

BEFORE THE
BOARD OF TRUSTEES
HOLLISTER SCHOOL DISTRICT

In the Matter of the Non-Reemployment
of 41 Full-Time Equivalent Certificated
Employees,

Respondents.

OAH No. N2005030047

PROPOSED DECISION

Administrative Law Judge Nancy L. Rasmussen, Office of Administrative Hearings, State of California, heard this matter on April 18, 2005, in Hollister, California.

Guy A. Bryant, Bryant & Brown, represented the Hollister School District.

Joseph A. Cisneros, Law Offices of Lawrence E. Biegel, represented respondents.

The matter was submitted on April 18, 2005.

FACTUAL FINDINGS

1. Judith Barranti, Ed.D., made and filed the accusation in her official capacity as Superintendent of the Hollister School District (District).
2. Respondents are listed on Appendix A, attached hereto and by this reference incorporated herein. They are certificated employees of the District.
3. On February 15, 2005, the District's Board of Trustees (Board) adopted Resolution No. 20:04-05 reducing or discontinuing particular kinds of services and directing the Superintendent or her designated representative to send appropriate notices to certificated employees of the recommendation that their services will not be required for the 2005-06 school year.
4. On or before March 15, 2005, the Superintendent or her designated representative gave written notice to an unknown number of certificated employees, including the 79 respondents, of the recommendation that their services will not be required for the 2005-06 school year.

5. Respondents filed timely requests for hearing to determine if there is cause for terminating their services for the 2005-06 school year. An accusation was served on respondents, all of whom are deemed to have filed timely notices of defense. All prehearing jurisdictional requirements have been met.

6. The Board took action to reduce or discontinue the following services for the 2005-06 school year:

<u>SERVICES</u>	<u>FTE</u> ¹
Elementary Instruction at Grades K-6 ²	36.0
Middle School Instruction at Grades 7-8	4.0
Middle School Counseling	<u>1.0</u>
Total	41.0

7. The Board's reduction of services was prompted by the projected deficit in the District's budget.

8. Pursuant to the Board's resolution, the District intends to retain regardless of seniority (i.e., "skip" in the layoff process) certificated employees who possess qualifications needed for Special Education, Middle School Math, Middle School Science, Music and Administration. The District sent preliminary layoff notices to employees who are entitled to be skipped under the above provision, but the affected respondents understand that they will not receive final layoff notices.

9. Before March 15, the District had not received notification from any certificated employees that they would be retiring or resigning before the 2005-06 school year. Since March 15, one employee has notified the District of an impending retirement or resignation and two other employees are considering leaving. Bill Jordan, the District's Director of Human Resources, did not know whether the attrition of one position would be taken into account in determining how many teachers will receive final layoff notices. Respondents argue that the District should be required to take that positively assured attrition into account, but this contention is without merit. Under *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635, a school district is not required to consider positively assured attrition occurring after March 15.

10. The Board's resolution contains the following provision for determining relative seniority among employees with the same first date of paid service in a probationary status in the District:

¹ Full-time equivalent positions.

² Elementary instruction at Grade 6 takes place at the District's two middle schools, which include Grades 6, 7 and 8.

Order of lay off for teachers with the same date of first paid service shall be determined according to the following criteria:

1. Breadth of credential authorization.
2. Advanced degrees in assignment or credential-related subject areas.
3. Greatest number of post-BA accredited college units on file with the District in assignment or credential-related subject areas.
4. Teaching experience at more than one school site within the District.
5. Greatest number of years teaching in California public elementary and secondary schools outside the District.

11. The District has not yet applied the above criteria to break seniority ties, but it intends to do so before issuing the final layoff notices. The criteria will be applied sequentially, i.e., if a tie can be broken utilizing the first criterion the District will not consider the other criteria, and the District will utilize the criterion next in order only if application of the previous criterion does not break the tie. The District does not believe that any ties will be unbroken after application of these criteria.

12. Respondents challenge the tie-breaking criteria as being impermissibly vague. The criterion to which they point as vague is the first one – “breadth of credential authorization.” When the District developed the tie-breakers, its intent was to give seniority preference to employees who are credentialed to teach in multiple areas, for maximum flexibility in future assignments. In applying the first tie-breaker, the District will look at how many credentials and authorizations an employee has and whether the credentials are for a single subject or multiple subjects. The number of areas in which each employee’s credentials and authorizations enable him or her to teach will determine relative seniority ranking, with a greater number of areas corresponding to greater seniority.

The Board has broad latitude in establishing and applying tie-breaking criteria. Education Code section 44955³ requires only that the District determine the order of seniority for employees with the same first date of paid service “solely on the basis of needs of the district and the students thereof,” and the District will meet this mandate when it implements the Board’s criteria. The “breadth of credential authorization” tie-breaker is not impermissibly vague, even though the resolution does not detail exactly how such breadth is to be determined. It is implicit that breadth of credential authorization corresponds to the number of different areas which an employee’s credentials and authorizations enable him or her to teach.

³ All statutory references are to the Education Code.

13. Although the Board's resolution does not specify what subject areas of Middle School Instruction at Grades 7-8 will comprise the reduction of 4.0 FTE, the District plans to make all of the reductions in Language Arts. According to Bill Jordan, Language Arts was targeted for reduction after analyzing the middle school enrollment and class size numbers and reviewing the seniority list.

14. Respondents contend that the 4.0 FTE reduction in Middle School Instruction at Grades 7-8 must be disallowed because this generic service is not a "particular kind of service" that may be reduced under section 44955. On this point, respondents must prevail. With elementary instruction, where one teacher teaches many subjects to the same students, a school district is not required to be more specific in identifying the particular kind of service to be reduced.⁴ However, instruction at Grades 7 and 8 in the middle school is in a departmentalized setting where students have different teachers for different subjects, and there is no practical impediment to specifically identifying particular kinds of services within the broad category of middle school instruction. Reflecting the fact that such instruction is subject-specific, middle school teachers are identified on the District's seniority list by the subject they teach (unlike elementary teachers, who are identified by the grade they teach). Section 44955 does not allow a school district to use the "particular kind of service" layoff process to reduce the number of teachers in general. Layoffs must be incidental to the reduction or discontinuation of *particular* kinds of services. The District's determination, after the fact, that the reductions in middle school instruction will be made in Language Arts does not cure the defect in the Board's resolution.

15. Elementary Instruction at Grades K-6 and Middle School Counseling are particular kinds of services that may be reduced or discontinued within the meaning of section 44955.

16. A number of respondents taught in the District under an emergency permit, an intern credential or a pre-intern certificate (some for as long as six years) before they obtained their preliminary or clear teaching credential. However, the District did not classify these employees as probationary until they submitted verification of their teaching credential or an affidavit from a university attesting to their completion of the requirements and application for the credential.⁵ Accordingly, the District assigned each of these employees a seniority date of their first date of paid service *after* the District received the credential

⁴ *San Jose Teachers Assn. v. Allen, supra*, 144 Cal.App.3d at pp. 637-638.

⁵ Shortly after respondents Brenda Starks-Jones and Jose Anaya started teaching under emergency permits in 1997, they each received a "Statement of Certificated Employment" from the District which listed their employment status as "Prob1." This purported classification in 1997 apparently was a mistake, since the District's seniority list shows these respondents' first date of paid service in a probationary status to be the date they submitted their credential or affidavit of credential some four or five years later. The 1997 documents also contain the proviso that "[t]his statement of employment confers no legal or equitable rights."

verification or affidavit. These respondents now contend that their seniority dates should be changed to reflect their first dates of paid service under an emergency permit, an intern credential or a pre-intern certificate. The claims of these respondents to earlier seniority dates are without merit and are rejected.

In the parties' briefs, there is extensive discussion of various statutes and cases, but none of these statutes and cases can be construed to authorize a credentialed teacher to retroactively add service under an emergency permit or provisional credential to acquire greater seniority during a layoff. In *California Teachers' Association v. Governing Board of the Golden Valley Unified School District* (2002) 98 Cal.App.4th 369, the court allowed a teacher serving under an emergency permit to be classified as a probationary employee and held that such a teacher is entitled to the statutory protections governing the mid-year dismissal of a probationary employee. However, the *Golden Valley* court agreed with the ruling in *Summerfield v. Windsor Unified School District* (2002) 95 Cal.App.4th 1026, that time spent teaching under an emergency permit cannot be counted toward accruing tenure as a permanent employee. It is logical to conclude that such service also should not count for seniority purposes. This conclusion finds support in *Summerfield* – although the teacher there had been employed under an emergency permit for the 1997-1998 school year and had been classified by her district as a probationary employee, the court referred to "her first probationary year" as the 1998-1999 school year, when she was first employed as a probationary employee under a preliminary credential.

Interns and pre-interns also do not acquire tenure under their provisional credentials, although section 44466, in effect, gives former interns credit of one year toward tenure if they keep teaching in the same district where they completed the internship program. (This is why several respondents with seniority dates of August 18, 2004 are designated as "Prob2" employees.)

Allowing employees teaching under an emergency permit or provisional credential to accrue seniority could lead to the absurd result of such employees being retained in a layoff situation over fully-credentialed teachers with less school district service. While respondents are not asserting that this should happen, there is no legal justification for their position that upon becoming fully-credentialed an employee's prior service retroactively accrues seniority.

17. The District discovered, during the hearing, that it had made a mistake when it assigned respondent Elena Hatchett a seniority date of August 18, 2004. Hatchett was hired as a pre-intern in August 2000, and she submitted to the District an affidavit of credential on May 24, 2004. The District agreed to change Hatchett's seniority date to May 24, 2004. Although no mistakes of this nature were identified in other employees' seniority dates, the District will correct such mistakes if they are found.

18. No certificated employee junior in seniority to any respondent is being retained by the District to perform services that any respondent is certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to sections 44949 and 44955, and all notices and other requirements of those sections have been provided as required.
2. Cause exists for the District to reduce or discontinue Elementary Instruction at Grades K-6 by 36.0 FTE and Middle School Counseling by 1.0 FTE for the 2005-06 school year.
3. Cause does not exist for the District to reduce Middle School Instruction at Grades 7-8 by 4.0 FTE for the 2005-06 school year.
4. Cause exists for the District to change the seniority date of respondent Elena Hatchett from August 18, 2004 to May 24, 2004.
5. Cause exists for the District to retain regardless of seniority those respondents who possess qualifications needed for Special Education, Middle School Math, Middle School Science, Music and Administration.
6. Cause exists for the District to apply the tie-breaking criteria set forth in Board Resolution No. 20:04-05 prior to issuing final layoff notices, as necessary to determine relative seniority among employees with the same first date of paid service in a probationary status.
7. Subject to the limitations set forth in Legal Conclusions 3 and 5, cause exists because of the reduction or discontinuation of particular kinds of services pursuant to section 44955 to give notice to respondents in 37.0 full-time equivalent positions that their services will not be required for the 2005-06 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of section 44949.

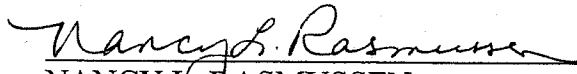
ORDER

1. The District shall not reduce Middle School Instruction at Grades 7-8 for the 2005-06 school year.
2. The District shall change the seniority date of respondent Elena Hatchett from August 18, 2004 to May 24, 2004.
3. The District shall identify, and dismiss the accusations against, those respondents who possess qualifications needed for Special Education, Middle School Math, Middle School Science, Music and Administration.

4. Prior to issuing final layoff notices, the District shall apply the tie-breaking criteria set forth in Board Resolution No. 20:04-05 as necessary to determine relative seniority among employees with the same first date of paid service in a probationary status.

5. Notice may be given to respondents in 37.0 full-time equivalent positions that their services will not be required for the 2005-06 school year because of the reduction or discontinuation of particular kinds of services.

DATED: April 27, 2005


NANCY L. RASMUSSEN
Administrative Law Judge
Office of Administrative Hearings

RESPONDENTS

Jose Anaya
Hilda Baldovinos
Jane Bambrick
Judith Belden
Angela Bellino
Stacie Bonura
Debora Boothe
Fred Brewster
Eric Carlson
Minerva Carson
Kimberly Casillas
Cynthia Castro
Susan Catanzaro
Stacey Chan
Dolores Chavez
Jennifer Cole
Mona Cortez
Joan Crawford
Pamela Cruz
Marsha Cuellar
Laura Dang
Donald Gauvreau III
Jananne Gaver
Ronna Gilani
Luz Gomez Thatcher
Richard Guzman
Wendy Harris
Elena Hatchett
Heidi Hawkins
John Hawkins
William Jacinto
Lori Kashiwagi
Mistee Koch
Mary Langstaff
Jennifer Liversage
Carol Maddock
Denae Marci
Suzette Martin
Robin McGinnis
Molly Moniz
Meghan Muscato

Megan Ottobani
William Parcell
Andrew Parra
Yolanda Parra
Jennifer Patterson
Virginia Pender
Barbara Penney
Sadie Rabusin
Jeanne Ramos
Poonam Rao
Jesse Richards
Laura Richards
Maria Rios
Erica Robledo-Dickens
Andrea Rodriguez
Patricia Rodriguez
Caroline Romero
Nancie Ross
William Sachau
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Rosa Sanchez
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Pamela Smith
Frances Sneddon
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Appendix A