

BEFORE THE
GOVERNING BOARD OF THE
LA MESA-SPRING VALLEY SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the 2019 Reduction in Force
of Virginia Pontius,

Respondent.

OAH No. 2019040321

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in La Mesa, California, on May 2, 2019.

Jonathan A. Pearl, Attorney at Law, Dannis Woliver Kelley, represented the La Mesa-Spring Valley School District.

Jon Y. Vanderpool, Attorney at Law, Smith, Steiner & Vanderpool, APC, represented Virginia Pontius.

The matter was submitted on May 2, 2019.

SUMMARY OF PROPOSED DECISION

The Governing Board of the La Mesa-Spring Valley School District determined to reduce or discontinue particular kinds of services provided by teachers for budgetary reasons. The decision was not related to the competency or dedication of the individuals whose services are proposed to be reduced or eliminated.

The La Mesa-Spring Valley School District (District) staff carried out the Governing Board's decision by using a selection process involving review of credentials and seniority and "bumping." The selection process was in accordance with the requirements of the Education Code.

FACTUAL FINDINGS

1. The La Mesa-Spring Valley School District (District) has 650 certificated employees, 21 elementary schools, four academies (grades four through eight), four middle

schools, and three of the four middle schools are academies. In addition, the District has the Quest Academy, an alternative setting that serves students in grades seven and eight. Quest Academy is an independent study program for students who learn better in a smaller setting, with smaller class sizes and more supports.

The Quest Academy was developed 10 years ago. The Governing Board has elected to change the model of the program but keep the name commencing the 2019-2020 school year. All teachers will be required to hold a special education credential, and there will be no counselor as part of the Quest Academy.

2. On March 5, 2019, the Governing Board of the La Mesa-Spring Valley School District (Governing Board) approved Resolution No. 18-19-18 (Resolution to Eliminate and/or Reduce the Number of Certificated Employees Due to a Reduction in Particular Kinds of Services). The resolution directed the District's Superintendent or his designee to give appropriate notices under the Education Code to all employees whose positions may be lost by virtue of this action.

The decision to reduce or discontinue a particular kind of service is a matter reserved to the District's discretion and is not subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167, 178-179.) A school district's decision to reduce a particular kind of service must not be fraudulent, arbitrary or capricious. (*San Jose Teachers Association v. Allen* (1983) 144 Cal. App. 3d 627, 637.)

3. The Governing Board determined that the following particular kind of service will be reduced or eliminated no later than the beginning of the 2019-2020 school year:

PARTICULAR KINDS OF SERVICE	NUMBER OF FTE
Counselors ¹	.6 (total FTE)

On March 5, 2019, the Governing Board approved Resolution No. 18-19-17 (Criteria for Determining Certificated Order of Seniority for Those Employees Who First Rendered Probationary Service to the District on the Same Date), implementing Education Code² section 44955, subdivision (b). There was no reason to apply these criteria in this case. The District did not adopt competency standards that would allow it to "skip" any employee.

4. The District timely served respondent with preliminary layoff notice pursuant to Sections 44949 and 44955. Respondent was given proper notice of the date, time and location of the hearing. A copy of the Resolution, relevant sections of the Education Code and information concerning the right to request a hearing were enclosed with the preliminary

¹ Prior to March 5, 2019, the District had planned to reduce services by 4.4 FTE; after consideration of attrition, it was determined that reduction of only .6 FTE was necessary.

² Hereinafter all reference is to the Education Code unless otherwise stated.

layoff notice. Respondent filed a Request for Hearing and Notice of Participation in a timely manner.

5. All prehearing jurisdictional requirements were satisfied.

6. The Governing Board considered and continues to consider all known attrition, including resignations, retirements and other permanent vacancies, in determining whether the final layoff notice shall be delivered to respondent.

7. Tina Sardina, the District's Assistant Superintendent of Human Resources, was responsible for implementing the technical aspects of the layoff. In order to assure accuracy, she supervised the development of a seniority list for permanent certificated staff that included, among other matters, the name of the certificated employee, seniority date, current FTE, credential(s) and authorization(s) and assignment.

The seniority date was based on the first date of paid service rendered.³ 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 performed the duties normally required of a certificated employee of the school district was deemed to have served a complete school year as a probationary employee if employed as a probationary employee 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,⁴ but only one year could be tacked on.

Ms. Sardina's staff used the seniority list to develop a proposed order of layoff to determine the least senior employees currently assigned to provide the service being reduced. Then, she determined whether the least senior employees held credentials in another area that would entitle them to "bump" other junior employees. In determining who would be laid off for the service reduced, Ms. Sardina's staff counted the number of reductions and determined the impact on incumbent staff in inverse order of seniority. After this, she checked the credentials of each affected individual and determined whether he/she could "bump" another employee.

8. Respondent argued that Daleena Harker-Reid is more junior and is being retained to perform a service for which respondent is credentialed and competent to provide.

Respondent's seniority date is August 21, 1995. She holds a Basic Pupil Personnel Services Credential which authorizes her to provide counseling and social work services. During the 2018-2019 school year, respondent was assigned to the Quest Academy in a .60 FTE counselor position.

³ Section 44845.

⁴ Section 44918.

Ms. Harker-Reid has a seniority date of September 25, 2017. She holds a Pupil Personnel Services Credential with a Counseling Authorization and a Multiple Subject Teaching Credential. During the 2018-2019 school year, Ms. Harker-Reid was assigned as a full-time counselor at Parkway Middle School (Parkway).

Ms. Sardina explained that the District elected to skip and retain Ms. Harker-Reid because she holds a 1.0 FTE counselor position; the District determined that it is in the best interests of adolescents to have the same counselor on a daily basis. Further, in Ms. Sardina's opinion, if respondent was retained for a .60 counselor position, it would be difficult to fill a .40 counselor position.

9. The District previously laid off respondent during a 2010 reduction in force. The District rehired respondent in a .60 counselor position for the 2013-2014 school year, and she has been employed continuously since that time, including during the 2018-2019 school year. Respondent argued that it has been her desire to have a full-time counselor position since the 2013-2014 school year. However, respondent acknowledged that she was aware that the full-time counselor position at Parkway had been posted, the position that Ms. Harker-Reid holds. Respondent understood that in order to be considered for the position, she needed to send an email or letter of interest. She elected not to do so because the vice-principal at Parkway had been the Dean of Students at the Quest Academy during the prior academic year; she and the Dean of Students did not communicate well, and she "did not think it could benefit the school."

10. Respondent seeks to "bump" into the full-time position held by Ms. Harker-Reid and cites *Hildebrandt v. St. Helena School District*, 172 Cal. App. 4th 334 (2009) in support of her position. However, *Hildebrandt* does not stand for the proposition that a part-time counselor may bump a junior full-time counselor.

In *Hildebrandt*, the court addressed whether two-part time psychologists could require the school district to split the single full-time position held by a junior psychologist. (*Id.* at p. 343-344.) That court noted that it was not deciding whether either part time psychologist was entitled to the full-time psychologist position for the simple reason that that issue was not before the court. (*Id.* at p. 345.) After hearing evidence regarding the school's "programmatic" need to have a full-time psychologist, the court concluded that the District was not required, "in effect," to split the full-time psychologist position into two-part time positions. (*Id.* at p. 345-346.) In its analysis, the court emphasized that a district has broad discretion to define a service in terms of the hours required to perform the service. (*Ibid.*)

In this case, the District established its need to have a full-time counselor at Parkway. As such, the District was not required to split the full-time counselor position into two positions.

Consistent with *Hildebrand*, respondent is not entitled to “bump” a junior full-time counselor; her argument to the contrary is not accepted.⁵ Respondent’s rights under Section 44955 apply only to the .60 FTE position she holds and not to a full-time FTE position.

11. The services that the Governing Board proposed to reduce were “particular kinds of services” that can be reduced or discontinued within the meaning of Education Code section 44955. The Governing 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 Governing Board’s reduction or discontinuance of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuance of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Governing Board.

13. No permanent employee will be terminated while any employee with less seniority is retained to render a service which a permanent employee is certificated and competent to render.

14. There was no evidence that the District proposes to eliminate any services mandated by state or federal statute or regulations.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in these sections are satisfied.

2. 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 vs. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

⁵ The decision in *Murray v. Sonoma County Office of Education* (1989) 208 Cal.App.3d 456 is also instructive on the issue of a part time employee’s right to a bump a junior employee. That court concluded that a school nurse who held a .60 FTE position was not entitled to reinstatement to a .16 FTE position held by a full-time nurse for one day of week at the school where the appellant nurse had worked. The court found that the .16 FTE as a “service” was one day of nursing per week, the Office of Education could use this “service” as it “saw fit,” and the nurse was entitled to “the same” employment rights prior to the layoff but not “greater rights.” (*Id.* at pp. 460-461, citing *Waldron v. Sulphur Springs Union School Dist.* (1979) 96 Cal.App.3d 503, at p. 505, emphasis not included.)

3. Cause exists under Education Code sections 44949 and 44955 for the La Mesa-Spring Valley 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 within the meaning of section 44955.

4. A senior teacher whose position is discontinued has the right to transfer to a continuing position that 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. (*Poppers v. Tamalpais Union High School Dist.* (1986) 184 Cal.App.3d 399, 405.)

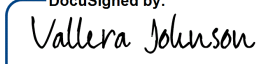
5. No employee with less seniority than respondent is being retained to perform a service that she is certificated and competent to render.

ORDER

1. The Notice of Recommendation that Certificated Services Will Not Be Required and Statement to Respondent of Reduction in Force against Virginia Pontius is sustained.

2. On or before May 15, 2019, the La Mesa-Spring Valley School District shall give notice to Virginia Pontius that her service will not be required for the 2019-2020 school year because of the reduction or discontinuance of particular kinds of services.

DATED: May 7, 2019

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VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings