

BEFORE THE
GOVERNING BOARD
OF THE
SWEETWATER UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Layoff of
CERTIFICATED EMPLOYEES OF THE
SWEETWATER UNION HIGH
SCHOOL DISTRICT,

Respondents.

OAH No. 2008030390

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in Chula Vista, California on April 18, 2008.

Nitasha K. Sawhney, Esq., and James Meeker, Esq., Garcia Calderon and Ruiz, represented Rita S. Beyers, Assistant Superintendent, Human Resources, Sweetwater Union High School District.

Fern M. Steiner, Esq., Tosdal Smith Steiner & Wax, represented Respondents.

The matter was submitted on April 18, 2008.

FACTUAL FINDINGS

1. Rita Sierra Beyers made and filed the Accusation, dated March 27, 2008, against the certificated employees of the Sweetwater Union High School District (District) listed in attached **Exhibit "A"** (Respondents).

2. Respondents are certificated employees of the District.

3. Jesus M. Gandara, the District's Superintendent, notified the Governing Board of Sweetwater Union High School District (Board) and Respondents that he recommended that notice be given to Respondents that their services would not be required for the 2008-2009 school year.

On March 10, 2008, the Board adopted Resolution Number 3809 that reduced or eliminated particular kinds of services for the 2008-2009 school year and set forth the criteria for skipping certain employees and the tie-breaker criteria to be used for employees with the same seniority date.

Respondents were served with a written notice of termination on March 11, 2008.

The written notice of termination stated that Respondents' services would not be required for the 2008-2009 school year and set forth the reasons for the recommendation. The recommendation that Respondents be terminated from employment was not related to competency. The notice advised Respondents of the right to hearing, that the request for hearing must be delivered to the Superintendent's Office no later than March 26, 2008, not less than seven days after the date the notice of termination was served and that the failure to request a hearing would constitute waiver of the right to a hearing.

Some but not all Respondents filed a timely Request for Hearing and/or Notice of Defense.

An Accusation was served on Respondents in a timely manner.

4. All prehearing jurisdictional requirements were satisfied.

5. On March 10, 2008, the Board adopted Resolution number 3809 and took action to reduce or eliminate the following particular kinds of certificated services commencing in the 2008-2009 school year:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Counselors – Secondary	17.0

The proposed reductions total 17.0 full time equivalent (FTE) positions.

6. Respondents argued that the decision to reduce counseling services was arbitrary and capricious.

The District receives funding for its budget from the State of California. Due to the State of California's financial crisis, the District anticipates that its budget will be reduced by ten percent (10%) or \$12 million. In order to provide for the shortfall, the Superintendent considered various options, including layoff of classified and certificated employees. With the exception of counselors, the District anticipated that the reductions will occur by means of attrition.

At the Board meeting, scheduled April 21, 2008, the Superintendent intended to recommend that the Board reduce counselor services to 3.2 FTE, from 17.0 FTE.

Pursuant to Assembly Bill 1802 (Supplemental Counseling Program), the District received \$2.7 million each year for the past two years and was required to provide counselor services for its students with these funds. The Memoranda of Understanding between the District and the Sweetwater Counseling and Guidance Association/CTA/NEA, dated December 1, 2006, and June 20, 2007, described the agreement of the parties regarding how the funds would be spent.

The District's Assistant Superintendent of Human Resources was not aware of how much funding the District received from the Supplemental Counseling Program. Lian Shoemake, Executive Director, South County Teachers United, California Teachers Association, represents, among other organizations, the Counseling and Guidance Association. He participated in the negotiation of the Memoranda. Based on the agreement of the parties, he testified that the District has or should have \$1.5 million dollars remaining from the funding that is required to be spent on counseling services.

Given the facts in the foregoing paragraphs of Finding 6, Respondent asserted that the reduction of counseling services was unnecessary.

In determining whether the decision of a school board is reasonable rather than arbitrary or capricious, its action is measured by the standard set of reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject. (*Campbell Elementary Teachers Association, Inc. v. West Valley Federation of Teachers, Local 1953, AFT, AFL-CIO* (1978) 76 Cal.App.3d 796.)

The Board has the discretion to make decisions about operation of the District, including which programs should be funded, reduced and/or terminated. According to the evidence in this record, the District carefully considered its options, including reduction of counselor services. If the counselor services are reduced as proposed, the District intends to provide all mandatory counselor services albeit in a different manner.

Considering the facts in this Finding 6, it cannot be said that the District's action to reduce counselor services was an abuse of its discretion, arbitrary or capricious.

7. Sandra Huevo, the District's Director of Certificated Personnel, was responsible for implementing the technical aspects of the layoff. The District developed a seniority list that contained, among other matters, each employee's name, position, assignment, seniority date, status and date his/her credential was issued.

The seniority date was based on the first date of paid service rendered.¹ A teacher hired as a probationary employee who worked as a substitute or temporary employee for at least 75 percent of the school days during the previous year and had performed the duties normally required of a certificated employee of the District, was deemed to have served a complete school year as a probationary employee if employed as a probationary employee

¹ Education Code section 44845.

for the following school year. The teacher was entitled to have that earlier year counted as a year of probationary service. The prior year was "tacked" on for seniority purposes,² but only one year could be tacked.

8. The District may deviate from terminating a certificated employee in order of seniority if the District demonstrates a specific need for personnel to teach a specific course or course of study, and the certificated employee has special training and experience necessary to teach the course or course of study or to provide those services, which others with more seniority do not possess.³

9. Subsequent to adoption of Board Resolution number 3809, the District received notice of retirement of a counselor and rescinded the layoff notice issued to Respondent Lauren Didio (Respondent Didio).

Respondent Didio's seniority date is July 25, 2007. The District skipped her because she holds additional credentials, to wit: Special Education (Mild/Moderate) Credential and a Multiple Subject Credential. On the day of the hearing, the Assistant Superintendent did not know what Respondent Dido's assignment would be during the ensuing school year.

Respondent Marivel Arroyo (Respondent Arroyo) is a counselor and has seniority date of July 12, 2007. She is the most senior counselor who received a layoff notice and more senior to Respondent Dido.

No evidence was offered to establish that Respondent Didio holds special training and/or experience to carry out duties as a counselor that Respondent Arroyo does not.

If Respondent Didio is assigned as a counselor during the 2007 – 2008 school year, her retention would be improper, and Respondent Arroyo should be retained as well.

10. 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.

11. The services that the District proposes 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.

12. The reduction or discontinuation of particular kinds of services relates to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of

² Education Code section 44918.

³ Education Code section 44955, subdivision (d).

services was necessary to decrease the number of certificated employees of the District as determined by the Board.

13. Except as provided in Finding 9, no certificated employee junior to any Respondent was retained to perform any services which 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 were satisfied.

2. A District may reduce services within the meaning of Education Code section 44955, subdivision (b), "either by determining that a certain type of service to students shall not 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." (*California Teachers Assn. v. Bd. of Trustees of the Goleta Union School Dist.* (1981) 132 Cal.App.3d 32, 36; citing *Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. Cause exists under Education Code sections 44949 and 44955 for the Sweetwater Union High 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.

4. A senior teacher whose position is discontinued has the right to transfer to a continuing position which 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 v. Richmond Unified School District* (1975) 13 Cal.3d 469.)

5. 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. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831.)

6. No employee with less seniority than any Respondent was retained to render a service which any Respondent is certificated and competent to render.

ORDER

1. The Accusation against Respondent Lauren Dido is dismissed. She shall be retained for the 2007 – 2008 school year.
2. If Respondent Lauren Dido is assigned to provide services as a counselor with the Sweetwater Union High School District, the Accusation against Respondent Marivel Arroyo shall be dismissed; Respondent Marivel Arroyo shall be retained for the ensuing school year.
3. Except as provided in Paragraphs 1 and 2 of this Order, the Accusation served on Respondents is sustained. Notice shall be given to Respondents set forth in **Exhibit "A"** before May 15, 2008 that their services will not be required for the 2008-2009 school year because of the reduction or discontinuance of particular kinds of services.
4. Notice shall be given in inverse order of seniority.

DATED: _____

May 6, 2008

Vallera J. Johnson

VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT A

1. Acosta, Jesus
 2. Alvarez, Karla
 3. Arroyo, Marivel
 4. Didio, Lauren
 5. Felix, Oscar
 6. Garcia, Elizabeth
 7. Harken-Howarth, Kate
 8. Hernandez, Verenice
 9. Huerta, Gisela
 10. Huerta, Sara
 11. Rico, Vanessa
 12. Sevilla, Ricardo
 13. Silva, Liliana
 14. Stephens-Ramsey, Stephanie
 15. Tran, Tich
 16. Tulao, Ronniel
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