

BEFORE THE
GOVERNING BOARD OF THE
PLUMAS LAKE ELEMENTARY SCHOOL DISTRICT
YUBA COUNTY, STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2011031012

PETE DONAHOO,

Respondent.

PROPOSED DECISION

Marilyn Anne Woollard, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 18, 2010, in Plumas Lake, California.

Michelle L. Cannon, Attorney at Law, Kronick, Moskovitz, Tiedemann & Girard, represented the Plumas Lake Elementary School District. Superintendent Dr. Jeffrey Roberts was also present.

Ted Lindstrom, Attorney at Law, Langenkamp, Curtis & Price LLP, represented respondent Pete Donahoo who was present.

Testimony was heard, documents were introduced, and the parties offered oral closing arguments. The record was then closed and the matter was submitted for decision on April 18, 2011.

FACTUAL FINDINGS

1. The Plumas Lake Elementary School District (District) teaches students from kindergarten (K) through the eighth grade and is comprised of three elementary schools. Both Cobblestone and Rio Del Oro Elementary Schools serve students in K through fifth grades. Riverside Meadows Elementary (Riverside) serves students in grades six through eight.

2. Dr. Roberts is the District's Superintendent. His actions and those of the District's Board of Trustees (Board) were taken solely in their official capacities.

3. In March 2011, Superintendent Roberts recommended to the Board that 1.5 full time equivalent (FTE) physical education (PE) certificated teaching positions be reduced for the 2011-2012 school year.

4. In response to this recommendation, on March 10, 2011, the Board adopted Resolution 2010-7, a “Resolution to Reduce or Eliminate Particular Kinds of Services,” hereafter referred to as the PKS Resolution.

5. On March 11, 2011, Superintendent Roberts provided respondent a written Notice of Intent to Dismiss (Notice).¹ By this letter, respondent was advised of the Superintendent’s recommendation to the Board that respondent be given notice that his services would not be required for the 2011-2012 school year pursuant to Education Code sections 44949 and 44955.² This recommendation was based upon Board Resolution No. 2010-7, adopted at the Board’s March 10, 2011 meeting. This letter was hand delivered to respondent.

6. Thereafter, respondent timely requested a hearing to determine whether cause existed for not reemploying him for the 2011-2012 school year. The second certificated employee given notice of intent to dismiss (Shelli Brevik) did not request a hearing and waived her right to a hearing. (§ 44949, subd. (b).)

7. On March 29, 2010, Superintendent Roberts signed the Accusation in his official capacity, asking that the Board be authorized to give respondent final notice that his services would not be required for the 2011-2012 school year, pursuant to sections 44949 and 44955. Respondent was served with the Accusation, the PKS Resolution, a blank Notice of Defense, Notice of Hearing, and copies of relevant statutes and related documents.

8. Respondent’s attorney timely filed a Notice of Defense on his behalf and requested an administrative hearing. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et seq.

9. All jurisdictional requirements have been met. Respondent does not contend that there are any procedural defects with the Board’s notice of the reduction in force mandated by its PKS Resolution.

¹ As clarified in Superintendent Roberts’ testimony, the letter was erroneously dated March 11, 2010.

² Unless otherwise indicated, all undesignated statutory references are to the Education Code.

PKS Resolution

10. Pertinent recitals to the Board's PKS resolution are as follows:

WHEREAS, due to the State budgetary shortfalls and funding reductions in general and specific programs, the Board of Trustees of the Plumas Lake Elementary School District reduced Physical Education teachers for the 2010-2011 School Year; and

WHEREAS, it is necessary to reassign a current language arts teacher who does not qualify as "Highly Qualified" to teach language arts but is "Highly Qualified" to teach physical education to a physical education position in order to maintain compliance with federal law; and

WHEREAS, the above described reassignment will result in the District being overstaffed with physical education teachers for the 2011-2012 school year; and

WHEREAS, a current half time physical education position is funded through the Federal Education Jobs Act money, it is determined that the the following particular kinds of services are to be reduced no later than the beginning of the 2011-2012 school year:

Teaching Positions:

Physical Education	1.5 FTE
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Total Full Time Equivalent Reduction = 1.5 FTE

11. *PKS:* The PKS Resolution provides that "Board has determined that each of the foregoing services constitutes a particular kind of service (PKS) within the meaning of Education Code section 44955. . ." The only services referenced in the PKS Resolution are language arts and PE. The PKS Resolution does not reduce or eliminate language arts as a particular kind of service. The sole PKS is in PE, which the Board appropriately determined to be a PKS within the meaning of section 44955.

12. *Attrition:* As indicated in the PKS Resolution and in Dr. Roberts' testimony, in making these reductions, the Board considered all positively assured attrition that may occur before the start of the 2011-2012 school year. There was no such attrition.

13. *Seniority List:* The District prepared a certificated seniority list for the layoff. The seniority list highlights the six teachers who hold clear or preliminary single subject PE credentials. The least senior teacher is Shelli Brevik, seniority date December 6, 2010 (preliminary credential). Respondent is the next least senior teacher, with a seniority date of August 13, 2007. Both respondent and Ms. Brevik were noticed for lay off. Four more

senior PE teachers were not subject to this layoff proceeding. Superintendent Roberts testified that, after the reduction of 1.5 FTE, there are only three FTE remaining in PE: two FTE are full positions and two are .5 FTE positions.

14. In implementing this layoff, no more senior teachers subject to layoff in PE “bumped” into respondent’s position. The District did not “skip” any less senior PE teachers to perform jobs that more senior PE teachers were certificated and competent to teach.

15. *Contentions:* Respondent contends that this reduction in force is contrary to section 44955, because he is certificated and competent to teach seventh and eighth grade English Language Arts (ELA) classes during the 2011-2012 school year with his valid California single subject credential and related supplementary authorizations. The District did not reduce or eliminate ELA as a PKS, but simply created the conditions for his layoff by prospectively reassigning him to PE in order to enforce its policy to comply with the No Child Left Behind Act (NCLB) (20 U.S.C. §§ 6319, 7801). Because there was no reduction in ELA services, respondent requests that the Accusation be dismissed.

The District asserts that it is within its sole discretion to assign and reassign certificated employees as necessary. Because respondent is not “highly qualified” to teach ELA under the NCLB and related Board policies, it appropriately reassigned respondent to PE where he is the second least senior employee and appropriately subject to layoff under the PKS Resolution.

16. *Respondent’s Credentials and Experience:* Respondent is a permanent certificated employee who holds a clear single subject credential in PE, with supplementary authorizations to teach biological sciences and introductory English. Respondent’s credential was initially issued December 31, 2002; he received his clear credential effective June 30, 2008. It is undisputed that respondent’s California credential and supplementary authorizations to teach English and biological sciences are currently valid and will remain so for the 2011-2012 school year. Respondent is not “highly qualified” to teach language arts under the NCLB.

Respondent was initially hired for the 2007-2008 school year to teach English at Riverside, using his supplementary authorization in English. This was a time of rapid growth for the District, which grew from one to three elementary schools. Respondent is just completing his fourth full year as a District teacher.

Since his hire, the vast majority of respondent’s teaching assignments have been as an ELA teacher. During the 2007 to 2008 school year, respondent taught all eighth grade English classes, with an additional section of English Intervention. In the 2008 to 2009 school year, in addition to English Intervention, respondent taught ELA to both sixth and eighth grade students. In the 2009 to 2010 school year, respondent taught eighth grade English, sixth grade PE, and English Intervention. This school year, 2010-2011, respondent taught eighth grade ELA and year book journalism. He did not teach PE.

Circumstances of Reassignment to Physical Education

17. *Superintendent Roberts' Testimony:* Superintendent Roberts testified about the circumstances that resulted in the Board's decision to issue a preliminary layoff notice to respondent. His testimony is summarized as follows.

18. The District has a policy that all teachers of core subjects be "highly qualified" as defined by the NCLB. Core academic subjects include the areas of respondent's supplementary authorizations; i.e., English, reading or language arts, and science. The District's policy is reflected in specific Board policies relating to the qualifications and assignment of certificated personnel.

Board Policy 4112.24(a) expresses the Board's desire to "recruit and hire teachers who possess the subject matter knowledge and teaching skills" required by the NCLB "in programs for educationally disadvantaged students and for students in core academic subjects." Addressing teacher qualifications under NCLB, the policy provides that "[a]ll teachers hired after the first day of the 2002-03 school year to teach core academic subjects in a program supported by Title I funds shall be 'highly qualified,' as defined by federal law and the State Board of Education, upon hire." The Superintendent or designee is to monitor the distribution of "highly qualified" teachers and "develop strategies, as needed, to encourage teachers who meet NCLB requirements to teach in schools with the lowest student performance." The Superintendent is further required: to inform teachers of NCLB requirements; to identify additional qualifications needed by individual teachers to demonstrate compliance; to "work with individual teachers to develop a plan for attaining full qualifications;" and to "publicly report on the progress of the District's teachers toward becoming fully qualified."

