

BEFORE THE
GOVERNING BOARD
OF THE
UPLAND UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2010020621

Respondents listed in Appendix A.

PROPOSED DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Upland, California on April 16, 2010.

Kerrie E. Taylor, Fagen, Friedman & Fulfroost LLP, represented the Upland Unified School District.

Shirley A. Lee, Schwartz, Steinsapir, Dohrmann & Sommers LLP, represented the respondents listed in Appendix A.

The matter was submitted on April 16, 2010.

FACTUAL FINDINGS

1. Gary Rutherford, Ed.D., made and filed the accusation in his official capacity as the Superintendent of the Upland Unified School District.

2. Respondents¹ are certificated district employees.

3. On February 23 2010, Board of Trustees of the Upland Unified School District adopted Resolution 02-23-10(a), determining that it would be necessary to reduce or discontinue particular kinds of services at the end of the current school year. The board

¹ The district initially identified 18 certificated employees for layoff. One individual was later dismissed from this proceeding, so that at the conclusion of the hearing, the 17 individuals identified in Appendix A were the remaining respondents in this matter. All references to respondents are to these 17, unless otherwise indicated.

determined that the particular kinds of services that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Elementary Teaching	27
Elementary Physical Education Teaching	3
Elementary Music Teaching	2

The proposed reductions totaled 32.0 FTE positions.

Subsequently, in an amended recommendation, the board determined that it was not necessary to lay off any elementary music teachers, so that by the date of the hearing, the proposed reductions totaled 30.0 FTE positions.

4. The board directed the superintendent to determine which employees' services would not be required for the 2010-2011 school year as a result of the reduction of the foregoing particular kinds of services. The board further directed the superintendent to send appropriate notices to all certificated employees of the district who would be laid off as a result of the reduction of these particular kinds of services.

5. On or before March 15, 2010, the district timely served on respondents a written notice that the superintendent had recommended that their services would not be required for the upcoming school year. The notice made reference to the board's resolution, which was enclosed with the notice. The notice advised respondents of their right to a hearing, that each respondent had to deliver a request for a hearing in writing to an identified district representative by the date specified in the notice, a date which in each case was more than seven days after the notice was served, and that the failure to request a hearing would constitute a waiver of the right to a hearing.

The recommendation that respondents be terminated from employment was not related to their competency as teachers.

6. Respondents timely filed written requests for hearing to determine if there was cause for not reemploying them for the upcoming school year. The accusation, along with a notice of hearing and certain other documents, was thereafter timely served on all respondents. Respondents timely filed notices of defense. All pre-hearing jurisdictional requirements were met.²

7. The services the board addressed in Resolution No. 02-23-10(a) were "particular kinds of services" that could be reduced or discontinued within the meaning of Education Code section 44955. The board's decision to reduce or discontinue these

² Timely joint notices of defense and requests for hearing were filed on behalf of all respondents. Many respondents also filed individual notices of defense and requests for hearing. The parties stipulated that all jurisdictional requirements were met.

particular kinds of services was not arbitrary or capricious and constituted a proper exercise of discretion.

8. The reduction or discontinuation of particular kinds of services related to the welfare of the district and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the district as determined by the board.

9. The board considered attrition in determining the actual number of necessary layoff notices to be delivered to its employees. No evidence was presented that any known positively assured attrition was not considered.

10. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

The district initially identified for layoff its three least senior physical education (PE) teachers: Sarah Farnworth, Deborah Panattoni, and Jennifer Garbick. Farnworth, the least senior of the three, currently teaches elementary PE, and has a clear single subject credential in PE. Panattoni, the second least senior, currently teaches junior high PE, and has a clear single subject PE credential as well as a supplementary authorization in family health with drug use and abuse, and an authorization to teach introduction to health science. Garbick, the third least senior, currently teaches elementary PE, and has a clear multiple subject (i.e., elementary school) credential, as well as a supplementary authorization in PE. The supplementary authorization permits Garbick to teach physical education at any grade level at or below ninth grade.

The district ultimately designated Farnworth and Panattoni for layoff.³ Respondents do not contest the layoff of Farnworth, but contend that Panattoni should not have been laid off.

The district articulated two alternative explanations for its decision to lay off Panattoni. First, considering all district PE teachers as a group, Panattoni is the second most junior PE teacher in the district. Second, considering only those PE teachers currently in an elementary school assignment, Garbick is the second most junior in that subclass. However, assuming that Garbick was thus appropriately designated for lay off, she was certificated and qualified to bump Panattoni out of the latter's *junior high* PE position. Either way, then, Panattoni and not Garbick was appropriately designated for layoff.

Respondents contended, on the other hand, that since Garbick has a multiple subject credential, she could have bumped not only Panattoni, but also, and more appropriately, a number of district elementary school teachers who have lower seniority than does Panattoni. In other words, respondents asserted that the district should have been required to reassign Garbick to an elementary school position in order to preserve Panattoni's junior high PE

³ Due to attrition, it was not necessary to lay off three PE teachers in order to effectuate the 3.0 FTE reduction in elementary PE teaching positions.

position. By not doing so, the district ran afoul of the layoff statute's recognition of seniority as a critical value to be upheld.

The district did not deny that it could have reassigned Garbick to an elementary teaching position, but asserted that it retains the discretion to determine how best to use Garbick, and that it properly exercised that discretion by deciding that it was best to continue her service as a PE teacher, a position in which she has several years of recent experience.

In response, respondents contended that if the district wished to retain Garbick in a PE position because of her experience, skipping criteria should have been included in the board's resolution.

Respondents read the Education Code (and in particular § 44955) too broadly. For example, while the Code certainly reflects the importance of seniority, seniority does not always control, but only to the extent specifically prescribed in the Code. Thus, section 44955, subdivision (b) provides, "Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render."

The proposed layoffs of Farnworth and Panattoni is not inconsistent with section 44955, subdivision (b): No teacher junior to Panattoni is being retained to render services (i.e., teach PE) for which Panattoni is certificated and competent to perform.

Further, respondents identified no authority in support of their assertion that a district must reassign a bumping employee to the position that will result in the layoff of the least senior certificated employee. Respondents' reliance on the skipping provision of section 44955 (subd. (d) thereof) is unavailing.⁴ That provision simply provides for an exception to the normal rule under subdivision (b) that employees are to be terminated by inverse seniority. Since as discussed above, the district's proposed layoffs of Farnworth and Panattoni is *not* inconsistent with subdivision (b), the issue of skipping does not come into play.

LEGAL CONCLUSIONS

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

2. A preponderance of the evidence sustained the charges set forth in the accusation. Cause exists under Education Code sections 44949 and 44955 for the district to

⁴ Specifically, respondents contended that since the district sought to reassign Garbick based on her experience as a PE teacher, it could only do so on the basis of formal skipping criteria contained in the board resolution. Skipping criteria would have been a relevant consideration had the district retained Garbick and laid off a *more senior* teacher who was certificated and competent to teach elementary PE. Respondents did not identify any such individual.

reduce or discontinue particular kinds of services. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. Cause exists to reduce the number of certificated employees of the district due to the reduction and discontinuation of particular kinds of services. The district identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. It is recommended that the board give respondents notice before May 15, 2010, that their services are no longer required by the district.

ADVISORY DETERMINATION

The following advisory determination is made:

The accusations served on respondents are sustained. Notice shall be given to the 17 respondents listed in Appendix A, before May 15, 2010, that their services will not be required because of the reduction or discontinuation of particular services as indicated.

DATED: _____

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings

Appendix A

1. Francine Avila
2. Steven Curtis
3. Sarah Farnworth
4. Sarah Fash
5. Denise Guerrero
6. Mariella Hart
7. Arlene Jones
8. Stephanie Masterson
9. Stacy Olguin
10. Deborah Panattoni
11. Randolph Pratt
12. Maribel Santana
13. Melody Simons
14. Kelley Smith
15. Amanda Swan
16. Lee Taylor
17. Jennifer Yang