

BEFORE THE
GOVERNING BOARD OF THE
MOTHER LODGE UNION SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of
Certificated Staff of the:

OAH No. 2011030197

MOTHER LODGE UNION SCHOOL
DISTRICT,

Respondents. .

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, on April 29, 2011, in Placerville, California.

James Scot Yarnell, Attorney at Law, represented the Mother Lodge Union School District (District).

Ballinger G. Kemp, Attorney at Law, represented respondent certificated employees.

Evidence was received in the form of documents and testimony. The case was submitted for decision on April 29, 2011.

FACTUAL FINDINGS

1. Tim Smith is the Superintendent of the District. The actions of Mr. Smith in making and filing the Accusation were taken in his official capacity.

2. Mr. Smith noted in his March 9, 2011 notice of proposed layoffs to District employees that the District's action was prompted by uncertainty over District financing related to State cuts in education funding for the 2011/2012 school year. The Superintendent has recommended that certain District programs and services be reduced and/or eliminated to address the anticipated budget deficit.

3. On March 9, 2011, the Superintendent recommended to the Board that particular kinds of services being offered by the District be discontinued or reduced. The Superintendent stated the reasons for the recommendation. The Board approved the recommendations and, following the adoption of the Resolution set forth below, directed the Superintendent or designee to implement the recommendations. The Board also charged the Superintendent and his staff to identify an equivalent number of certificated personnel and give those certificated employees notice in writing of the Superintendent's recommendation that their services would not be required for the ensuing school year. The recommendation of certificated personnel to be identified for layoff from employment with the District was not related to their skills or performance as teachers.

4. In response to the Superintendent's recommendation above, the Board adopted Resolution No. 2011-03-09.2 on March 9, 2011. The Board resolved that the District needs to reduce or eliminate particular kinds of services as recommended by the Superintendent and, accordingly, it was resolved that it is necessary to terminate the employment of an equivalent number of certificated employees of the District due to the reductions. Resolution No. 2011-03-09.2 authorized the Superintendent, or designee, to take action to reduce or discontinue the following particular kinds of services for the 2011/2012 school year:

<u>Particular Kind of Service (PKS)</u>	<u>Full-Time Equivalent (FTE)</u>
Multiple Subject Services	5.5
Special Education Services	2.0
Counseling	1.0
TOTAL	8.5 FTE

The proposed reductions total 8.5 FTE, with an equivalent number of certificated positions.

5. The services set forth in Resolution No. 2011-03-09.2 are "particular kinds of services" that may be reduced or discontinued within the meaning of Education Code section 44955. There was no evidence that the Board's decision to reduce or discontinue these particular kinds of services was arbitrary or capricious. The reduction or elimination of the particular kinds of services set forth in Resolution No. 2011-03-09.2 constituted a proper exercise of the Board's discretion, within the meaning of Education Code section 44955.

6. On March 9, 2011, the District personally served written preliminary notice that advised permanent and probationary certificated employees, pursuant to Education Code sections 44949 and 44955, that their services would not be required for the next school year. The preliminary notices were served on nine certificated permanent and/or probationary employees of the District. Each written notice set forth the reasons for the recommendation and noted that the Board had adopted Resolution No. 2011-03-09.2, which was attached to

the preliminary notice. All nine certificated employees served a preliminary notice timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year.¹

7. The Superintendent made and filed Accusations against each of the certificated employees of the District who timely requested a hearing after receipt of the preliminary notice or double notice. It was not disputed that the Accusations, with required accompanying documents and blank Notices of Defense, as well as Notices of Hearing, were timely served on the responding employees.

8. Notices of defense were filed by, or on behalf of nine District employees.

Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955.

Tie-Break Criteria

9. Kerry Rabusin and respondents Tammy Comer and Elizabeth Hawkins have the same District seniority date, August 10, 2005. Resolution No. 2011-03-09.2, paragraph 5, provided the following with regard to District employees with the same seniority date:

That as between employees who first rendered paid service on the same date, the order of termination shall be based solely on the needs of the District and the students thereof, as determined by the point system described herein. This system shall be applied only where the implementation of layoffs or rehire actually impacts two or more employees with the same date of paid service and is applied only to those employees. In the case of each tie, points shall be granted to each affected employee based upon all the following criteria:

- a. Possession of a currently valid preliminary or clear California teaching credential – *1 point*
- b. Possession of multiple valid preliminary or clear California teaching credentials – *1 point*
- c. Possession of one or more English Language Development certifications (*e.g.* LDS, CLAD, SB 1969, SB 395, BCC, BCLAD) or other ELD qualifying credential – *1 point*;
- d. Possession of an undergraduate major or minor in: math, science, special education – *1 point*;
- e. Possession of one or more post graduate degree(s) – *1 point*;
- f. Highest current placement on the certificated salary schedule – *1 point*;

¹ The nine respondents include: Tammy Comer, Elizabeth Hawkins, Jill Kraft, Danielle Peterson, Tiffany Presgrave, Kari Richards, Geoffrey Skjelbred, Todd Smith and Jennifer Spiva.

- g. Spanish bilingual competency as determined by major, minor or supplemental authorization in Spanish – *1 point*;
- h. In any case where a tie results after calculating the cumulative points for each the [sic] above criteria, the tie shall be broken by ranking the tied employees from lowest to highest according to the last four digits of their social security number, with the lowest number deem less senior than the next higher number.

(Italics in original.)

10. After reviewing the credentials and other documents on file for each of the three certificated employees with an August 10, 2005 hire date, and applying the above tie-break criteria, the three were ranked as follows:

Kerry Rabusin	Rank 1	(Five Points)
Elizabeth Hawkins	Rank 2	(Three Points)
Tammy Comer	Rank 3	(Three Points)

11. Because respondents Hawkins and Comer had the same point total, the District applied the tie-break criterion in Resolution paragraph 5(h). Ms. Hawkins had the higher rank based upon the last four digits of their social security numbers. She does not contest the application of the tie-break criteria.

12. Ms. Comer contends that the District’s tie-break criteria did not reflect the Board Resolution philosophy of determining order of termination “based solely on the needs of the District and the students thereof.” She suggests that after criteria 5(a) through 5(g) were applied, the District should have considered other criteria such as years of experience.

13. Education Code section 44955, subdivision (b) provides that as between employees with the same seniority date, “the governing board shall determine the order of termination solely on the basis of the needs of the district and the students thereof.” At one time, the statute specifically included language allowing a lottery to determine relative seniority. That language was replaced with the current language. (*Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648, 656; *Alexander v. Bd. of Trustees of Delano Joint High School District* (1983) 139 Cal.App.3d 567, 573.) It is permissible to use a lottery as a final tie-breaker after applying other objective criteria based on the needs of the District and its students. This was done here. Resolution No. 2011-03-09.2 identified seven objective criteria to be considered before application of a lottery based upon social security numbers. Ms. Comer does not contend that the tie-break criteria were applied incorrectly, only that more criteria should have been considered prior to applying a lottery to determine relative seniority.

The tie-break criteria applied by the Board was well within its discretion to adopt, and there was no evidence that it was based upon anything other than the needs of the District and its students.

Welfare of the District and Its Students

14. The Superintendent correctly identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render. The reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils, within the meaning of Education Code section 44949.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of sections 44949 and 44955 were met. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide them due process. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) The description of services to be reduced, both in the Board Resolution and in the notices, adequately describe particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838. See, also, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

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 v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.) The burden is on the District to demonstrate that the reduction or elimination of the particular kinds of services is reasonable and that the District carefully considered its needs before laying off any certificated employee. (*Campbell Elementary Teachers Association v. Abbott, supra*, 76 Cal.App.3d at pp. 807-808.)

3. The services identified in Resolution No. 2011-03-09.2 are particular kinds of services that may be reduced or discontinued under sections 44949 and 44955. Legal cause exists to reduce or eliminate 8.5 FTE of particular kinds of services offered by the District as set forth in detail in the Factual Findings. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuance of services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949.

4. The District was required to exercise tie-break criteria with respect to teachers with a District seniority date of August 10, 2005. The application of tiebreak criteria was appropriate.

5. Cause exists for the reduction of the particular kinds of services and for the reduction of full-time equivalent certificated positions at the end of the 2010/2011 school year pursuant to Education Code sections 44949 and 44955. No employee with less seniority than any respondent is being retained to render a service which any respondent is certificated and competent to render.

6. The District's Governing Board may give respondents final notice before May 15, 2011, that their services will not be required for the ensuing school year, 2011/2012.

RECOMMENDATION

Cause exists for the reduction of 8.5 full-time equivalent certificated positions at the end of the 2010/2011 school year. Notice shall be given to respondents that their services will be reduced or will not be required for the ensuing school year, 2011/2012, because of the reduction and discontinuance of particular kinds of services. Notice shall be given in inverse order of seniority.

DATED: May 2, 2011

JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings