

BEFORE THE BOARD OF TRUSTEES
OF THE
SOUTHERN KERN UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against:

Amy Armstrong, Maryanna Baldrige,
Alicia Mattson, Cynthia McNutt, Jessica
Mountz, Aida Ortiz, Mary Vallejo, Thomas
York,

Respondents.

OAH No. 2008030682

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in Rosamond, California, on May 5, 2008.

Peter C. Carton, Attorney at Law, Schools Legal Service, represented complainant Rodney J. Van Norman, Superintendent of the Southern Kern Unified School District.

Michael R. Feinberg, Attorney at Law, Schwartz, Steinsapir, Dohrmann & Sommers LLP, represented respondents Amy Armstrong, Maryanna Baldrige,¹ Alicia Mattson, Cynthia McNutt, Jessica Mountz, Aida Ortiz, and Mary Vallejo.

There was no appearance by or on behalf of respondent Thomas York.

The record was held open at the request of the parties to permit them to file simultaneous closing briefs, which were timely filed on May 7, 2008. Complainant's brief was marked as Exhibit 15 and respondents' brief was marked as Exhibit L. The parties stipulated to an extension of time to May 12, 2008, for the submission (by facsimile transmission) of a proposed decision to the Southern Kern Unified School District.

FACTUAL FINDINGS

1. Rodney J. Van Norman made and filed the accusation in his official capacity as Superintendent of the Southern Kern Unified School District.
2. Respondents are certificated employees of the district.

¹ At the conclusion of the hearing, the district rescinded its layoff notice to Maryanna Baldrige. As a result, she is no longer a respondent in this matter.

3. On March 5, 2008, the district's governing board adopted Resolution No. 07-08-10 reducing particular kinds of services and directing the superintendent to give appropriate notices to certificated employees whose positions will be affected by the action (PKS resolution).

4. On or before March 15, 2008, James A. Johnson, the district's Assistant Superintendent for Personnel and Operations, gave written notice to 22 certificated employees, including respondents, of the recommendation that their services will not be required for the 2008-2009 school year. Each notice set forth the reasons for the recommendation.²

5. Each of the respondents filed a timely request for hearing to determine if there is cause for terminating his or her services for the 2008-2009 school year.

6. An accusation was served on each of the respondents. With the exception of respondent York, each of the respondents filed a notice of defense. All prehearing jurisdictional requirements have been met as to each respondent.

7. In its PKS resolution, the governing board took action to reduce the following particular kinds of service for the 2008-2009 school year:

<u>Services being reduced or eliminated</u>	<u>FTE</u>
Self-contained Classroom Instruction, Grades K-6	24
Administration	1
Departmentalized Instruction, High School English (6 sections)	1
History (6 sections)	1

The total reduction of FTE positions in the PKS resolution is 27.

8. The PKS resolution directs the superintendent to "determine which employees' services may not be required for the 2008-2009 school year as a result of this reduction in services and to give those employees notice of the Superintendent's recommendation that they not be reemployed not later than March 15, 2008"

² Prior to hearing, the district rescinded its layoff notices to Pamella Anderson, Dorothy Bones, Susan Hemmis, Kristina Hillman, Michelle Hubkey, Catherine Jones, Jennifer Kurfess, Tracy Lethgo, Christen Luther, Keith Meyer, Julie Mozee, Tara Schank, Christine Shoptaw, and Amanda Trimillos.

9. The reductions called for by the PKS resolution are based upon the governing board's uncertainty over the level of state funding the district will receive for the 2008-2009 school year.

Seniority dates of respondents Armstrong, McNutt, and Vallejo

10. Respondents Armstrong, McNutt, and Vallejo disagree with the seniority date assigned to them by the district. According to the district's seniority list, their seniority date is August 10, 2006. Assistant Superintendent Johnson testified that he reviewed respondents' employment contracts and that, under those contracts, August 10 is the first date that each of the respondents rendered paid service to the district. Respondents assert that their seniority date should be August 7, 2006, the first date that they attended training for which they were paid by the district.

11. Respondent Vallejo's offer of employment and employment contract were admitted into evidence; the offers and contracts for Armstrong and McNutt were not offered into evidence. On August 7, 2006, respondent Vallejo accepted the district's written offer of employment. The offer states (among other things) that she would be paid an annual salary of \$41,638 for 183 days, "starting August 10, 2006 and ending June 1, 2007." On August 10, 2006, respondent Vallejo signed a contract of employment as a probationary employee with the district. In the contract, the parties agreed that respondent Vallejo's service to the district "will be for 183 days scheduled at the convenience of District, between 8/10/2006 and 6/1/2007." (Original emphasis.) The contract states that the district will pay respondent her annual salary of \$42,970 in 12 equal payments at the end of each month, beginning in August and ending in July.

12. Vallejo testified that on August 7, 8, and 9, 2006, she attended district training sessions on accelerated math and reading and a district software program called "IntergradePro." She felt that her attendance was mandatory, because her principal called her during the summer and said that August 7 is "the day I start work." The district paid her \$235 for each day of training.

Armstrong testified that she attended the same training and that she, too, was told by her principal to attend the training. Armstrong also received \$235 from the district for each day of training.

Respondent McNutt did not testify.

13. The district and the teachers call these training days "buyback days." James Quellman, a district teacher and long-time president of the teachers' union, testified that the state offers financial incentives to school districts to offer staff development training outside of the teachers' regular contract. The state pays the district a certain amount for each teacher who attends a day of training and, under the collective bargaining agreement between the teachers' union and the district, the district pays each teacher \$235 per day of attendance. The collective bargaining agreement states that participation in buyback days is voluntary.

Buyback days are in addition to the teachers' required work days, and the \$235 per day payment for attending a buyback day is in addition to the teachers' normal compensation. Quellman testified that, typically, the union is unable to meet with new teachers until the first day of school, and therefore new teachers may not realize that participation in buyback days is voluntary.

14. Respondents Armstrong, McNutt, and Vallejo are not entitled to a seniority date of August 7, 2006. A certificated employee's seniority is measured from the date that he or she first rendered paid service to the district in a probationary position. (Ed. Code, §§ 44845, 44955.) The testimony of Assistant Superintendent Johnson, supported by respondent's Vallejo's offer and contract, establishes that respondents' employment in probationary positions began on August 10. In addition, although respondents Vallejo and Armstrong may not have realized it at the time, participation in buyback days is voluntary, buyback days are not included in their contractually-required work days, and the \$235 per day payment that each of them received represented an agreed-upon stipend in excess of their contractual salaries.

15. The district correctly determined that the seniority date for respondents Armstrong, McNutt, and Vallejo is August 10, 2006.

Tie-break process

16. Respondents Armstrong, McNutt, and Vallejo challenge the tie-break process followed by the district to establish the relative dates of seniority between employees with the same seniority date of August 10, 2006.

17. On February 6, 2008, the district's governing board adopted tie-break criteria to apply to determine the order of termination between employees with the same first date of paid service to the district. (Resolution No. 07-08-08.) The resolution states, in relevant part, that the order of termination "shall be based solely on the needs of the district. The specific criteria used in determining this need shall be as follows, but not necessarily listed in order of importance:

- Credentialing
- Experience
- Extracurricular Activities
- Training
- Special Education Needs
- Competence
- Evaluations
- NCLB Highly-Qualified Status
- BCLAD/CLAD/Bilingual Credential Needs"

18. The district's seniority list identifies 10 employees with a seniority date of August 10, 2006, who were subject to layoff under the PKS resolution. After the layoff

notices were sent to those employees and prior to this hearing, the district determined that it could rescind three of the layoff notices.

Assistant Superintendent Johnson applied the governing board's tie-break criteria to determine which layoff notices should be rescinded. He reviewed the personnel files of each of the affected employees. Johnson found that none of the teachers had provided paid extracurricular service to the district; none of the teachers had received more extensive training than the others; none of the teachers held a special education credential; all of the teachers were competent; all of them had positive evaluations; all of them were highly-qualified under No Child Left Behind; and all of them held a BCLAD. Johnson found their breadth of credentialing and their teaching experience to be determinative; he stated that, in his view, it was common sense that the district would value credentials and experience. McNutt and Vallejo hold a preliminary multiple subject credential, while their colleagues with the same seniority date hold clear credentials; Armstrong has a clear multiple subject credential, but fewer years of experience than her colleagues with the same seniority date. The district rescinded the preliminary notices it had sent to three employees who were found to have greater relative seniority than Armstrong, McNutt, and Vallejo, and let the preliminary notices to Armstrong, McNutt, and Vallejo stand. The district did not, at the time the other preliminary notices were rescinded, inform respondents Armstrong, McNutt, and Vallejo of how the tie-break criteria had been applied to rank their seniority.

19. On March 25, 2008, respondents demanded production of any documents "relating to . . . the application to employees of any criteria used to establish an order of employment for employees who first rendered paid probationary service to the District on the same date." In a letter dated April 4, 2008, counsel for the district informed respondents' counsel only that the criteria used were "[b]readth and number of credentials" and "experience."

20. Respondents assert that the district's tie-break criteria, and the district's application of those criteria, do not comply with state law.

21. The tie-break process is governed by Education Code section 44955, subdivision (b), which provides (in relevant part) as follows:

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of the needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing . . . a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of

reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

22. Respondents assert that the governing board's tie-break resolution is invalid on its face because it does not determine the order of importance of the tie-break criteria. Instead, it leaves that task to the district. In addition, respondents argue, the criteria are vague, and therefore allow the superintendent to make impermissible value judgments in deciding which employees should be laid off.

Respondent's arguments are not persuasive. Education Code section 44955, subdivision (b), requires only that the order of termination shall be based on the "needs of the district and the students thereof." The criteria adopted by the governing board in this case are related to the needs of the district and its students. Nothing in Education Code section 44955 precludes the governing board from delegating to its executive staff the responsibility of applying the tie-break criteria, as the governing board did in its PKS resolution when it directed its superintendent to identify the employees to be laid off. It is true that some of the criteria are facially broad and require the superintendent to exercise judgment when he or she applies them; a different system, with more precisely-worded criteria and the value to be assigned for meeting or failing to meet each criterion, might be less likely to invite challenge. But the district's system is not invalid, and there is no evidence that the order of termination was based on impermissible value judgments about the affected employees. On the contrary, after applying all other criteria, the order of termination was based upon objective criteria relating to the employees' credentials and years of experience. That respondents McNutt and Vallejo hold preliminary credentials only, and that respondent Armstrong has less teaching experience than her colleagues who started work for the district on the same day, was not contested.

23. Respondents argue that two of the criteria in the tie-break resolution, "evaluations" and "competence," are indistinguishable from one another, and that a teacher's job performance may not be used in a layoff proceeding. The only authority offered by respondents, however, *Martin v. Kentfield School District* (1983) 35 Cal.3d 294, does not support their argument. *Martin* involved reemployment rights under Education Code section 44596, not permissible tie-break criteria under Education Code section 44955; it does not hold or state that competence is not a permissible tie-break criterion under section 44955.

24. Respondents assert, correctly, that the district failed to provide them with a written statement describing the "application of the criteria in ranking each employee relative to the other employees in the group." The district should have done so. Before the hearing, the district did not inform the affected employees that, in addition to breadth of credentials and experience, the district also considered the other tie-break criteria set forth in the board's resolution: extracurricular activities, training, special education needs, competence, evaluations, NCLB highly-qualified status, and BCLAD/CLAD/Bilingual credential needs.

Respondents, however, were not prejudiced by the district's incomplete disclosure. Some of the criteria – special education needs, NCLB highly-qualified status, and BCLAD/CLAD/Bilingual credential needs – were either met or not met, and all the employees with an August 10, 2006, seniority date met or failed to meet the same criteria. It is true that the other criteria – extracurricular activities, training, competence, and evaluations – are broad; on their face, they might have allowed respondents to argue that they are more competent than their colleagues or that they participated in extracurricular activities that should have been valued more highly. But the district interpreted these criteria so narrowly that they provide little room for an employee to show that he or she ranks higher than another employee; once again, the criteria were essentially met or not met, and the employees with an August 10 seniority date all fared the same under these criteria. Respondents might argue that the district should have interpreted the criteria differently, but it is within the district's discretion to interpret the tie-break criteria in a manner that promotes the needs of the district and its students, and the district's interpretation was reasonable.

The only criteria that provided a basis to distinguish the August 10 employees from one another were credentialing and experience. These are essentially objective criteria that, based on the testimony of Assistant Superintendent Johnson, meet the needs of the district and its students. The district informed respondents that these criteria were applied to them and respondents did not establish that the criteria were applied improperly.

Under Education Code section 44955, subdivision (b), the district's failure to provide a complete written statement does not protect respondents Armstrong, McNutt, and Vallejo against an otherwise proper layoff.

25. Respondents note, again correctly, that the district did not apply the tie-break criteria until after it sent the March layoff notices. Respondents assert that the district's action was inconsistent with "the purpose for which tie-breaking is required" under Education Code section 44955.

Respondents' argument is not persuasive. Education Code section 44955 does not require the application of tie-break criteria prior to March 15.

26. The district complied with the requirements of the Education Code when it determined that respondents Armstrong, McNutt, and Vallejo are junior to other teachers with an August 10, 2006, seniority date.

Other matters

27. Respondent Mountz's seniority date is September 8, 2006. Mountz is a National Board Certified Teacher; she is the only teacher in the district who has participated in that program. Mount believes that the training she received is beneficial to her students, her colleagues and the district.

Respondent's testimony is not questioned. With certain exceptions that are not relevant here, however, state law requires that teachers be laid off in the reverse order of their district seniority, and respondent Mountz is junior to other teachers who are being laid off.

28. Respondents assert that the entire layoff is predicated upon the district's intent to eliminate class size reduction (CSR), and that the district has now decided to maintain CSR; in essence, respondents argue that the layoff is arbitrary and capricious. The evidence, however, fails to establish that the elimination of CSR is the sole basis for the governing board's PKS resolution, or that the board has taken any new action with respect to CSR since it adopted the PKS resolution.

29. Any other assertions put forth by respondents at the hearing and not addressed above are found to be without merit and are rejected.

30. No permanent or probationary employee with less seniority is being retained to render a service for which respondents are certificated and competent.

31. The cause for the reduction in particular kinds of services relates to the welfare of the schools and their pupils.

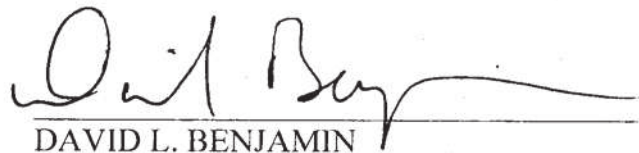
LEGAL CONCLUSIONS

Cause exists because of the reduction of particular kinds of services pursuant to Education Code section 44955 to give notice to respondents that their services will not be required for the 2008-2009 school year. This cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

ORDER

The district may give notice to respondents that their services will not be required for the 2008-2009 school year.

DATED: May 12, 2008



DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings