

**BEFORE THE
GOVERNING BOARD OF THE
SULPHUR SPRINGS SCHOOL DISTRICT
STATE OF CALIFORNIA**

In The Matter of the Accusation Against:

**CERTIFICATED EMPLOYEES OF
THE SULPHUR SPRINGS SCHOOL
DISTRICT IMPACTED BY THE
REDUCTION IN FORCE, ET.AL.,**

OAH No. 2010030585

Respondents.

PROPOSED DECISION

H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 20, 2010, at the Sulphur Springs School District Office, Canyon Country, California.

Margaret A. Chidester, Attorney at Law, represented the Sulphur Springs School District (District).

Robert A. Bartosh, Attorney at Law, represented the respondents.

The matter was submitted on April 20, 2010.

SUMMARY OF PROPOSED DECISION

The Governing Board of the Sulphur Springs 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.

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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.

FACTUAL FINDINGS

1. Kim Lytle is the Director of Personnel and Pupil Services for the District.
2. Between February 26, and March 12, 2010, the District served on each respondent a written notice that it had been recommended that notice be given to respondents pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year. Each written notice set forth the reasons for the recommendation and noted that 65.2 full-time equivalent (FTE) positions would be reduced and/or discontinued.
3. Notice was served on all respondents by either personal service or certified mail. Certificated employees timely requested, in writing, a hearing to determine if there is cause for not reemploying them for the ensuing school year.
4. The Director of Personnel and Pupil Services made and filed Accusations against each of the certificated employees who requested a hearing. The Accusations, with required accompanying documents and blank Notices of Defense, were timely served on those certificated employees.

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5. Timely Notices of Defense were filed by or on behalf of those respondents who desired a hearing. The employees who filed a Notice of Defense were Glenn Endo, Krista Jahnke, Danielle Paroda, Jennifer Tyboroski, and Natalie Ripley.¹

6. Respondents in this proceeding are probationary or permanent certificated employees of the District.

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¹ The District objected to Respondent Natalie Ripley participating in the hearing because it had not received Ms. Ripley's Notice of Defense by the March 26, 2010 deadline. Ms. Ripley signed and dated her Notice of Defense on March 8, 2010, and submitted it to Patricia Fitzpatrick, the president of the Sulphur Springs Teachers Association, to be submitted to the District along with the other Notices of Defense. What happened to Ms. Ripley's Notice of Defense thereafter is not known. Ms. Fitzpatrick credibly testified that she placed Ms. Ripley's Notice of Defense into an intra-district envelope and placed it into Kim Lytle's mailbox. Ms. Lytle and her secretary, Merry Martinez, testified with equal credibility that they never saw it. Upon learning that Ms. Lytle had not received Ms. Ripley's Notice of Defense, Ms. Fitzpatrick sent it to Ms. Lytle via facsimile on March 31, 2010. However, the District refused to accept Ms. Ripley's Notice of Defense, claiming that it had not been submitted by the statutory deadline. The Administrative Law Judge ruled that Ms. Ripley had done all she could to ensure timely submission of her Notice of Defense, that the District had not been prejudiced by its late submission, and that to preclude Ms. Ripley's participation in the hearing based on the above facts would constitute a deprivation of due process. Ms. Ripley was permitted to participate in the hearing.

7. On February 24, 2010, in Resolution No. R 10-03, the Board took action to reduce or discontinue the following particular kinds of services for the 2010-2011 school year:

<u>SERVICES</u>	<u>NUMBER OF FULL-TIME EQUIVALENT POSITIONS</u>
1 Categorical Program Director	1.00
5 Elementary Assistant Principals	5.00
61 K-6 Classroom Teaching Positions	54.80
3 Intervention Teachers	0.71
3 Physical Education Teachers	1.20
2 Music Teachers	0.70
1 Program Coordinator-Special Education	1.00
2 Art Teachers	0.69
1 CBET Teacher	0.10
Total	65.20

8. Subsequent to adoption of the Board's Resolution, the District identified vacancies in School Year 2010-2011 due to retirements, release of temporary teachers, and resignations.

9. Exhibit "B" to Board Resolution R 10-03 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.

10. The District maintains a seniority list which contains employees' seniority dates (first date of paid service as a probationary employee), 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.

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11. The District used the seniority list to develop a proposed layoff and “bumping” list of the least senior employees currently assigned in the various services being reduced. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and whether they could “bump” other less senior employees.

12. The District used information from its seniority list to apply the tie-breaker criteria of Exhibit “B” to Board Resolution No. R 10-03.

13. Certain employees share the same first date of paid service as a probationary employee. Application of the tie-breaker criteria of Exhibit “B” to Board Resolution R 10-03 did not resolve their tied first dates of paid service. Their relative seniority was determined by a lottery in which their names were drawn. The person whose name was selected first then chose a piece of paper from among a number of similar pieces.² A number was written on each piece of paper. The process was then repeated for the number of employees with the same first date of paid service as a probationary employee. The individual who chose the paper bearing the highest number above “one” was deemed the individual with the greatest seniority for that seniority date.

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² If the employee was not present during the lottery procedure, another individual selected the number on the employee’s behalf.

14. In Exhibit “A” to Resolution R 10-03, pursuant to Education Code section 44955, the Board chose to exempt from the order of certificated layoff, certificated employees who, “because of special training, experience, or credential that others with more seniority do not possess,” met any of the following criteria:

1. Certificated personnel who possess administrative credentials, who are currently assigned to administrative positions, and who will be assigned to administrative positions for the 2010-2011 school year.

2. Certificated personnel who possess a credential authorizing service in special education, who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2010-2011 school year.

3. Certificated personnel who possess a credential authorizing service in language, speech and hearing, who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2010-2011 school year.

4. Certificated personnel who possess a permit authorizing service as a school nurse who is currently assigned under that permit area, and who, if serving in school year 2010-2011 will be placed in a school nurse assignment.

5. Certificated personnel who possess a credential, such as a BCC or BCLAD, authorizing service in working with English Learners, who are currently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2010-2011 school year.

15. The rationale for the exemptions was that employees satisfying those criteria are generally difficult to locate and hire.

LEGAL CONCLUSIONS

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

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2. All of the identified services are particular kinds of services that could be reduced or discontinued under 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 Code section 44949.

3. Respondents argued that the Board ordered the Superintendent or his/her designee to serve only a sufficient number of preliminary notices to cover the FTE positions being reduced or eliminated, and that the fact that more employees received notices constituted over-noticing and justified a dismissal of the Accusation.

4. It was not established that the District acted in an arbitrary or capricious manner in pursuing and implementing the layoff by issuing more preliminary notices of layoff than the number of FTE positions being reduced or eliminated. No statutory, regulatory, or case authority was offered for the proposition that the number of certificated employees who receive preliminary notices must equal the number of FTE positions being reduced or eliminated. Further, even if one were to accept Resolution R 10-03 as an order to the Superintendent, the resolution refers to a list of employees who "shall" receive notices of termination. However, the resolution does not require notices only to enough employees to cover the number of FTE positions being reduced or eliminated. It provides the Superintendent or his/her designee with discretion to notice additional employees. The resolution reads in part:

The Superintendent or his designee is hereby directed to serve notices of termination in accordance with and in the manner prescribed by Education Code §§ 44955 and 44949. In addition, the Superintendent/designee is authorized, where deemed necessary, to issue additional notices so that certain other employees whose rights may be affected will have an opportunity to be heard.

5. 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.)

6. 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.

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

8. 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.) That was properly done in this case by way of the exemption list.

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 26, 2010

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings