

BEFORE THE
GOVERNING BOARD
OF THE
LAKE ELSINORE UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Respondents Listed on **Exhibit "A"**

OAH No. 2008020569

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in Lake Elsinore, California on April 18, 2008.

Mark W. Thompson, Esq., Atkinson, Anderson, Loya, Ruud & Romo, represented Dr. Frank W. Passarella, Superintendent, Lake Elsinore Unified School District.

Jon Y. Vanderpool, Esq., Tosdal Smith Steiner & Wax, represented Respondents listed in **Exhibit "A."**

The matter was submitted on April 18, 2008.

FACTUAL FINDINGS

1. Kip Meyer made and filed Accusation, dated March 14, 2008, against Respondents listed on **Exhibit "A"** in his official capacity as Assistant Superintendent (Assistant Superintendent), Personnel Services, and designee of Dr. Frank W. Passarella, Superintendent (Superintendent), Lake Elsinore Unified School District (District).

2. Respondents are certificated employees of the District.

3. The Superintendent notified the Governing Board of Lake Elsinore Unified School District (Board) and Respondents that he recommended that notice be given to Respondents that their services would not be required for the 2008-2009 school year.

On March 11 2008, the Board adopted Resolution No. 2007-08-071 that reduced or eliminated particular kinds of services for the ensuing school year and established skipping and tie-breaker criteria.

Respondents were served on March 14, 2008.

The written notice of termination stated that Respondents' services would not be required for the 2008-2009 school year and set forth the reasons for the recommendation. The recommendation that Respondents be terminated from employment was not related to competency. The notice advised Respondents of the right to hearing, that the request for hearing must be delivered to the Superintendent's office no later than March 31, 2008, not less than seven days after the date the notice of termination was served and that the failure to request a hearing would constitute waiver of the right to a hearing.

The District served an Accusation on Respondents in a timely manner.

Respondents filed a timely Request for Hearing and/or Notice of Defense.

4. All pre-hearing jurisdictional requirements were met.

5. On March 11, 2008, the Board adopted Resolution No. 2007-08-071 and took action to reduce or eliminate the following particular kinds of certificated services commencing in the 2008-2009 school year:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
1802 Counselors	7.0
Elementary Band Teacher	1.0
Elementary Physical Education Teacher	1.0
Freshman Foundation Teacher	2.2
Health Teacher	5.4
Secondary Social Science Teacher	2.0
Secondary Physical Education Teacher	4.6
Middle School Core Teacher	7.0

The proposed reductions totaled 30.2 full-time equivalent (FTE) positions.

6. Respondents objected to terminating teachers who provide instruction in the District's health program. The Board requires its student to complete certain courses taught by health teachers, and there are students who have not satisfied this requirement; in addition, the District is required to provide instruction regarding certain subjects, such as AIDS.

Instruction in the health program will continue during the 2008 – 2009 school year. The manner or method by which these services will be provided will change. It will be accomplished by fewer teachers to a similar number of students.

According to the evidence, the Board intends to provide mandatory services; the District has considered several options but has not made a final decision about how these services will be provided and is not required to do so prior to the issuance of final layoff notices.

There is no evidence that the District abused its discretion or that the decision to reduce the health program by 5.4 FTE positions was arbitrary or capricious.

Given the foregoing, insufficient evidence was offered to establish that reduction of the health program was improper.

7. The District considered all known attrition, including resignations and retirements, in determining the actual number of final layoff notices to be delivered to its certificated employees.

8. The District rescinded layoff notices issued to Respondents Blanca Dixon, Phillip Johnson, and Marni Thuyns.

9. The Assistant Superintendent was responsible for implementation of the technical aspects of the layoff. The District developed a seniority list that contained, among other matters, each employee's name, seniority date, status, current assignment, credential(s) and whether the teacher was No Child Left Behind (NCLB) compliant.

The seniority date was based on the first date of paid service rendered.¹ A teacher hired as a probationary employee who worked as a substitute or temporary employee for at least 75 percent of the school days during the previous year and had performed the duties normally required of a certificated employee of the District, was deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year. The teacher was entitled to have that earlier year counted as a year of probationary service. The prior year was "tacked" on for seniority purposes,² but only one year could be tacked.

10. The District used the seniority list to develop a proposed layoff and "bumping" list to determine the least senior employees currently assigned in the various services being reduced. The District then determined whether the least senior employees held credentials in another area that would entitle him or her to "bump" other junior employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and whether they could "bump" other employees.

¹ Education Code section 44845.

² Education Code section 44918.

11. In compliance with Education Code section 44955, subdivision (d)(1), by adoption of Resolution No. 2007-08-071, dated March 11, 2008, the Board skipped and retained all certificated employees who held EL authorization. Any and all teachers qualified to provide services to EL students were properly skipped and should not have received a layoff notice.

12. The Board adopted tie-breaker criteria to determine the order of termination of employees with the same seniority date, which provides, in pertinent part:

“WHEREAS, Education Code section 44955, subsection (b), related to certificated layoffs, provides in relevant part, ‘[a]s 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 need of the district and the students thereof;

NOW, THEREFORE, BE IT RESOLVED that based upon the needs of the District and the students thereof, in the event of a certificated layoff the following criteria shall be applied in order based on the information on file as of March 11, 2008, one step at a time until the tie is broken, to resolve ties in seniority between certificated employees:

1. Highly Qualified status pursuant to the No Child Left Behind Act in the area of assignment.
2. Authorization to teach English Language Learners (CLAD, BCLAD, SB395, SDAIE, etc.)
3. Credential status in area of assignment in order of priority: a) clear; b) preliminary; c) intern; d) provisional/other.
4. Number of additional credentials or supplemental authorizations.
5. Number of years credentialed teaching experience outside the District
6. Possession of a Masters Degree – earliest date prevails.
7. Total post-secondary credits.
8. If a tie still exists after applying steps one through seven (1 – 7) above, seniority shall be determined based upon a comparison of the most recent employee evaluations or classroom observations if there is no employee evaluation on file.”

13. Respondents Danny Hernandez (Respondent Hernandez) and Caren Simpson (Respondent Simpson) each received a layoff notice while other more junior employees were skipped and retained because the more junior employees were authorized to provide instruction to EL students, and Respondents Hernandez and Simpson are not.

For many years, the District has encouraged its certificated employees to obtain authorization to teach EL students. Following an audit of the District’s categorical funding programs in 2007, the District was cited (found in violation) because teachers without EL authorization provided instruction to EL students. As part of the layoff process, the District

required that certificated employees provide evidence of EL authorization no later than March 11, 2008.

Over the years, by letter or email, the District has consistently communicated with Respondent Hernandez regarding the issue. By letter, dated September 28, 2001, the District notified Respondent Hernandez about the requirement and the consequence thereof. Respondent Hernandez completed the course requirements on January 31, 2008. However, he provided the necessary information to the District in an untimely manner, on March 17. Respondent Hernandez testified about a number of reasons that one would consider reasonable but for the consistent efforts made by the District over the past six years.

Respondent Simpson has not obtained an EL authorization. She testified that she learned about the requirement a year ago and that she is scheduled to take the required courses in August 2008.

Given the foregoing, the District properly issued preliminary layoff notices to Respondents Hernandez and Simpson.

14. Between the employees who first rendered paid service to the District on the same date, the Board determined their order of termination solely on the basis of needs of the District and the students. The Board adopted specific criteria and provided clear instructions for implementation of the criteria. The order of termination was based on the needs of the District and its students. The tie-breaker criteria were fairly applied to rank those employees hired on the same date.

15. The services that the District proposes to reduce were "particular kinds of services" that can be reduced or discontinued within the meaning of Education Code section 44955. The Board's decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

16. The reduction or discontinuation of particular kinds of services relates to the welfare of the District and its pupils. The reduction or discontinuance of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

17. No certificated employee junior to any Respondent was retained to perform any services which any Respondent was certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in these sections are satisfied.

2. A District may reduce services within the meaning of Education Code section 44955, subdivision (b), "either by determining that a certain type of service to students shall

not 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." (*California Teachers Assn. v. Bd. of Trustees of the Goleta Union School Dist.* (1981) 132 Cal.App.3d 32, 36; citing *Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. Cause exists under Education Code sections 44949 and 44955 for the Lake Elsinore Unified School District to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuance of particular kinds of services is related solely to the welfare of the schools and the pupils thereof.

4. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he/she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal. 3d 469.)

5. Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831.)

6. No employee with less seniority than any Respondent is being retained to render a service which any Respondent is certificated and competent to render.

ORDER

1. The Accusation against Respondents Blanca Dixon, Phillip Johnson and Marni Thuyns is dismissed. Respondents Blanca Dixon, Phillip Johnson and Marni Thuyns shall be retained.
2. Except as provided in paragraph 1 of this Order, the Accusations served on Respondents listed in attached **Exhibit "B"** are sustained. Notice shall be given to Respondents before May 15, 2008 that their services will not be required for the 2008-2009 school year because of the reduction or discontinuance of particular kinds of services.
3. Notice shall be given in inverse order of seniority.

DATED: _____

May 6, 2008

Vallera J. Johnson

VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT A

1. Archer, Jamie
2. Dixon, Blanca
3. Dillon, Marie
4. Duhamel, Stephanie
5. Gilliland, Mindie
6. Henderson, Brian
7. Hernandez, Amy
8. Hernandez, Danny
9. Jones, Christopher
10. Parks, Kathleen (0.6 FTE)
11. Penwarden, Andrew
12. Romero, Christopher (0.6 FTE)
13. Simpson, Caren
14. Thuyns, Marni

EXHIBIT B

1. Archer, Jamie
 2. Dillon, Marie
 3. Henderson, Brian
 4. Hernandez, Amy
 5. Hernandez, Danny
 6. Jones, Christopher
 7. Parks, Kathleen (0.6 FTE)
 8. Penwarden, Andrew
 9. Romero, Christopher (0.6 FTE)
 10. Simpson, Caren
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