

BEFORE THE GOVERNING BOARD OF THE
SAN MATEO – FOSTER CITY SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

C. JEAN FISHER and NANCY SMITH,

Respondents.

OAH No. N 2004030495

PROPOSED DECISION

Robert Walker, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Mateo, California, on April 13, 2004.

Mary K. Raftery, Deputy County Counsel, County of San Mateo, represented the San Mateo – Foster City School District.

Sheila K. Sexton, Attorney at Law, represented the respondents, C. Jean Fisher and Nancy Smith.

FACTUAL FINDINGS

1. Respondents, C. Jean Fisher and Nancy Smith, are certificated district employees.

2. Not later than March 15, 2004, in accordance with sections 44949 and 44955 of the Education Code,¹ the superintendent caused the governing board of the district and respondents to be notified in writing that it was recommended that respondents be notified that the district would not require their services for the ensuing school year. The notice stated the reasons for the recommendation. The recommendation was not related to respondents' competency.

3. A notice was delivered to each respondent, either by personal delivery or by depositing the notice in the United States mail, registered, postage prepaid, and addressed to respondent's last known address.

¹ All references to the Code are to the Education Code unless otherwise specified.

4. The notice advised each respondent of the following: He or she had a right to a hearing. In order to obtain a hearing, he or she had to deliver a request for a hearing in writing to the person sending the notice. The request had to be delivered by March 22, 2004, which was not less than seven days after the notice of termination was served. And the failure to request a hearing would constitute a waiver of the right to a hearing.

5. Each respondent timely filed a written request for a hearing to determine whether there was cause for not reemploying her for the ensuing year. An accusation was timely served on each respondent. Each respondent filed a timely notice of defense. All prehearing jurisdictional requirements were met.

6. The recommendation was to reduce or discontinue particular kinds of services, including 9 full time equivalent positions of counselors. Respondents are counselors. Seven of the counselors who were the subject of the recommendation have teaching credentials and can bump, that is, -- move into positions held by -- other employees. Respondents, however, do not hold teaching credentials and, therefore, are not in a position to bump into other positions.

7. Respondents contend that the superintendent is not actually recommending that the district discontinue counseling services. Respondents contend that the superintendent actually plans to transfer the work of the counselors to teachers and administrators or to outside contractors and that, therefore, the purported recommendation to discontinue counseling services is merely a subterfuge in order to get rid of respondents. The great weight of the evidence, however, is that the recommendation to discontinue the district's counseling program is legitimate. Counselors are not the only people in a school district who counsel. Teachers provide counseling. Administrators provide counseling. Some of the counseling that counselors provide is unique, that is, not provided by teachers or administrators. Some of the counseling that counselors provide, on the other hand, is similar to some of the counseling that teachers and administrators provide. The fact that teachers and administrators will continue to provide counseling does not mean that the recommendation to discontinue the counseling program is disingenuous. This is not a case of getting rid of the employees who perform a certain function but replacing them with employees with a different title. Also, respondent presented no evidence in support their argument that the superintendent intends to contract out the counseling work.

8. Within the meaning of section 44955 of the Code, the services are "particular kinds of services" that can be reduced or discontinued. The recommendation to reduce or discontinue these services was not arbitrary or capricious but constituted a proper exercise of discretion.

9. The reduction or discontinuation of particular kinds of services relates to the welfare of the district and its students. The reduction or discontinuation is necessary in order to decrease the number of certificated employees of the district.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under sections 44949 and 44955 of the Education Code. All notice and jurisdictional requirements contained in those sections were satisfied.

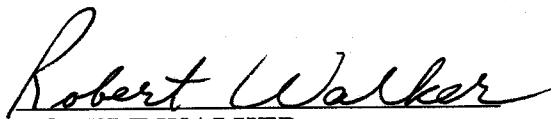
2. Within the terms of sections 44949 and 44955 of the Education Code, the district has cause to reduce or discontinue particular kinds of services and to give notices to respondents that their services will not be required for the ensuing school year. The cause relates solely to the welfare of the schools and the pupils.

ORDER

1. The accusations served on C. Jean Fisher and Nancy Smith are sustained.

2. Before May 15, 2004, the district may give notice to C. Jean Fisher and Nancy Smith that the district will not require their services for the ensuing school year.

Dated: April 27, 2004


ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings