BEFORE THE GOVERNING BOARD
MONTEREY PENINSULA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Determination of Cause for Non-Reemployment of 31.0 Full-Time Equivalent Certificated Employees for School Year 2004-2005	OAH No. N2004030294

PROPOSED DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Monterey, California on April 20, 2004.

Melanie A. Petersen, Attorney at Law, Lozano Smith, 450 S. Melrose Drive, Suite 100, Vista, California 92081, represented the Monterey Peninsula Unified School District.

Michelle A. Welsh, Attorney at Law, Stoner, Welsh & Schmidt, 413 Forest Avenue, Pacific Grove, California 93950 represented respondents Therese Beaudry-Harvat, Michael Blasheck, Allison Bohnen, Melissa Buschmann, Sherry de Leuw, Kendra Dunnick, Malinda Furtado, Brenda Hampton, Stephanie Hansen, Karla Hansen, Denise Hedlind, Leisa Hidas, Kristi Hoffman, David Jones, Amy Karabensh, Alison Kaufman, Deborah Landon, Liana Lingofelt, Amy Lloyd, Marisela Maldonado, Jon Martinez, Victoria Mitchell, Lucia Navarrete, Jennifer Nix, Pete Noble, Kristin O'Hara, Holly Oppman, Angela Schiaffo, Melissa Segond, Melissa Snyder, Lula Taylor and Kristin Vernon.

No appearance was made by or on behalf of respondents Elizabeth Brashear Jones, Anne Congleton, Barry Covington, Jennifer Saxe, Helayne Frank, Michael Lubbes, Anneliese Neitling, Tiffany Paluck, Guadalupe Perez, Caryn Pogojeff, Jennifer Saito, Alison Scherling, Briana Tringali, Ayala Younger or Kimberly Worth Keefer.

The matter was submitted on April 20, 2004.

FACTUAL FINDINGS

1. On March 8, 2004, the governing board of the Monterey Peninsula Unified School District adopted Resolution No. 03/04-6, in which the board resolved to reduce or discontinue the following particular kinds of services (PKS) for the 2004-2005 school year and directed the superintendent or his designee to send notice to certificated employees that their services would be terminated at the end of the 2003-2004 school year:

Elementary School Classroom Teachers (K-5)	21.0 FTE
Middle School Teachers	
Core	1.0
English	1.0
Social Studies	1.0
Physical Education	1.0
Industrial Technology	1.0
	5.0
High School Teachers	
English	1.0
Social Studies	1.0
Physical Education	1.0
Industrial Technology	1.0
Music	1.0
	5.0
Total Full-Time Equivalent Reduction	31.0 FTE

2. On March 12, 2004, the superintendent gave written notice to respondents that it had been recommended that notice be given them that their services would not be required for the 2004-2005 school year. Respondents are all deemed to have filed timely requests for hearing and notices of defense. The parties stipulated that all jurisdictional requirements of Education Code sections 44949 and 44955 have been met.

3. At or before the hearing, the district rescinded the accusations against the following respondents, all of whom will be retained for the 2004-2005 school year: Therese Beaudry-Harvat, Allison Bohnen, Kendra Dunnick, Brenda Hampton, David Jones, Amy Karabensh, Alison Kaufman, Liana Lingofelt, Peter Noble, Holly Oppman, Tiffany Paluck, Melissa Segond, Angela Schiaffo, Chrystal Shakur, and Melissa Snyder.

4. At the March 8, 2004 meeting at which the board adopted the PKS resolution, it also adopted resolutions to non-reelect emergency credentialed employees and to release temporary employees. Respondents contend that the release of these employees creates vacant positions into which respondents are entitled to be placed, therefore obviating the need for their termination. This issue was resolved in the district's favor in a prehearing ruling on respondent's motion to dismiss the accusation. The release of those employees does not create vacancies into which respondents are entitled to move.

5. In determining which permanent and probationary employees would be subject to layoff in this proceeding, the district elected to "skip" teachers with "hard to find credentials." Skipped were teachers with math, science and special education credentials, as well as teachers possessing Bilingual, Crosscultural Language and Academic Development (BCLAD) certificates. Resolution No. 03/04-6 contained no authorization for skipping any

employees. Respondents assert they first learned of the district's decision to skip certain teachers after the Education Code section 44949 "March 15" notices were sent. Citing *Karbach* v. *Board of Education*[1], respondents contend their due process rights were therefore violated.

A district may deviate from terminating employees in strict seniority order if it demonstrates a specific need to retain junior employees possessing training or experience that more senior employees do not have. Education Code section 44955(d) gives the authority for making these skipping determinations to the district; it does not require pre-March 15 board action. Thus, that the board resolution contained no skipping authorization is irrelevant. And that respondents did not learn of the district's skipping determination until after they received their layoff notices does not establish a due process violation. *Karbach* held that the purpose of the section 44949 March 15 notice is to insure that an affected employee "be informed of facts upon which he can reasonably assess the probability he will not be reemployed." The court went on to find that, under the facts of that case, the notice provided "did not inform many of the [respondents] that their jobs were in jeopardy." Such is not the case here. Respondents, all of whom fell within the service reductions being made, were clearly put on notice that their jobs were in jeopardy. The notices did not violate the *Karbach* rule. Nor were respondents' due process rights otherwise violated; although they may not have learned of the district's skipping determination until after they received their layoff notices, they were not deprived of the opportunity to be heard on that issue, raising it at this hearing.

6. The district has an unmet need for teachers qualified to teach bilingual classes. There are about 600 students in the district whose parents have signed the waiver necessary to enroll them in bilingual classes. However, not all students with waivers are in such classes since there are not enough qualified teachers. Teachers with BCLAD certificates are qualified to teach bilingual classes. The district also has a long-standing "Plan to Remedy" under which teachers who have demonstrated a proficiency in Spanish and who are working toward their BCLAD certificates are assigned to teach bilingual classes. The district intends to skip six teachers because of their bilingual abilities. All are respondents in this proceeding. Respondents Maldonado, Navarette, and Perez all have BCLAD certificates. Respondents Furtado, Pogojeff, and Vernon are all Plan to Remedy teachers. All six are teaching in bilingual classes. All six will be assigned to bilingual classes in the 2004-2005 school year. All six respondents are appropriately being skipped.

7. The district has received notification that a number of certificated employees will resign or retire effective the end of the current school year. Respondents contend that this "positively assured attrition" must be used to reduce the number of respondents subject to termination. The district, citing *San Jose Teachers Association* v. *Allen*[2], contends that attrition need not be considered in a PKS layoff.

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[1] (1974) 39 Cal.App.3d 355.

[2] (1983) 144 Cal.App.3d 627.

Education Code section 44955 provides that when a school district has experienced a decline in its average daily attendance (ADA) during a specified computation period, or when a particular kind of service is to be reduced or eliminated, "and when . . . it shall have become necessary by reason of [either] of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year." The court in *Burgess* v. *Board of Education*[3] held that "normal attrition" must be used to offset layoffs made possible by a decline in ADA since ignoring such attrition "results in a reduction in force not necessarily require by decline in average daily attendance." Two years later, citing *Burgess*, the court in *Lewin* v. *Board of Trustees*[4] held that "because the number of employees may be reduced only when it is 'necessary' to do so, the governing board must consider normal attrition in the work force as a part of *any* reduction in employment." (Emphasis added.) But, reasoning that "[b]oard members are not soothsayers," the court held that only "positively assured attrition"—that known to the board by the time of its final determination on May 15—and not "potential attrition"—expected retirements and resignations occurring up to the start of the next school year—needed to be considered. The Lewin holding was expanded upon in *Moreland Teachers Association* v. *Kurze*.[5] In an ADA case, the court wrote:

> Acknowledging actual attrition occurring between March 15 and May 15 to reduce the number of employees to be laid off results in no prejudice to the school district, while sparing that number of employees unnecessary termination of employment.
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> . . . We see no legal or practical impediment to revising downward the number of needed terminations resulting from events occurring in the intervening two months. On the contrary, there is sound reason to do so, as otherwise the reduction in force for the ensuing school year would be greater than that necessitated by the decline in attendance.

In *San Jose* v. *Allen*, the case relied upon by the district, the court was called upon to decide what it described as "an issue of first impression:" whether positively assured attrition had to be considered in a PKS layoff.[6] Holding that attrition need not be considered, the court reasoned:

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[3] (1974) 41 Cal.App.3d 571, at 579.

[4] (1976) 62 Cal.App.3d 977, at 980-983.

[5] (1980) 109 Cal.App.3d 648, at 654.

[6] Whether it was truly a case of first impression is not clear. It appears that the service reductions in *Lewin* were for both ADA and PKA reasons, and the court never differentiated between attrition in one situation versus the other.

> A board's decision as to reduction or discontinuation of a particular kind of service is not tied in with any statistical computation, such as reduction in the number of students. The number of terminations made necessary by PKS reductions depends totally upon the district's decision as to how many services to reduce. Put another way, the language of section 44955 that the governing board of a school district "may terminate the services of not more than a corresponding percentage of the certificated employees of said district" is only applicable to ADA terminations based upon an actual reduction in attendance. Where the governing board determines to discontinue or reduce a particular kind of service, there is no way to calculate a "corresponding percentage," hence it is within the discretion of the board to determine the amount by which it will reduce a particular service.
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> . . . in PKS cases the determination of the amount by which a service is to be reduced is the determination of the number of positions to be eliminated.
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> . . . In making a final decision on PKS reductions, the extent to which the services are reduced inherently determines the number of positions to remain. If a service is to be eliminated, for example, it is obvious that it is unnecessary to consider attrition in any way.[7]

As the *San Jose* court stated, there is no "corresponding percentage" of employees in PKS cases as there is in ADA cases. But another principle of section 44955 must also be considered—that employees' services may be terminated only when made necessary by service reductions. In PKS cases, one must distinguish between the number of positions to be eliminated due to the reduction or elimination of particular kinds of services and the number of employees who will lose their jobs as a result of those cuts. The numbers are rarely the same. In its decision, the *San Jose* court failed to make that distinction: it focused solely on the number of positions to be reduced and did not consider whether the loss of those positions would require the termination of an equal number of employees. This distinction may be illustrated as follows: Assume a district with six full-time music teachers decides to reduce music for the following school year from six FTE to three FTE. Because of that reduction, the three most junior music teachers would be laid off. It is true, as the *San Jose* court held, that the reduction from six to three positions would not be affected in any way by, for example, the May 10 retirement of a music teacher; for the following school year the district will still be offering only half as many music courses as it does in the current school year. But that retirement would affect the number of employees who would have to

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[7] *San Jose Teachers Association* v. *Allen*, *supra*, at pp. 635-636.

be laid off. Because of the retirement, it is no longer necessary to terminate three teachers to effect the service reduction. Only two junior teachers need be laid off. The third reduction would be accounted for by attrition.

Whether in ADA or PKS reductions, the words of the *Moreland* court hold true: considering attrition occurring between March 15 and May 15 results in no prejudice to the district and spares some employees from unnecessary termination, and not to consider such attrition would result in a greater reduction in force than warranted by the service cuts. Thus, it is found that in determining how many employees may be terminated as a result of the planned service reductions, the district must consider certain kinds of positively assured attrition. First, only attrition occurring between the date of its decision to reduce services (in this case, March 8) and the date of the board's final action on or before May 15 may potentially reduce the number of employees to be terminated; attrition occurring up to March 8 will not reduce the number of employees to be terminated since that attrition had already been factored into the determination of how many positions were to be reduced.[8] Second, the only attrition that must be considered is that which creates vacancies in positions in which respondents would be qualified to serve. As a corollary to this, the resignation or retirement of a respondent does not create a vacancy, but merely allows the district to reduce a service without having to lay off any other employees, and therefore need not be considered.

The district has learned that 14 elementary school teachers that will be retiring at the end of the current school year. Two of those retirements were known to the district before March 8, 2004; the remainder became known after that date. Two secondary PE teachers also announced their retirements after March 8. Two secondary English teachers have resigned, one before March 8, one after. Using the principles set forth in the preceding paragraph, the number of elementary school teachers who may be terminated in this proceeding must be reduced by 12, the number of post-March 8 retirements. (In the absence of evidence to the contrary it is assumed that each departing employee occupies a full-time position.) No reduction is required for the two elementary retirements or the one secondary English resignation known to the board at the time of its March 8 action. As a result of the post-March 8 retirement of two secondary PE teachers, it is no longer necessary to terminate the services of any respondent in order to effectuate the 2.0 FTE reduction in that service. The post-March 8 secondary English resignation was of Barry Covington, a respondent in this proceeding. That resignation does not require the retention of any other respondent.

8. On March 8, 2004, the governing board of the district adopted Resolution No. 03/04-5, which established tie-breaking criteria to be used to determine the order of termination of employees having the same seniority date. In the tie-breaking process, employees earn points in five specified criteria. If ties remain after all five criteria are applied, a sixth criterion is used. These same tie-breaking criteria had been used by the

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[8] See *Moreland, supra*, at p. 648.

district previously, and had been established in an unidentified prior year through an agreement with the teachers' bargaining unit, the Monterey Bay Teachers Association. No bargaining or discussions were held this year prior to the adoption of the criteria.

9. Respondent Karla Hansen holds a K-8 multiple subject credential with a supplemental authorization for single subject English up to grade 9. She currently teaches middle school math in a "limited assignment." A "limited assignment" in the district appears to be like an emergency credential. Hansen does not hold a math credential, but she testified she is one course away from qualifying for a supplemental authorization in math, and she expects to have that authorization by the end of the summer. Hansen asserts her supplementary authorization in English renders her certificated and competent to teach that subject. The district apparently takes the position that a teacher with a supplementary authorization is not "highly qualified" in that subject within the meaning of the federal No Child Left Behind Act and is therefore not entitled to be retained to teach that subject.

Supplementary authorizations are issued in accordance with Education Code section 44526. Nothing in that section limits a teacher's ability to provide instruction in the authorized subject. No evidence was presented to show the No Child Left Behind Act diminished the value of a supplementary authorization. Hansen is found certificated and competent to teach secondary English. Although she may be only one course away from qualifying for a supplementary authorization in math, until she actually receives the authorization she cannot be considered certificated and competent in that subject within the meaning of Education Code section 44955. Her teaching math under a "limited assignment" affords her no right to be retained to teach it again next year.

Hansen has been credited with 16/72 points on the tie-breaking criteria.[9] She seeks credit for an additional four points for the sixth criterion: "One (1) point for every college/university semester unit or District unit (recognized by MPUSD) earned after bachelor's degree." Hansen testified she completed four additional units last semester at Chapman College, but that neither she nor the district has yet received a transcript from the college. She would like her points to be updated when the transcript is received. Adding points to Hansen's tie-breaking score will not affect her placement on the seniority list; she is already ranked the "most senior" employee within her seniority date.

The tie-breaking the criteria and the board's resolution adopting them are silent as to cut-off dates for consideration of tie-breaking points. The district would not be prejudiced by allowing consideration of additional tie-breaking points up until May 15, or any earlier date when the board renders its final decision on layoffs. Therefore, Hansen is entitled to have her tie-breaking points increased for additional units for which verification is received before the board takes final action in this matter.

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[9] The first number refers to the points earned in the first five criteria. The second number refers to the points earned in the sixth criterion.

10. Respondent Deborah Landon has been credited with a tie-breaking score of 14/26. She seeks credit for an additional four points in Criterion No. 5, which would increase her point total to 18/26 and move her up eight positions on the seniority list. Criterion No. 5 states:

> Professional preparation, i.e., advanced degrees (M.A. or Doctorate) (4 points will be given for <u>each</u> advanced degree) [Emphasis in original]

Landon holds a certification issued by the National Board for Teaching Standards. In order to obtain such a certification, a teacher must have at least three years full-time teaching experience and must complete a year-long certification process that includes a rigorous portfolio review and a board testing procedure. Landon is one of only two teachers in the district to hold this national certification. She believes it qualifies as "professional preparation" equivalent to an advanced degree. She argues that the wording of the criterion allows for points to be awarded for other than M.A. and doctorate degrees since the "i.e.," in the criterion shows those two types of degrees are merely examples of types of professional preparation for which points can be awarded, they are not the sole categories in which points can be given.

Respondent's assertion is rejected. While it is true the use of "i.e.," in the criterion is somewhat vague, Landon's argument ignores the second line, which provides that four points will be given for each "advanced degree." It does not specify what points would be given for something other than an advanced degree. It is found that the only "professional preparation" for which points may be awarded are masters or doctorate degrees.

11. Respondent Denise Hedlind holds a single subject music credential. She teaches high school vocal music. Hedlind has been employed by the district for 14 years, with two breaks in service. Prior to 1991, she was a full-time employee with permanent status. She resigned from the district in 1991 when her son was born. Hedlind returned to the district within 12 months of her resignation and was hired into a 0.5 FTE position. She retained her permanent status. Hedlind remained a half-time employee until 2000, when she again resigned. She again returned to the district 11 months later. On December 20, 2001, Hedlind again signed a contract accepting an offer of half-time employment as a permanent employee.

Citing Education Code section 44931 and *Dixon* v. *Board of Trustees*[10], Hedlind contends that she is entitled to the status of a full-time, rather than a half-time, permanent employee. Section 44931 provides that a permanent employee who resigns and is reemployed within 39 months is entitled to have restored to her "all of the rights, benefits and burdens of a permanent employee." *Dixon* held that this applied "to the full range" of such rights, benefits and burdens, including placement on the salary schedule.[11] But neither

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[10] (1989) 216 Cal.App.3d 1269.

[11] Id. at p. 1286.

section 44931 nor *Dixon* support respondent's claim. Full-time employment is not one of the rights or benefits of permanent status. Hedlind, who has voluntarily accepted half-time employment for more than a decade, is not now entitled to status as a 1.0 FTE employee.

12. Respondent Lula Taylor is a full-time employee. Her only credential entitles her to teach music in grades K-12. The district is reducing secondary music by 1.0 FTE. It intends to accomplish that reduction by terminating Denise Hedlind from her 0.5 FTE music position and by reducing Taylor, who is senior to Hedlind, from a 1.0 to a 0.5 FTE position. Taylor asserts she is not subject to a reduction in her position because Hedlind should be considered a 1.0 FTE employee, and should therefore absorb the full brunt of the music reduction. As set forth above, Hedlind's claim for a 1.0 position was rejected. Taylor's assertion is also therefore rejected.

Taylor is not in a music position for the current school year. She is teaching various core and reading courses instead. She does not have a credential for any of these classes, but is teaching under an emergency credential. Taylor maintains she is entitled to be reassigned to a similar position for the next school year. In addition, Taylor is completing training for her Crosscultural Language and Academic Development (CLAD) certificate and will take the test for that certificate on May 8. However, none of these facts insulate Taylor from layoff in this proceeding. First, emergency credentials are valid for only one year, although they may be renewed up to four times. They may be issued only after a school district files a declaration of need with the Commission on Teacher Credentialing.[12] Districts are not obligated to file such declarations and there is no guarantee that a current holder of an emergency credential will receive a renewed emergency credential. In other words, the district is not required to obtain an emergency credential that will allow Taylor to teach a subject outside her credential, and there is no assurance one would be issued in any case. Second, unlike the BCLAD certificate, the CLAD certificate does not authorize teaching in bilingual classes. Even if respondent does obtain her CLAD certificate, it would afford her no greater rights in this proceeding.

13. Respondents point out that the district has laid off teachers three times since 2000. It is argued that these actions are detrimental to the district, and that it therefore cannot be found, as required by Education Code section 44949, that "the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof." This argument is rejected. The district seeks to reduce services in an effort to deal with a budget deficit of approximately 2.2 million dollars. In light of that, and in the absence of any evidence showing that the district has in any way abused its discretion, it must be found that the service reduction is related to the welfare of the schools and its pupils.

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[12] See Education Code sections 44300 and 44251.

LEGAL CONCLUSIONS

1. Cause for the elimination of 31.0 FTE positions exists in accordance with Education Code sections 44949 and 44955. Except as set forth below, cause further exists to give respondents notice that their services will not be required for the 2004-2005 school year. This cause relates to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

2. As set forth in Finding 3, the district has rescinded the accusations filed against the following respondents: Therese Beaudry-Harvat, Allison Bohnen, Kendra Dunnick, Brenda Hampton, David Jones, Amy Karabensh, Alison Kaufman, Liana Lingofelt, Peter Noble, Holly Oppman, Tiffany Paluck, Melissa Segond, Angela Schiaffo, Chrystal Shakur, and Melissa Snyder. Accordingly, notice may not be given them that their services will not be required for the 2004-2005 school year.

3. As set forth in Finding 6, the district has appropriately skipped respondents Malinda Furtado, Marisela Maldonado, Lucia Navarette, Guadalupe Perez, Caryn Pogojeff, and Kristin Vernon because they will be continue to be assigned to teach bilingual classes. Accordingly, notice shall not be given them that their services will not be required for the 2004-2005 school year.

4. As set forth in Finding 7, the district is required to use 12 elementary school teacher retirements and two secondary PE teacher retirements to reduce the number of respondents whose employment will be terminated. In accordance with the principles set forth in that finding, the district shall also consider additional positively assured attrition occurring up until the date of the board's final action in this matter.

5. As set forth in Finding 9, the district shall consider respondent Karla Hansen certificated and competent to teach secondary English. The district shall also increase her tie-breaking point for additional units for which verification is received prior to the board's final action in this matter.

6. As set forth in Finding 10, respondent Deborah Landon is not entitled to additional tie-breaking points.

7. As set forth in Finding 11, respondent Denise Hedlind is not entitled to status as a 1.0 FTE employee.

8. As set forth in Finding 12, respondent Lula Taylor is subject to reduction to a 0.5 FTE position by virtue of the PKS reduction in music. She is not entitled to be retained to teach any other subject.

ORDER

Except as limited by Legal Conclusions 2, 3, and 4, notice may be given respondents that their services will not be required for the 2004-2005 school year.

DATED: April 26, 2004

MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings