

BEFORE THE  
BOARD OF TRUSTEES  
EXETER UNION ELEMENTARY SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

COURTNEY BRODECKY, et al.,

Respondents.

OAH No. 2010031426

**PROPOSED DECISION**

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in Exeter, California, on April 15, 2010.

Carol L. Laird, Deputy County Counsel, County of Tulare,<sup>1</sup> represented the complainant, Renee Whiston, Superintendent, Exeter Union Elementary School District.

James F. McBrearty, Attorney at Law,<sup>2</sup> represented the respondents. There are 10 respondents, and they are listed in exhibit A.

The matter was submitted on April 15, 2010.

**FACTUAL FINDINGS**

*GENERAL FINDINGS CONCERNING STATUTORY REQUIREMENTS*

1. Respondents are certificated district employees.
2. Education Code sections 44949 and 44955,<sup>3</sup> provide for two notices to be given in connection with terminating an employee. The first notice is given by the superintendent. The superintendent makes a recommendation that certain employees be laid off, and the superintendent gives notice of that recommendation to those employees and the

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<sup>2</sup> James F. McBrearty, Attorney at Law, 750 E Bullard, Suite 101, Fresno, California 93710.

<sup>3</sup> All references to the Code are to the Education Code unless otherwise specified.

governing board. The superintendent must give that notice no later than March 15. That notice will be referred to as the Superintendent's Notice of Layoff Recommendation. There is no requirement that a governing board take any action in March. But while it is unnecessary, governing boards usually adopt a resolution ratifying the superintendent's recommendation.

3. The second notice is a notice of a governing board's decision to terminate an employee. That notice is provided for in Code section 44955 and must be given before May 15.

4. In this case, not later than March 15, 2010, the superintendent of the district caused the governing board of the district and respondents to be notified in writing that it was recommended that respondents be notified in May that the district would not require their services for the ensuing school year.

5. Except as to Melina De La Cruz, the Superintendent's Notice of Layoff Recommendation stated the reasons for the recommendation. The recommendation was not related to respondents' competency.

6. A Superintendent's Notice of Layoff Recommendation was delivered to each respondent, either by personal delivery or by depositing the notice in the United States mail, registered, postage prepaid, and addressed to respondent's last known address.

7. The Superintendent's Notice of Layoff Recommendation advised each respondent of the following: He or she had a right to a hearing. In order to obtain a hearing, he or she had to deliver a request for a hearing in writing to the person sending the notice. The request had to be delivered by a specified date, which was a date that was not less than seven days after the notice was served.<sup>4</sup> And the failure to request a hearing would constitute a waiver of the right to a hearing.

8. Respondents timely filed written requests for a hearing to determine whether there was cause for not reemploying them for the ensuing year. An accusation was timely served on respondents. Respondents were given notice that, if they were going to request a hearing, they were required to file a notice of defense within five days after being served with the accusation.<sup>5</sup> Respondents filed timely notices of defense. All prehearing jurisdictional requirements were met.

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<sup>4</sup> Employees must be given at least seven days in which to file a request for a hearing. Education Code section 44949, subdivision (b), provides that the final date for filing a request for a hearing "shall not be less than seven days after the date on which the notice is served upon the employee."

<sup>5</sup> Pursuant to Government Code section 11506, a party on whom an accusation is served must file a notice of defense in order to obtain a hearing. Education Code section 44949, subdivision (c)(1), provides that, in teacher termination cases, the notice of defense must be filed within five days after service of the accusation.

9. The governing board of the district resolved to reduce or discontinue particular kinds of services. Within the meaning of Code section 44955, the services are “particular kinds of services” that can be reduced or discontinued. The decision to reduce or discontinue these services was not arbitrary or capricious but constituted a proper exercise of discretion.

*SERVICES THE DISTRICT INTENDS TO REDUCE OR DISCONTINUE*

10. By a memorandum dated March 9, 2010, the superintendent gave notice to the board that it was recommended that the full-time equivalents (FTE) of eight positions be reduced or discontinued. The superintendent listed the names of 10 teachers to be sent a Superintendent’s Notice of Layoff Recommendation.

11. The governing board of the district determined that, because particular kinds of services are to be reduced or discontinued, it is necessary to decrease the number of permanent or probationary employees in the district by 10.5 FTEs.

12. The particular kinds of services the governing board of the district resolved to reduce or discontinue are:

Instruction in K-6 Multiple Subject	7 FTE
Literacy Coach	1 FTE
Reading Specialist	1 FTE
At-Risk Counselor	0.5 FTE
6 Sections of Physical Education/1 Section Athletic Director	1 FTE
Total	10.5 FTE

13. Because of bumping, two of the K-6 positions are actually being retained. The Literacy Coach and Reading Specialist are bumping into them. Thus, only five FTE of K-6 positions are being discontinued.

14. Also, the district is creating a full-time special education position and assigning the At-Risk Counselor to that position.

*USE OF TIE-BREAKING CRITERIA BASED ON THE CURRENT NEEDS OF THE DISTRICT AND STUDENTS*

15. The district applied tie-breaking criteria to rank teachers whose date of hire is August 6, 2007. Katrina Lewis came in last after application of the tie-breaking criteria, and the district sent her a Superintendent’s Notice of Layoff Recommendation. The district, however, stipulated that it will rescind the notice to Ms. Lewis. Therefore, ultimately, the

tie-breaking criteria are not being used in determining who will be laid off. Those criteria, however, may be used in determining the order in which teachers have a right to be rehired.

*DISTRICT'S INTENTION TO DEVIATE FROM SENIORITY (SKIPPING)*

16. Pursuant to Code section 44955, subdivision (d)(1), the governing board of the district resolved to deviate from terminating employees in the order of seniority.

17. The district identified the following courses or courses of study as ones creating a specific need for personnel: mathematics, science, and special education. The district demonstrated a specific need for personnel to teach those subjects

*RIGHT TO BE RETAINED ACCORDING TO SENIORITY AND QUALIFICATIONS – DATE OF HIRE*

18. Job security is not inherent in seniority. The Legislature chose to provide teachers with limited job security according to their seniority.

*RIGHT TO BE RETAINED ACCORDING TO SENIORITY AND QUALIFICATIONS – BUMPING*

19. The second paragraph of section 44955, subdivision (c), does not add to teachers' seniority rights. It does, however, make it clear that governing boards must make assignments in such a way as to protect seniority rights. Employees must be retained to render any service their *seniority* and qualifications entitle them to render. Thus, if a senior teacher whose regular assignment is being eliminated is certificated and competent to teach a junior teacher's courses, the district must retain the senior teacher and reassign him or her to render that service. This is commonly referred to as bumping. The district must either reassign or terminate the junior employee.

20. The Literacy Coach and Reading Specialist positions are being discontinued. The teachers who hold those positions have a right to bump into K-6 teaching positions, and they are doing that. Neither the Literacy Coach nor the Reading Specialist was sent a Superintendent's Notice of Layoff Recommendation.

*CREATION OF A POSITION FOR THE AT-RISK COUNSELOR*

21. The At-Risk Counselor works in that position one-half time and works in a special education position one-half time. The district is eliminating the one-half FTE for an At-Risk Counselor but is creating a full-time special education position for that teacher. And because of the skipping resolution, which includes special education, that teacher is skipped for layoff. The teacher in the At-Risk Counselor position was not sent a Superintendent's Notice of Layoff Recommendation.

#### *DISTRICT MAY NOT LAY OFF DE LA CRUZ*

22. The district sent Melina De La Cruz a Superintendent's Notice of Layoff Recommendation. Ms. De La Cruz teaches 52 percent of an FTE in a PreSchool position. Superintendent Whiston testified that the PreSchool position is not a K-6 position. As noted above, Code section 44949, subdivision (a), requires the superintendent to notify the board as to which teachers are recommended for layoff, and that subdivision requires the superintendent to state the reason for the recommendation. In Superintendent Whiston's March 9, 2010, memorandum to the board, there is no suggestion that the PreSchool position is being reduced or discontinued. Also, in the board's March 9, 2010, resolution there is no mention of reducing or discontinuing that service. Thus, no reason has been given for recommending that Ms. De La Cruz be terminated. And there was no evidence that any senior teacher is bumping into that position. There simply is no ground on which Ms. De La Cruz can be laid off, and as to her, the accusation should be dismissed.

#### *TEACHERS WHO MAY BE TERMINATED*

23. Eleven teachers share a date of hire of August 4, 2008. One teacher was hired after that, on August 27, 2008, but she is a probationary teacher who is not being reemployed. Four of the teachers who share a date of hire of August 4, 2008, are being skipped because they teach science or special education. Each of the other seven teachers employed on that date was sent a Superintendent's Notice of Layoff Recommendation, and the district may terminate them.

24. The district may terminate Jared Mandville, who teaches physical education and serves as an athletic director.

#### *MANDATED SERVICES*

25. State and federal laws mandate that certain services be provided at or above mandated levels. There was no evidence that the district is reducing those services below mandated levels.

#### *SUMMARY OF FINDINGS REGARDING RETENTION OF EMPLOYEES*

26. With regard to respondents who are permanent employees, the district is not retaining any probationary employee to render a service that such a respondent is certificated and competent to render.

27. With regard to respondents who are permanent employees, the district is not retaining any employee with less seniority than such a respondent has to render a service that the respondent is certificated and competent to render.<sup>6</sup>

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<sup>6</sup> Code section 44955, subdivision (b), provides seniority protection for a *permanent* employee in terms of the services the employee is "*certificated and competent to render.*"

28. With regard to respondents who are either permanent or probationary employees, the district is not retaining any employee with less seniority than such a respondent has to render a service that the respondent's qualifications entitle him or her to render.<sup>7</sup>

## LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Code sections 44949 and 44955. All notice and jurisdictional requirements contained in those sections were satisfied.

2. Because the district failed to specify a reason for the recommendation to terminate Ms. De La Cruz, the accusation against her must be dismissed.

3. Pursuant to stipulation, the notice to Katrina Lewis will be rescinded.

4. Within the terms of Code sections 44949 and 44955, the district has cause to reduce or discontinue particular kinds of services and to give notices to the remaining eight respondents that their services will not be required for the ensuing school year. The cause relates solely to the welfare of the schools and the pupils.

## ORDER

1. As to Melina De La Cruz, the accusation is dismissed.

2. The notice to Katrina Lewis is rescinded.

3. The district may give notice to eight respondents that the district will not require their services for the ensuing school year. Those respondents are:

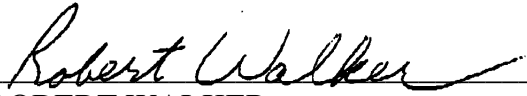
Brodecky, Courtney  
Brooks, Jennifer  
Fishbough, Terri  
Johnson, Laura  
Mandville, Jared

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<sup>7</sup> Code section 44955, subdivision (c), provides seniority protection for both *permanent and probationary* employees in terms of the services an employee's "qualifications entitle [him or her] to render."

Pena-Martinez, Lorena  
Robertson, Whitney  
Williams, Timothy

Dated: May 4, 2010

  
ROBERT WALKER  
Administrative Law Judge  
Office of Administrative Hearings

## Exhibit A

### Respondents

Brodecky, Courtney  
Brooks, Jennifer  
De La Cruz, Melina  
Fishbough, Terri  
Johnson, Laura  
Lewis, Katrina  
Mandville, Jared  
Pena-Martinez, Lorena  
Robertson, Whitney  
Williams, Timothy