

**BEFORE THE GOVERNING BOARD
SOUTH WHITTIER SCHOOL DISTRICT**

In the Matter of the Reduction in Force
Involving the Respondents Identified in
Attachment "A,"

OAH No. 2012030668

Respondents.

PROPOSED DECISION

Administrative Law Judge Jankhana Desai, Office of Administrative Hearings, State of California, heard this matter on April 4, 2012, in Whittier, California.

Aaron V. O'Donnell, Esq., Atkinson, Andelson, Loya, Ruud & Romo, represented the South Whittier School District (District).

Jean Shin, Staff Attorney, California Teachers Association, represented Respondents, who are identified in Attachment "A," attached hereto.

The record was closed and the matter was submitted for decision at the conclusion of the hearing.

FACTUAL FINDINGS

1. Erich Kwek, the District's Superintendent, filed the Accusation in his official capacity.

2. Respondents are certificated employees of the District.

3. On February 28, 2012, the Governing Board of the District (Board) adopted Resolution No. 11-12-12, which proposed to reduce or discontinue particular kinds of services encompassing 13.0 full-time equivalent (FTE) positions for the 2012-2013 school year.

4. By no later than March 15, 2012, certain certificated employees of the District, including Respondents, were given preliminary notice that their services would not be required for the following school year, pursuant to Education Code sections 44949 and 44955.¹

¹ All further statutory references are to the Education Code.

5. Respondents timely requested a hearing to determine if there was cause for terminating their services. Each was thereafter served with an Accusation. Respondents timely filed Notices of Defense and the instant hearing ensued.

6. All prehearing jurisdictional requirements have been met.

7. On February 28, 2012, the Board also adopted Resolution 11-12-13, which provided for the termination from employment of teachers Carrie Galloway (Galloway) and Kristen Ryan (Ryan) as temporary employees. Prior to the hearing, they were non-reelected and released from employment separately and independently from the layoff process. The District contends that such individuals do not possess any rights to this hearing process. However, those individuals were provided with a preliminary notification of layoff as a precaution, in order to permit them to participate and exercise any claimed rights to the hearing process. The District stated in correspondence that “it is not our intent to convert your temporary employment status to that of a probationary or permanent employee.” The Respondents treated in this way are identified in Attachment “A” as “Precautionary Respondents.”

8. Resolution No. 11-12-12 specifically provides for the reduction or elimination of the following particular kinds of services:

| | | |
|--------|----------------------------|----------------------|
| 1. | School Community Counselor | 1.0 FTE ² |
| 2. | K-6 Classroom Teaching | 12.0 FTE |
| TOTAL: | | 13.0 FTE |

9. The decision to reduce or eliminate 13.0 FTEs was the result of financial difficulties experienced by the District.

10. The Board’s 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.

11. The reduction or discontinuance of services set forth in Factual Findings 3 and 8 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 Board.

12. The Board also adopted Resolution No. 11-12-14, which established tie-breaking criteria to determine the relative seniority of certificated employees who first rendered paid service on the same date. The tie-breaking criteria were used in this matter to resolve ties in seniority amongst certificated personnel. The criteria were listed in priority order; each criterion was used only if the preceding one did not resolve the tie. No challenge was made to this resolution.

² FTE stands for “full-time equivalent.”

13. The District determined the order of termination of the employees serving in the positions to be reduced or discontinued by creating a seniority list containing employees' seniority dates, current assignments and locations, credentials and authorizations. The District used the seniority list to implement and determine the proposed layoffs. Despite section 44845, which provides that, "Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position," the District assigned teachers seniority dates based on the teachers' first date of teaching in a classroom, i.e., the first day of school. The Respondents who started teaching in 1997 were assigned a seniority date of September 8, 1997, and the Respondents who started teaching in 1998 were assigned a seniority date of September 8, 1998.

14. The District assigned Respondents Ruby Acosta (Acosta), Greta Benavides (Benavides), James Hamilton (Hamilton), Janette LaCourse (LaCourse), and Lisa Palomino (Palomino) a seniority date of September 8, 1997. The District then applied the tie-breaking criteria and determined the relative seniority ranks of these teachers from highest to lowest to be: Benavides (ranked 92), Acosta (ranked 99), LaCourse (ranked 100), Hamilton (ranked 102), and Palomino (ranked 103). (Exhibit 13.) No challenge was made to the application of the tie-breaking criteria.

15. However, this ranking did not take into account a new teacher training attended by Acosta, Benavides, Hamilton, and LaCourse in August 1997, prior to the first date of teaching. The training was held on August 18 through 22, 25 through 27, and 29, 1997. The teachers were made to believe that the training was mandatory, and an August 12, 1997 Board approval of the training reaffirmed their belief. Although they started attending the training on different dates, they attended portions, if not all, of the August 1997 training, and were paid for the portions that they attended.

The teachers were paid \$22 per hour, a rate different than their teaching salary. The District submitted payroll records showing when these teachers were first paid for attending the training. (Exhibit 16.) These records show that August 20, 1997 was the first date of paid attendance for Acosta, LaCourse, and Hamilton, while the first date of paid attendance for Benavides was August 27, 1997.

Palomino was hired in 1997 after the August 1997 new hire training. No evidence was presented that Palomino was paid for service before the first day of school. The District properly assigned her the seniority date of September 8, 1997.

In anticipation of a possible challenge to the seniority list based on the August 1997 training, the District concluded that if teachers were assigned seniority dates based on the first date they were paid to attend the training, and the tie-breaking criteria set forth in the resolution was applied, the seniority positions of these teachers would change.³ Benavides

³ The District gave Benavides a layoff notice in anticipation of a challenge to the seniority list.

would then rank in seniority lower than Acosta, Hamilton, and LaCourse. Therefore, Benavides would be subject to layoff instead of Acosta. (Exhibit 15.) No challenge was made to the application of the tie-breaking criteria. Benavides, however, testified that she attended all of the training but did not realize there was a sign in sheet so she failed to sign in during the first few several days of training. However, it is the first date of paid service that is determinative and the records from 1997 indicate that the first date Benavides was paid for attending the training was August 27, 1997. (Exhibit 16.) The seniority dates for Acosta, Benavides, Hamilton, and LaCourse, must be adjusted to reflect their first paid date of service in the District, the first day they were paid for attending the 1997 training.

16. Similarly, a new teacher training took place in August 1998, starting August 17, 1998. At hearing, Respondents made an offer of proof that each of the Respondents with a seniority date of September 8, 1998 attended the teacher training in August 1998, with no objection by the District. The seniority dates of the teachers that were paid to attend the 1998 training should be adjusted to reflect a seniority date of their first paid date of attendance of the 1998 training. In any event, this will not change the fact that the Respondents currently assigned a seniority date of September 8, 1998, are subject to layoff.

17. Galloway and Ryan were both previously classified as permanent employees and were laid off in 2011 pursuant to a reduction in force due to budgetary cuts in 2011. Galloway testified that she was rehired to replace a teacher who had resigned and that she had signed a temporary contract. As permanent employees, Galloway and Ryan shared a seniority date of September 8, 1998. They contend that they should be classified as permanent employees and if they are laid off, they should be laid off as permanent employees. Although re-classifying them does not affect the District's ability to lay them off, the District's seniority list should accurately reflect their status.

Section 44909 authorizes the District to hire temporary employees and outlines the rights of those employees. Most notably, the code section specifically provides that it does not apply "to any regularly credentialed employee who has been employed in the regular educational programs of the school district as a probationary employee before being subsequently assigned to any one of these programs." Section 44918 outlines the rights of temporary employees but specifically holds that "permanent and probationary employees subjected to a reduction in force pursuant to Section 44955 shall, during the period of preferred right to reappointment, have prior rights to any vacant position in which they are qualified to serve superior to those rights hereunder afforded to temporary and substitute personnel who have become probationary employees pursuant to this section."

Section 44956 establishes the rights of permanent employees whose services are terminated. For 39 months, those employees have a preferred right of re-employment "in the order of original employment . . . if the number of employees is increased or the discontinued service is reestablished, with no requirements that were not imposed upon other employees who continued in service; provided, that no probationary or other employee with less seniority shall be employed to render a service which said employee is certificated and competent to render." An employee may waive that right for and a district may deviate from

re-employing in order of seniority if it “demonstrates a specific need” or to maintain or achieve “compliance with constitutional requirements.”

Section 44956 further provides that when the employee is reappointed, “the period of his absence shall be treated as a leave of absence and shall not be considered as a break in the continuity of his service, he shall retain the classification and order of employment he had when his services were terminated, and credit for prior service under any state or district retirement system shall not be affected by such termination, but the period of his absence shall not count as a part of the service required for retirement.” An employee may be hired as a substitute teacher but the substitute service shall not affect his previous classification and rights.

The Legislature specifically distinguished temporary employees who were never permanent or probationary employees, from those employees who were formerly permanent or probationary employees of the district laid off during a reduction in force proceeding and then re-hired by the district as temporary employees. Former employees have rights superior to those of temporary or substitute teachers who were not formerly employed as permanent or probationary employees. Consistent with those provisions, Galloway and Ryan have re-employment rights and when re-hired are entitled to be reinstated as though they had not been laid off. Offering “temporary contracts” to these previously laid off employees violates the clear Legislative intent of the Education Code.

The seniority list should be revised to reflect that Galloway and Ryan are permanent employees of the District with seniority dates of September 8, 1998. Both teachers are subject to layoff.

18. No permanent certificated employee with less seniority will be retained to render a service that the Respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955, by reason of Factual Findings 1 through 7.

2. The services identified in Resolution No. 11-12-12 are particular kinds of services that can be reduced or discontinued pursuant to section 44955, by reason of Factual Findings 3, 6, and 8.

3. Cause for the reduction or discontinuation of those particular services relates solely to the welfare of the District’s schools and pupils within the meaning of section 44949, by reason of Factual Findings 1-11.

4. The seniority date of a certificated employee is defined as the date the employee “first rendered paid service in a probationary capacity.” (§ 44845.) These words must be given

their plain and commonsense meaning in order to effectuate the legislative intent. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 775; *California Teachers Assn. v. Governing Bd. of Rialto Unified School District* (1997) 14 Cal.4th 627, 632-633; *Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46, 51-52.) The statute requires crediting a certificated employee with the seniority date on which he or she was first paid to render service in a probationary capacity. The statute does not expressly require a particular salary rate or schedule, a particular type of service in a probationary capacity, or that the service be “mandatory.”

Respondents Acosta, Hamilton, and LaCourse were paid for attending the 1997 training starting August 20, 1997. Respondent Benavides was paid for attending the 1997 training starting August 27, 1997.

If the date on which the employee first rendered paid service in a probationary capacity is incorrect, the employee’s seniority date must be adjusted to reflect the earlier first date of probationary service. (*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1273.)

Accordingly, the seniority dates of Respondents Acosta, Hamilton, LaCourse must be adjusted to August 20, 1997, and the seniority date of Respondent Benavides must be adjusted to August 27, 2007. After this adjustment and with the application of the tie-breaker criteria, Respondents Benavides, Hamilton, LaCourse and Palomino are subject to layoff, and Respondent Acosta is not subject to layoff, by reason of Factual Findings 1 through 17.

5. The District’s seniority list must be adjusted to reflect that Galloway and Ryan are permanent employees with seniority dates of September 8, 1998, by reason of Factual Finding 17. The classification of Respondents Galloway and Ryan does not affect the lay-off outcome for the purpose of the instant lay-off. Regardless of how they are classified, they are subject to layoff, by reason of Factual Finding 17.

6. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services by reason of Factual Findings 1 through 18, and Legal Conclusions 1 through 5.

RECOMMENDATION

1. The Accusation against Respondent Ruby Acosta is dismissed. The District shall not give her a final layoff notice for the next school year.

2. The District’s seniority list shall be revised to reflect that Respondents Carrie Galloway and Kristen Ryan are permanent employees of the District with seniority dates of September 8, 1998.

3. The Accusations are sustained as against Respondents Greta Benavides, Marjorie Coddington, Sophia Fontes, Carrie Galloway, James Hamilton, Yolanda Holguin, Janette LaCourse, Barbara Llamas, Lisa Palomino, Kimberly Pauls, Kristen Ryan, and Denise Zazueta. The Board may give a final notice of layoff to those Respondents. Notice shall be given to those Respondents that their services will not be required for the 2012-2013 school year due to the reduction of particular kinds of services.

Dated: May 4, 2012

JANKHANA DESAI
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT A: LIST OF RESPONDENTS & PRECAUTIONARY RESPONDENTS

1. Ruby Acosta
2. Greta Benavides
3. Marjorie Coddling
4. Sophia Fontes
5. Carrie Galloway (Precautionary)
6. James Hamilton
7. Yolanda Holguin
8. Janette LaCourse
9. Barbara Llamas
10. Lisa Palomino
11. Kimberly Pauls
12. Kristen Ryan (Precautionary)
13. Denise Zazueta