

**BEFORE THE
GOVERNING BOARD OF THE
SOUTHERN KERN UNIFIED SCHOOL DISTRICT
COUNTY OF KERN**

In the Matter of the Accusations Against:

OAH NO. 2011040162

Pamella Anderson, Maryanna Baldridge,
Dorothy Bones, Rebecca Chitwood, Christine
Dorman, Denise Dudley, Carol Edgeworth,
Theresa Gutierrez, Susan Hemmis, Kristina
Hillman, Michelle Hubkey, Terry Johnson,
Catherine Jones, Wayne Karr, George Kelly,
Debroah Keys, Tracy Lethgo, Stanley Lyons,
Julie Mozee, Mishell Prothro, Tara Schank,
Kimberly Schmidt, Deanna Swetland, Valerie
Truehill, Geoffrey Webberly, and Michael
Williams,

Respondents.

PROPOSED DECISION

Humberto Flores, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 20, 2011, in Rosamond, California.

Peter Carton, Attorney at Law, represented the Southern Kern Unified School District. Lucas Oppenheim, Attorney at Law, represented Respondents.

The hearing in this matter was initially scheduled for April 25, 2011. On April 11, 2011, Presiding Administrative law Judge Michael Scarlett granted a continuance to May 5, 2011. The matter was subsequently continued a second time to May 20, 2011. Evidence was received and testimony was given at the hearing. At the conclusion of the hearing, the parties agreed to extend submission of this matter to May 31, 2011, to give the parties an opportunity to submit post hearing briefs and argument. The parties submitted their written briefs and arguments on May 31, 2011. Respondents' post hearing brief was marked as exhibit S. The District's post hearing brief was marked exhibit 14.

During a telephone conference call on June 6, 2011, Mr. Carton and Mr. Oppenheim agreed to extend the due date of the proposed decision to June 13, 2011, and to extend the due date for final decision by the governing board to June 21, 2011.

SUMMARY

The Governing Board (Board) of the Southern Kern Unified School District (District) decided to reduce particular kinds of services provided by certificated personnel for the 2011-2012 school year for budgetary reasons. District staff carried out the Board's decision by using a selection process involving review of credentials, seniority, and bumping rights.

FACTUAL FINDINGS

1. Rodney J. Van Norman, Superintendent of the District, filed the Accusation in his official capacity.

2. Respondents are certificated employees of the District.

3. On February 24, 2011, the Board adopted Resolution No. 10-11-14, to discontinue or reduce particular kinds of services for the 2011/2012 school-year as follows:

Administration	1.0 FTE
Counselor	1.0 FTE
Speech Pathologist	1.0 FTE
Special Education, SDC	2.0 FTE
Self-contained Classroom Instruction Grades K-6	15.0 FTE
Departmentalized Instruction, Grades 6-12:	
Art	2.0 FTE
Band	.5 FTE
Health	.5 FTE
Industrial Arts	1.0 FTE
Mathematics	1.0 FTE
Physical Education	3.0 FTE
ROTC	2.0 FTE
Science	1.0 FTE
<u>Social Science</u>	<u>1.0FTE</u>
Total	32.0 FTE

4. The Board passed Resolution 10-11-14 pursuant to Education Code section 44955 and made a determination to decrease the number of certificated employees for the ensuing school year by a corresponding number of full-time equivalent (FTE) positions as set forth in Factual Finding 3.

5. The Board also passed Resolution 10-11-13, which established tie-breaking 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 would be based on the needs of the District and its students in accordance with the specific criteria set forth in the resolution.

6. The Board directed the Superintendent to notify the employees affected by the Board's resolution. On or before March 15, 2011, the Superintendent notified certificated employees, including Respondents, in writing that it had been recommended their services would not be required for the next school year. The mailing included the reasons for the notification. Respondents made timely requests for hearing.

7. On April 1, 2011, Superintendent Van Norman made and filed Accusations against each Respondent. Each Respondent filed a Notice of Defense.

8. The District maintains a seniority list which contains employees' seniority dates (the first date of paid service in a probationary position), current assignments and locations, advanced degrees, credentials, and authorizations. The District used the Seniority List to develop a layoff list of the least senior employees currently assigned in the various services being reduced. The seniority list (exhibit 7) specifies certain seniority dates for the certificated employees of the District. Although the Assistant Superintendent of the District referred to this exhibit as the seniority list during his testimony, it was clear from his testimony that he did not prepare the document or research the underlying employee records used to determine the seniority dates contained in this document.¹ This affects the weight given to the document.

9. The District considered positively assured attrition, including resignations and retirements, occurring prior to sending notices of non-reemployment to the certificated employees affected by the decision to reduce particular kinds of services. At the hearing, the District's counsel stated that there were six retirements or resignations effective at the end of the current school year. As a result, the District notified Respondents Pamella Anderson Rebecca Chitwood, Wayne Karr, Tracy Lethgo, Tara Schank, and Kimberly Schmidt that their layoff notices had been rescinded.

10. Ms. Chitwood, whose layoff notice was rescinded, teaches in a categorically funded program. Mr. Oppenheim argues that Ms. Chitwood should not have received a layoff notice as part of the reduction of self-contained classroom instruction because she doesn't teach in a self-contained classroom. Therefore, Mr. Oppenheim argues that the rescission of her layoff notice should not be based on a retirement or resignation and that the District should rescind the layoff notice of another teacher. Mr. Oppenheim did not provide statutory or case authority for his contention. The Assistant Superintendent testified that any teacher with a multiple subject credential would be authorized to teach Ms. Chitwood's class. Finally, the question is moot since Ms. Chitwood's layoff notice was rescinded. Therefore, Mr. Oppenheim's contention is rejected.

¹ In their closing argument, Respondents objected to exhibit 7. During the hearing, Mr. Carton moved for the admission of the "seniority list" but mistakenly referred to it as exhibit 13. The Administrative Law Judge admitted the document. To avoid further confusion, the undersigned hereby admits both exhibits 7 and 13.

11. The District did not issue a layoff notice to Ann Buxton, who has a multiple subject credential. Ms. Buxton has less seniority than the Respondents who hold the same credentials and there was not justification to skip her. Therefore, the layoff notice issued to the most senior Respondent with the same credential should be rescinded. Based on the application of the tie-break criteria, the most senior Respondent holding a multiple subject credential is Kristina Hillman.

12. In its resolution, the Governing Board of the District reduced PE from five to two FTEs. Respondents contend that the District does not actually intend to reduce PE. Respondents' contention is persuasive. The Assistant Superintendent testified that Rodney Van Norman, the former Superintendent of the District, has a PE credential and will fill one of the remaining PE positions. The District contends that Mr. Van Norman's seniority date should be September 18, 2005, based on the application of Education Code section 44956.5. Mr. Van Norman did not testify at the hearing and there was no documentary evidence to establish his specific employment history with the District. Therefore, the record is insufficient to establish an exact seniority date for Mr. Van Norman. The Assistant Superintendent also testified that the District needs at least four PE teachers in grades 7-12 and did not know why the District had not rescinded any layoff notices to insure the District would have enough PE teachers for the 2011/2012 school year. Finally, in his closing argument, Mr. Carton admitted that "[W]hen the dust settles at the end of the school year, the board and the new superintendent may well have to revisit the possibility of further restructuring PE services for the fall."

13. The District contends through exhibit 7 that the seniority date for Respondent Deborah Keys is August 7, 2008. However, Ms. Keys testified that she began teaching in a probationary position on December 14, 2006, and that she was immediately reemployed and has had no break in service since that date. Her testimony was corroborated by exhibits J and K. However, even if Ms. Keys' assertion regarding her seniority date is correct, the evidence does not support a finding that her layoff notice should be rescinded because there are other more senior teachers with the same credential who have received layoff notices.

14. With the exception of the proposed reduction in PE services, the reduction or discontinuation of the particular kinds of services set forth in Factual Finding 3, related to the welfare of the District and its pupils.

15. The remaining Respondents, whose layoff notices have not been rescinded and whose Accusations will not be dismissed, are not certificated and competent to render a service being performed by any employee with less seniority who is being retained.

LEGAL CONCLUSIONS

1. All notices and other requirements of Education Code sections 44949 and 44955 were met. Therefore, jurisdiction was established for this proceeding as to all Respondents.

2. Except as set forth in Factual Finding 12 and Legal Conclusion 5, cause was established as required by Education Code sections 44949 and 44955 to reduce the number of certificated employees due to the reduction of particular kinds of services. The Board's decision to reduce the identified services of respondents was neither arbitrary nor capricious. The decision relates solely to the welfare of the District's schools and the pupils within the meaning of Education Code section 44949.

3. Cause exists to dismiss the Accusation against Respondent Kristina Hillman based on Factual Finding 11.

4. Cause exists to dismiss the Accusations against Respondents Pamella Anderson Rebecca Chitwood, Wayne Karr, Tracy Lethgo, Tara Schank, and Kimberly Schmidt based on Factual Finding 9.

5. A district may not dismiss an employee pursuant to Education Code section 44955 and yet continue the identical kind of service and position held by the terminated employee. (*Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 812.) If there is no difference in the method or manner of providing a particular service, a school district may not justify the substitution of personnel by claiming a reduction in services. (*Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831, 843-844.) In PKS cases, the determination of the amount by which a service is to be reduced is ordinarily the determination of the number of positions to be eliminated. (*San Jose Teachers Assn. V. Allen* (1983) 144 Cal.App.3d 627, 637.) In this case, the evidence established that the District needs at least four PE teachers in grades 7-12 for the 2011/2012 school year. The District's contention that Mr. Van Norman should fill one of the PE positions is rejected because the evidence was insufficient to establish a specific seniority date for Mr. Van Norman. Therefore, the Accusations against Stanley Lyons and Mishell Prothro (the two PE teachers who received layoff notices) should be dismissed.

6. The Administrative Law Judge has considered and rejected all other contentions asserted by Respondents.

7. Cause exists to give notice to Respondents Maryanna Baldrige, Dorothy Bones, Christine Dorman, Denise Dudley, Carol Edgeworth, Theresa Gutierrez, Susan Hemmis, Michelle Hubkey, Terry Johnson, Catherine Jones, George Kelly, Debroah Keys, Julie Mozee, Deanna Swetland, Valerie Truehill, Geoffrey Webberly, and Michael Williams, that their services will not be required for the 2011-2012 school year.

ORDER

1. Notice may be given to Respondents Maryanna Baldrige, Dorothy Bones, Christine Dorman, Denise Dudley, Carol Edgeworth, Theresa Gutierrez, Susan Hemmis, Michelle Hubkey, Terry Johnson, Catherine Jones, George Kelly, Debroah Keys, Julie Mozee, Deanna Swetland, Valerie Truehill, Geoffrey Webberly, and Michael Williams, that their services will not be required for the 2011-2012 school year.

2. The Accusations against Respondents Pamella Anderson, Rebecca Chitwood, Wayne Karr, Tracy Lethgo, Tara Schank, Kimberly Schmidt, Kristina Hillman, Stanley Lyons, and Mishell Prothro are dismissed.

Dated: June 9, 2011

HUMBERTO FLORES
Administrative Law Judge
Office of Administrative Hearings