

BEFORE THE
GOVERNING BOARD OF THE
SOUTHERN KERN UNIFIED SCHOOL DISTRICT
COUNTY OF KERN, STATE OF CALIFORNIA

In the Matter of the Layoffs of:

STEPHANIE EBELTOFT, et al.,

Respondents.

OAH No. 2010031173

PROPOSED DECISION

This matter was heard by Mark E. Harman, Administrative Law Judge (ALJ) of the Office of Administrative Hearings, State of California, on April 20, 2010, in Rosamond, California.

Peter C. Carton, Attorney at Law, represented the Southern Kern Unified School District (District). Lucas Oppenheim and Tamra M. Smith, Attorneys at Law, represented Stephanie Ebeltoft (Ebeltoft), Paul A. Grana (Grana), Michelle Hubkey (Hubkey), Cindy McNutt (McNutt), and Jessica Mountz (Mountz) (collectively, Respondents).

The District decided to reduce or discontinue certain educational services and gave Respondents and other certificated District employees notice of its intent not to reemploy them for the 2010-2011 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2010-2011 school year.

Oral and documentary evidence was received. The matter was submitted for decision on April 20, 2010.

FACTUAL FINDINGS

1. The District operates four comprehensive schools and one alternative school for 3,400 students. Rodney J. Van Norman is the Superintendent of the District. He filed the Accusation in his official capacity. James Johnson, Assistant Superintendent, and his staff were responsible for implementation of the technical aspects of the layoff.

2. Respondents are certificated employees of the District.

3. On February 17, 2010, the Superintendent recommended to the Governing Board of the District (Governing Board) that it reduce or discontinue particular kinds of services for the 2010-2011 school year and, for that reason, that it give notice to certain certificated employees that their services will not be required for the 2010-2011 school year.

On the same date, the Governing Board adopted Resolution No. 09-10-12 to reduce or discontinue the following services:

PARTICULAR KINDS OF SERVICES	NO. OF FULL TIME EQUIVALENT (FTE) POSITIONS
K-6 Self-Contained Classroom Instruction	8
High School English Teaching Services	1
High School Math Teaching Services	1
High School Science Teaching Services	1
High School Social Science Teaching Services	1
Middle School Art Teaching Services	1
Middle School Music/Choir Teaching Services	1
Middle School Computers Teaching Services	1
Administration	1
School Psychologist	1
	—
<u>Total FTE Reduction</u>	17

4. Pursuant to this resolution, on or before March 15, 2010, the District served preliminary layoff notices, via personal service, to nine certificated employees, including Respondents, that the District's Superintendent had recommended to the Governing Board that the District give notice to these employees that their services will not be required in the 2010-2011 school year.

5. Respondents, and Aida Ortiz, timely requested a hearing to determine if there is cause for not reemploying them for the 2010-2011 school year. Aida Ortiz withdrew her request for hearing on April 7, 2010.

6. The Superintendent caused the Accusations, dated March 25, 2010, and their related documents, to be filed and served upon each of the Respondents. Respondents timely filed their Notices of Defense.

7. All prehearing jurisdictional requirements have been met.

8. The services set forth in factual finding number 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.¹

9. The Governing Board took action to reduce the services set forth in factual finding number 3 primarily because of the State's proposed reduction of funding for education. The decision to reduce or discontinue the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

10. The reduction or discontinuance of services set forth in factual finding number 3 is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

11. On February 17, 2010, the Governing Board adopted Resolution 09-10-11, which includes criteria for determining the order of seniority of those employees with the same first date of paid service (tie-breaking criteria). These tie-breaking criteria are based on the needs of the District and its students and included: credentialing; authorizations to teach English learners; experience; special education needs; evaluations; training; and extracurricular activities. The District applied these criteria to determine the relative order of seniority among employees who had the same seniority date.

12. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments, and credentials. The District used the seniority list to develop a proposed lay-off list of the least senior employees currently assigned to 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 determined whether these employees held credentials in another area and were entitled to "bump" other employees.

13a. Respondents contend that the District has assumed a 30-to-1 student/teacher ratio in K-3 classrooms for the 2010-2011 school year, and that this assumption is incorporated in the analysis the District has used in determining the reductions in services and decrease in the number of District employees at the close of the current school year. In Article XX of the current bargaining agreement between the District and its certificated employees, the District agreed to make every effort to adhere to the maximum of 25 students

¹ All further statutory references are to the Education Code.

per classroom (covered by class size reduction) in the K-3 level. “Every effort is defined as a maximum of 1.25 students per class at a single grade level or subject at one site above the [25-student] class size limits.” It is nearly certain that, following implementation of the layoffs as proposed by the District herein, and absent future modifications, class sizes will increase in the 2010-2011 school year. Respondents maintain that this will violate the collective bargaining agreement and that, within several weeks after the first day of classes of the 2010-2011 school year, the District will be forced to open one or more additional classrooms for K-3 students. In Respondents’ view, this will severely and substantially disrupt class continuity and the educational process for these students. Hence, Respondents argue, without citing any case authority, that the proposed reduction in services and corresponding layoffs is not related to the welfare of the District and its pupils and cannot be sustained under section 44949, subdivision (c)(3), which states in pertinent part, that the ALJ must determine whether “the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof.”

13b. The District prevails in this argument because it has established sufficient facts which reasonably support the actions that it is taking, i.e., the bleak outlook for the State’s finances necessitates a reduction in school services and a corresponding decrease in certificated employees. Furthermore, the District’s proposed layoffs do not prevent the District from rehiring or recalling employees affected thereby if circumstances were to change before the beginning of the 2010-2011 school year. The District also may renegotiate the bargaining agreement with the teachers. Thus, Respondents’ arguments are not ripe and are merely speculative with regard to any particular outcome next fall.

14a. The District determined that Respondent Ebeltoft has a seniority date of October 13, 2009, which she disputes. She currently teaches math and science in a core classroom to sixth graders at Tropico Middle School under a contract with the District that became effective October 13, 2009. Her contract identifies her status as “Probationary Year Two.” As of May 1, 2009, she has a preliminary multiple subject credential with an English language learner (ELL) authorization. She has applied for supplemental authorization in mathematics, which is pending with the Commission on Teacher Credentialing.

14b. Respondent Ebeltoft was employed by the District for most of the 2007-2008 school year, beginning on September 20, 2007, and for the entire 2008-2009 school year, teaching under an intern credential.² The District classified her as a temporary employee

² Ebeltoft became employed as a Kindergarten classroom teacher on September 20, 2007. Her contract said she was an “Intern Classroom Teacher” and that her employment with the District would terminate on June 30, 2008. The District notified Ebeltoft on February 26, 2008 that, as provided in the contract, her employment would end “not later than June 30, 2008.” The District’s letter also cited section 44929.21, presumably in reference to notices of nonreelection normally provided to probationary employees whom the District does not intend to retain for the succeeding school year. Ebeltoft was hired again for the entire 2008-2009 school year and taught a core self-contained ninth grade classroom in math, science, English, and history. Her contract, by its terms, ended on June 30, 2009. The

during those years of service apparently because she had less than a regular credential. She argues that the District should have classified her as a probationary employee under the authority of *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260 (*Bakersfield*). If she were reclassified as probationary for those years, her seniority date would move to September 20, 2007.

14c. The District did not rehire Ebeltoft at the beginning of the 2009-2010 school. When her 2008-2009 contract ended in June 2009, she returned to the District at the start of the 2009-2010 school year as a substitute teacher. The District considers her first date of paid service in a probationary position as October 13, 2009, in part because, under her previous contracts, she did not hold a regular teaching credential. Under the District's policy, intern teachers are classified as temporary employees and awarded annual contracts. This allows the District each year to advertise their positions and attempt to recruit fully prepared teachers for their assignments and, having been unsuccessful, to certify that it had thereby exercised reasonable efforts, which the District maintains is legally required under state law. Following this certification process, the District could then rehire qualified interns for the succeeding year. Since temporary employees do not accrue seniority, if the District's classification policy were deemed valid, the District correctly determined Ebeltoft's seniority date. The District, however, failed to establish that this process was used in connection with Ebeltoft's prior positions. Furthermore, *Bakersfield* explicitly rejected a similar argument, holding that persons holding less than a regular credential must in certain circumstances be classified as probationary and, as probationary employees, they are entitled to accrue seniority. (*Bakersfield*, *supra*, 145 Cal.App.4th at pp. 1300-1301.)

14d. Whether Ebeltoft prevails and receives a new seniority date, however, will have no impact on the relative order of termination in this proceeding. Respondents Hubkey, McNutt, and Mountz are permanent employees, have clear multiple subject credentials, are higher than Ebeltoft on the seniority list, with seniority dates earlier than September 20, 2007, and are teaching in K-6 classroom settings (Mountz is teaching ELL). The District intends to layoff these employees, as well. None of Ebeltoft's circumstances provide her any additional priority in order to retain her position. Since these facts do not change the order of termination in this proceeding, it is unnecessary to decide other issues Ebeltoft has raised.

15a. Respondent Grana is teaching two periods of band, two periods of music appreciation, and one period of choir at Rosamond High School. He has a preliminary credential to teach music in K-12 classrooms. Grana testified sincerely, and with pride, about the growth he has seen in the high school band program, and its participants, since he has been employed there. He attributes this primarily to the fact that, by having both middle school and high school band programs, the District has offered students interested in music additional opportunities and incentives to pursue their interests. Under the current layoff

District notified Ebeltoft on February 2, 2009, that the "employment contract and all employment with this District will expire automatically effective June 30, 2009. This notice is also given under Education Code § 44929.21." (Exhibit F.)

scenario, the position of middle school music teacher will be eliminated, and the current middle school teacher, Mr. Ferrandini, will bump into Grana's position. Students will not begin to have a band experience until their freshman year in high school. A beginning music class will have to be moved to the high school, further depleting opportunities for talented musicians to have worthwhile experiences in a band program.

15b. All of Grana's arguments appear to be good ones for retaining a middle school music teacher, but the wisdom of the Governing Board's decision to eliminate the position is not a proper issue for this proceeding. As long as a decision to reduce or discontinue services is reasonable, the motivation is not open to challenge. (*Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796.)

16. The District did not retain any certificated employee junior to Respondents to render a service which these Respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 7.
2. The services listed in factual finding number 3 are particular kinds of services that could be reduced or discontinued under section 44955.
3. Cause exists for the District to reduce or discontinue the particular kinds of services listed in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils within the meaning of section 44949, as set forth in factual finding numbers 1 through 10.
4. Cause exists to terminate the services of Respondents Stephanie Ebeltoft, Paul A. Grana, Michelle Hubkey, Cindy McNutt, and Jessica Mountz for the 2010-2011 school year due to the reduction of particular kinds of services, by reason of factual finding numbers 1 through 16 and legal conclusion numbers 1 through 3.

ORDER

The Accusation is sustained and the District may notify Respondents Stephanie Ebeltoft, Paul A. Grana, Michelle Hubkey, Cindy McNutt, and Jessica Mountz that their services will not be needed during the 2010-2011 school year due to the reduction of particular kinds of services.

Dated: May ____, 2010

MARK E. HARMAN
Administrative Law Judge
Office of Administrative Hearings