommendations. The Board also charged the Superintendent and her staff to identify an equivalent number of certificated personnel and give those certificated employees notice in writing of the Superintendent's recommendation that their services would not be required for the ensuing school year. The recommendation of certificated personnel to be identified for layoff from employment with the District was not related to their skills or performance as teachers.

4. In response to the Superintendent's recommendation above, the Board adopted Resolution No. 18-03-08-11 on March 8, 2011. The Board resolved that the District needs to reduce or eliminate particular kinds of services as recommended by the Superintendent and, accordingly, it was resolved that it is necessary to terminate the employment of an equivalent number of certificated employees of the District due to the reductions. Resolution No. 18-03-08-11 authorized the Superintendent, or designee, to take action to reduce or discontinue the following particular kinds of services for the 2011-12 school year:

<u>Particular Kind of Service (PKS)</u>	<u>Full-Time Equivalent (FTE)</u>
Grade K-6 Classroom Instructional Services	11.0
Elementary P.E. Instructional Services	1.0
Junior High Opportunity Room Services	0.4285
Junior High Science Services	1.1428
Junior High Social Studies Services	0.7143
Junior High English/Language Arts Services	1.0
Vocational Education Video/Graphic Design	1.0
High School Art Services	1.0
High School English Services	1.0
High School Investigative/Evaluative Science	1.0
High School Earth Science Services	0.2857
District Psychologist/Intern	1.0
TOTAL	20.5713 FTE

The proposed reductions total 20.5713 FTE, with an equivalent number of certificated positions.

5. The services set forth in Resolution No. 18-03-08-11 are “particular kinds of services” that may be reduced or discontinued within the meaning of Education Code section 44955. There was no evidence that the Board’s decision to reduce or discontinue these particular kinds of services was arbitrary or capricious. The reduction or elimination of the particular kinds of services set forth in Resolution No. 18-03-08-11 constituted a proper exercise of the Board’s discretion, within the meaning of Education Code section 44955.

6. On March 10, 2011, the District personally served written preliminary notice that advised permanent and probationary certificated employees, pursuant to Education Code sections 44949 and 44955, that their services would not be required for the next school year. The preliminary notices were served on 17 certificated permanent and/or probationary employees of the District. Each written notice set forth the reasons for the recommendation and noted that the Board had adopted Resolution No. 18-03-08-11, which was attached to the preliminary notice. Of the 17 employees served a preliminary notice, 15 certificated employees timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year.

7. The Superintendent made and filed Accusations against each of the certificated employees of the District who timely requested a hearing after receipt of the preliminary notice or double notice. It was not disputed that the Accusations, with required accompanying documents and blank Notices of Defense, as well as Notices of Hearing, were timely served on the responding employees.

8. Notices of defense were filed by, or on behalf of, 15 District employees. The District rescinded the preliminary notice to one employee, leaving 14 respondents.

Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955.

District Seniority Dates and Employment Status

9. Tenure is the relationship between a teacher and the District which gives the teacher greater job security.

Seniority is the relationship between the teachers within a school district. Among the teachers credentialed to provide a given service, greater seniority in the District gives a greater legal entitlement to a position. (See *Ferner v. Harris* (1975) 45 Cal.App.3d 363.)

Seniority date is defined as the date upon which an employee first rendered paid service in a probationary position. (Ed. Code, § 44845.)

10. At the time of hearing, the parties stipulated to the following regarding dates of first paid service, in any capacity, by respondents with the District:

- a. Respondents Mandy Ewing, Maria Gonzalez Amezcua, Jillian Hanson, Heidi Jaramillo, Katie Kirby, Anthony Lopez, Sara Pendola, Ernesto Perez, Michelle Plantenberg, Laurie Thomas, Denise Vasquez, and Gerardo Vazquez were all employed or eventually recognized as probationary teachers in the 2009 – 2010 school year. As such, they were considered probationary employees, but because of prior employment as temporary employees for more than 75 percent of the 2008 – 2009 school year they were credited with one additional year of service in accordance with Education Code section 44918.
- b. However, respondents Heidi Jaramillo, Katie Kirby, Anthony Lopez, Michelle Plantenberg and Denise Vasquez each first served in categorically funded positions on August 9, 2007.
- c. Respondents Sara Pendola and Ernesto Perez first served in categorically funded positions on August 11, 2008.
- d. Respondents Laurie Thomas and Gerardo Vazquez first served in categorically funded positions on August 17, 2009.

Respondents each contend that due to the categorical funding of their positions, they should have received probationary employment rather than temporary employment with the dates they first served in a categorically funded position.

The District's records show that respondents Mandy Ewing, Maria Gonzalez Amezcua and Jillian Hanson only served as backfill temps prior to being employed as probationary employees. Respondent Jillian Hanson disputes this and contends that she should be a categorically funded temporary employee for school year 2008 – 2009 and testified accordingly.

Seniority Date Determinations

11. The stipulation (Finding 10) was based upon a review of each respondent's prior employment history, determining that prior to the 2009 – 2010 school year, all respondents had been employed by way of temporary contracts. The District reviewed each contract to determine when each had first worked in a categorically funded position, if ever.

12. Education Code section 44845 provides: "Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position." Thus, temporary service is not generally included for purposes of computing eligibility for classification as a permanent employee.

Education Code sections 44909 and 44918 further define circumstances of employment under which service as a categorically funded employee or temporary employee, for at least 75 percent of the number of days the regular schools of the district were maintained, will be deemed service for a complete school year as a "probationary" employee. The District applied these sections here. Since respondents were all employed as probationary employees for the 2009 – 2010 school year, and had worked at least 75 percent of the days in the 2008 – 2009 school year as temporary employees, they were all given one year credit back to August 11, 2008, as their District seniority date.

13. Respondents believe that their District seniority dates must be adjusted even further to account for earlier service in categorically funded positions. Specifically, respondents Jaramillo, Kirby, Lopez, Plantenberg and Vasquez (Denise) each first served in categorically funded positions on August 9, 2007.

The California Court of Appeal held that under certain circumstances, temporary employees serving in categorically funded positions may be entitled to layoff notice if there is a reduction of service, but the funding source or program pursuant to which they are employed is continuing. (*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260.) *Bakersfield* extended to categorical employees the procedural formalities due permanent and probationary employees where there was no indication that the categorical program had expired. It characterized categorical employees in this position as "probationary" for this purpose. (*Id.* at p. 1287.) Respondents also believe *Bakersfield* extends and allows for the counting of time spent in categorical temporary service towards their seniority.

14. The District believes respondents' interpretation fails because categorical employees in programs that expire would receive no procedural layoff rights if they can simply be released when all categorical funds for a program are exhausted. They would have no right to retention. Thus, the District argues that it would not make sense to count seniority for an employee who worked five years in a categorical temporary assignment, if that same employee could be released when all categorical funds expired. The *Bakersfield*

court expressly recognized that categorically funded employees are treated like temporary employees in certain respects:

[T]hey may be dismissed without the formalities required for probationary and permanent employees in the event the program expires or is terminated, and their service does not count toward acquiring permanent status (unless they are reemployed the following year in a probationary position).

(*Id.* at p. 1286. See also *Zalac v. Governing Board* (2002) 98 Cal.App.4th 838, 842-846.)

Moreover, the District noted that *Bakersfield* applies only to employees actually serving in categorically funded positions. It did not hold that “backfill” temporary employees replacing regular employees serving in categorical programs have any procedural rights in connection with a certificated layoff. Such employees are replacing other employees on a leave of absence and may be released at the pleasure of the governing board as other temporary employees.

15. Respondents rely upon a 1972 Attorney General opinion. (55 Ops.Atty.Gen. 428 (1972).) In *Haase v. San Diego Community College District* (1980) 113 Cal.App.3d 913, the Court of Appeal rendered its interpretation of Education Code section 13329, predecessor to current section 44909, and the same section analyzed in the Attorney General opinion. In *Haase*, the employee worked for three consecutive years as a part-time temporary instructor at a community college, pursuant to the predecessor to section 44909. The appellate court found that Haase was not a probationary employee. In doing so the court explained:

This conclusion is further strengthened by the language of the enactment giving credit toward tenure for service under the section for “at least 75% of the number of days in regular schools of the district by which he is employed are maintained” where such person is later employed as a contract employee. Language relating to credit if one eventually becomes a contract employee is superfluous if one has already reached that status.

16. The District’s expressed concerns in this case were indirectly considered by the Fifth District Court of Appeal in its *Bakersfield* decision. In *Bakersfield*, laid off teachers who had been classified as temporary employees in their employment contracts claimed that they were entitled to be classified as probationary employees. The district classified one group of teachers in that case as temporary based upon the status of their certification to teach – working under emergency teaching permits. The appellate court determined that the district’s policy for classifying teachers as temporary employees, insofar as it was based on the fact they held something less than a preliminary or professional

(clear) credential, was invalid. (*Bakersfield Elementary Teachers Association v. Bakersfield City School District*, *supra*, (2006) 145 Cal.App.4th at p. 1301.) Districts could classify teachers as temporary only if, by virtue of the positions they occupied or the manner of services performed, they fell within specific Education Code provisions that defined temporary employees. All certificated teachers who are not so classified as temporary employees, and who are not properly classified under the Education Code as permanent or substitute employees, must be classified as probationary employees. (Ed. Code, § 44915.)

Thus, the *Bakersfield* court determined that such improperly classified certificated teachers, and also those teachers assigned to categorically funded positions where funding had not expired, may not be laid off without the procedural formalities due a permanent and probationary employee. These certificated teachers must be considered as probationary employees and accorded the rights of probationary employees as provided in the Education Code, “including the right to accrue seniority (§ 44845) and the rights to notice and a hearing in the event of a workforce reduction (§§ 44949, 44955).” (*Bakersfield Elementary Teachers Association v. Bakersfield City School District*, *supra*, (2006) 145 Cal.App.4th at p. 1301.)

17. The Bakersfield City School District in *Bakersfield* was troubled that such interpretation of the Education Code permitted certificated employees having less than a regular credential to be classified as probationary employees, “and so to acquire seniority.” It contended that this would defeat the Education Code’s preference for fully credentialed teachers and “envision the possibility an emergency-permitted teacher may have more seniority than one with a regular credential.” (*Id.* at p. 1300.) The appellate court addressed this argument as follows:

Section 44845 states: “Every probationary or permanent employee ... shall be deemed to have been employed on the date upon which he [or she] first rendered paid service in a probationary position.” (See *San Jose Teachers Assn. v. Allen*, *supra*, 144 Cal.App.3d at pp. 640-641, 192 Cal.Rptr. 710 [statute applies to probationary service in children’s center, i.e., in any position requiring certification qualifications, as well as to service in regular program].) If the Legislature had intended that only probationary and permanent employees *with a preliminary or clear credential* shall acquire seniority, it would not have been difficult to say so. ... But once having determined that certificated employees with less than a regular credential must in certain circumstances be classified a probationary, we cannot then overlook the clear directive in section 44845 that, as probationary employees, they are entitled to accrue seniority.

[Emphasis in original.]

18. This approach was also followed by the First District Court of Appeal when considering similar arguments and concerns raised by the Vallejo City Unified School District that it would be required to retain or reappoint provisionally credentialed teachers ahead of fully credentialed teachers who have less seniority if the district were required to base seniority solely on “the date upon which [a probationary or permanent employee] first rendered paid service in a probationary position.” (*California Teachers Association v. Vallejo City Unified School District* (2007) 149 Cal.App.4th 135, 156.)

The *Vallejo* court relied upon the reasoning set forth in *Bakersfield*. But it then further explained that districts enjoyed discretion in determining which teachers are released or rehired. For example, it noted that when multiple employees enjoy the same start date, the district was to determine the order of termination “solely on the basis of the needs of the district and the students thereof.” (Ed. Code, § 44955, subd. (b).) When making assignments and reassignments, the governing board was to consider teacher “seniority *and qualifications*.” (Emphasis in original. *California Teachers Association v. Vallejo City Unified School District*, *supra*, 149 Cal.App.4th at p. 156.) Importantly, the *Vallejo* court noted: “Another option to avoid the problem of rehiring less qualified teachers would be for a school district to exercise its discretion to nonreelect probationary employees who lack a full credential.” (*Ibid.*)¹

In declining to carve out an exclusion to address seniority concerns, the *Vallejo* court concluded:

Thus, school districts have tools at their disposal enabling them to retain and rehire the most qualified teachers, and no pressing policy reason requires us to read an exclusion into the layoff provisions that is not supported by statutory language.

19. Although the District credited respondents, as former temporary employees, with one year’s credit toward seniority after they were hired or classified as probationary employees under Education Code sections 44909 and 44918, they were required to do more. *Bakersfield* extends and allows for the counting of time spent by certain respondents in categorical temporary service towards their district seniority.

¹ The *Vallejo* court reasoned: “In *Mendocino*, *supra*, 92 Cal.App.4th 522, 111 Cal.Rptr2d 879, Division Five of this court considered whether a school district had authority to nonreelect a probationary teacher who had been laid off for economic reasons but was eligible for preferred reappointment. The court considered the policies served by the nonreelection statute (§ 44929.21, subd. (b)) and the layoff statutes (§§ 44949, 44955, 44957) and concluded a district’s absolute right of nonreelection, and its purpose of ensuring children are taught by qualified educators, prevails.” (*Id.* at p. 157.)

20. For the above reasons, for purposes of establishing District seniority, the following findings are made:

a. Respondents Heidi Jaramillo, Katie Kirby, Anthony Lopez, Michelle Plantenberg and Denise Vasquez each first served in categorically funded positions on August 9, 2007. They are to be credited with an additional year of seniority by virtue of this status. At hearing, the parties represented that this change will have no impact on proposed layoffs as no less senior teachers are being retained to perform services that these respondents are certificated and competent to perform.

b. Respondents Sara Pendola and Ernesto Perez first served in categorical positions on August 11, 2008. They were already credited with an additional year of service because of prior employment as temporary employees for more than 75 percent of the 2008 – 2009 school year. The fact that their service was in a categorical position, and not temporary, does not affect the calculation of their district seniority. Their seniority dates should not be adjusted.

c. Gerardo Vasquez and Laurie Thomas first served in a categorically funded position on August 17, 2009. The district tacked on an additional year of service under Education Code section 44918. The additional year is deemed to be probationary service under section 44918. Their seniority dates should not be adjusted.

d. Respondents Mandy Ewing, Maria Gonzalez Amezcua served as backfill temps prior to being employed as probationary employees. As noted in Finding 14, *Bakersfield* applies only to employees actually serving in categorically funded positions. It did not hold that “backfill” temporary employees replacing regular employees serving in categorical programs have any procedural rights in connection with a certificated layoff. Such employees are replacing other employees on a leave of absence and may be released at the pleasure of the governing board as other temporary employees.

Even if respondent Jillian Hanson was a categorically funded temporary employee for school year 2008 – 2009, she did not hold probationary employment until the following year. She was properly credited by the District for the one year’s service in 2008 – 2009. Her District seniority date reflects this.

Competency Issues

21. Respondent Bret Leal. Respondent Leal possesses a Professional Clear Single Subject credential in Art. His District seniority date is August 11, 2000. He is assigned to teach Art at Farmersville High School, one of the programs that is being reduced. Mr. Leal would consent to being assigned to work in continuation or opportunity school assignments held by junior teachers next school year. The District has determined that he is not competent to do so.

As a Title 1 recipient, the District receives federal funds for all schools and must maintain and assign highly qualified teachers into teaching assignments as defined by federal No Child Left Behind (NCLB) requirements, particularly in core subjects. Over time the District has required teaching staff at its continuation school to possess a credential specific to the core assignment or to obtain state approved verification (VPSS) to meet NCLB highly qualified requirements. Mr. Leal does not possess VPSS certification in English, Math or Science. These are the core subjects taught by employees more junior to Mr. Leal at the continuation school.

Mr. Leal has not demonstrated that he is competent to bump into the continuation or opportunity school assignments held by junior teachers.

22. Respondent Laurie Thomas. Ms. Thomas has concerns about how the physical education services to District students will be provided next year. She is the only female junior high school physical education teacher and contends that it would not be appropriate for a male teacher to supervise the girls' locker room.

The District is aware and prepared to provide student locker room supervision by other means. Classified employees will provide supervision, and students shall receive instruction through other credentialed and competent teachers.

Welfare of the District and Its Students

23. The Superintendent correctly identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render. 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.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of sections 44949 and 44955 were met. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide them due process. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) The description of services to be reduced, both in the Board Resolution and in the notices, adequately describe particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838. See, also, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

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 v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.) The burden is on the District to demonstrate that the reduction or elimination of the particular kinds of services is reasonable and that the District carefully considered its needs before laying off any certificated employee. (*Campbell Elementary Teachers Association v. Abbott, supra*, 76 Cal.App.3d at pp. 807-808.)

3. The services identified in Resolution No. 18-03-08-11 are particular kinds of services that may be reduced or discontinued under sections 44949 and 44955. Legal cause exists to reduce or eliminate 20.5713 FTE of particular kinds of services offered by the District as set forth in detail in the Factual Findings. 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 discontinuance of services relates solely to the welfare of the District’s schools and pupils within the meaning of section 44949.

4. As set forth in Finding 20a, the seniority dates for respondents Heidi Jaramillo, Katie Kirby, Anthony Lopez, Michelle Plantenberg and Denise Vasquez should be adjusted. They each first served in categorically funded positions on August 9, 2007. They are now credited with an additional year of seniority by virtue of this. (See Findings 9 through 19.) Their seniority dates must be adjusted to account for the additional year of service deemed probationary.

The seniority dates for remaining respondents should not be adjusted. (See Finding 20b through 20d.)

5. The District was required to exercise tie-break criteria with respect to teachers with a District seniority date of August 11, 2008. Except for the corrections to seniority dates per Finding 20a, application of tiebreak criteria was appropriate.

6. Cause exists for the reduction of the particular kinds of services and for the reduction of full-time equivalent certificated positions at the end of the 2010 – 2011 school year pursuant to Education Code sections 44949 and 44955. No employee with less seniority than any respondent is being retained to render a service which any respondent is certificated and competent to render.

7. The District’s Governing Board may give remaining respondents whose preliminary notices have not been rescinded final notice before May 15, 2011, that their services will not be required for the ensuing school year, 2011-2012.

RECOMMENDATION

Cause exists for the reduction of 20.5713 full-time equivalent certificated positions at the end of the 2010-2011 school year. After making the adjustments to seniority dates set forth in the Factual Findings and Legal Conclusions, notice shall be given to respondents that their services will be reduced or will not be required for the ensuing school year, 2011-2012, because of the reduction and discontinuance of particular kinds of services. Notice shall be given in inverse order of seniority.

DATED: April 19, 2011

JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT A

Final List of Respondents Following Rescission of One Notice

1. Daniel Benitez
2. Mandy Ewing
3. Maria Gonzalez Amezcua
4. Jillian Hanson
5. Heidi Jaramillo
6. Katie Krby
7. Bret Leal
8. Anthony Lopez
9. Sara Pendola
10. Ernesto Perez
11. Michele Plantenberg
12. Laurie Thomas
13. Denise Vasquez
14. Gerardo Vazquez