Board Policy 4112.2(a), "Certification," provides that the Superintendent "shall ensure that persons employed in positions requiring certification qualifications possess the appropriate credential or permit from the Commission on Teacher Credentialing (CTC) authorizing their employment in such positions. "As necessary, all teachers of core academic subjects shall meet the requirements" of the NCLB. Administrative regulations in support of this policy provide, in relevant part, that "individuals appointed to the certificated staff shall: 1. possess the appropriate certification qualifications...; [and] (3) when required by the federal No Child Left Behind Act for teachers of core academic subjects, possess the qualifications of 'highly qualified' teachers . ." A teacher who earned his credential on or after July 1, 2002 is considered to be "new to the profession." To meet NCLB requirements, new teachers at the middle school level must demonstrate subject matter competence by satisfying one of five enumerated requirements. The relevant requirement for respondent to become NCLB compliant is that he must "pass or complete...a validated statewide subject matter examination certified by the CTC." (AR 4112.24(b).) The examination is the California Subject Examination for Teachers or CSET.

Board Policy 43113(a) authorizes the Superintendent “to assign certificated personnel to positions for which their preparation, certification, experience, and aptitude qualify them.” This policy provides that, to meet its requirements under NCLB, the District has determined that all certificated teachers “shall be assigned to teach core academic subjects in Title 1 and non-Title 1 programs in accordance with” NCLB requirements “pertaining to teacher qualifications.”

19. Riverside Elementary School, where respondent is assigned as an ELA teacher, has been determined to be out of compliance with the NCLB requirement that all teachers of “core” subjects be deemed “highly qualified” to teach. The District is under NCLB “Improvement Status” as set forth in Titles I, II, and III of the Elementary and Secondary Education Act. Riverside is in its second year of not having 100 percent highly qualified teachers in core subject areas. If the school is not 100 percent compliant, the District must develop a compliance plan and send a letter to the parents of every student who will be taught by respondent advising them that he is not “highly qualified” under the federal law.

20. Superintendent Roberts determined that respondent was and is the only “core subject” teacher in the District who is not “highly qualified” under NCLB. In April 2010, Superintendent Roberts told respondent that this was the last year (2009-2010) he could teach core subjects without being highly qualified. Respondent said he would complete the CSET over the summer. In the fall of 2010, the Superintendent learned that respondent had not taken the examination, and he again instructed respondent to complete the test. In October 2010, respondent told Superintendent Roberts that he had only passed two of the four required CSET subtests for highly qualified status in English. Respondent was advised that the tests were offered in November 2010 and in January 2011 and that he needed to complete the CSET.

21. In January 2011, Superintendent Roberts asked respondent about the status of his CSET test and learned that respondent had not taken the CSET in either November or January. In February 2011, Superintendent Roberts and respondent met to discuss this issue. Superintendent Roberts determined that it was necessary to assign respondent for the 2011-2012 school year to an area where he was both credentialed and highly qualified; i.e., PE. There was no other position to which respondent could be assigned where he was certificated and highly qualified. Superintendent Roberts knew this would result in an overstaffing of PE, which had a certificated staff reduction the previous school year. He advised respondent that he would be reassigned to teach PE for the 2011-2012 school year, that there would be a reduction in PE staff, and that this would result in his layoff for the coming school year. The PKS Resolution effectuating this decision was then adopted by the Board.

22. Superintendent Roberts testified that he does not know who will teach respondent’s ELA classes next year. There is no teacher in the District currently who holds a clear or preliminary single subject English credential. Although respondent has a valid supplementary authorization to teach ELA next year, Superintendent Roberts’ position is that respondent is no longer qualified to teach ELA classes as of the 2011-2012 school year due

to his lack of NCLB compliance and Riverside's obligations under Program Improvement. If the District is not compliant next year, the entire District will be placed in Program Improvement status. Superintendent Roberts testified that this was "absolutely a major factor" in the reduction in force and that the District does not perceive its actions to be a reduction of PKS in ELA services. Once the enrollment figures for the 2011-2012 year are known, respondent's classes may be taught by NCLB highly qualified teachers with multiple subject (MS) credentials. The District has no specific candidate in mind to fill respondent's position.³

23. *Respondent's testimony:* Respondent testified that his former principal Chris Morris had encouraged him to become NCLB compliant but did not indicate that achieving this status was mandatory. Initially respondent and Mr. Morris hoped he could qualify based on experience, but they learned this was not possible and that he needed to take the CSET. Mr. Morris never ordered respondent to take the CSET. When Superintendent Roberts offered to pay for the CSET if he passed it, respondent took the test and "naively assumed" he would pass all four parts. He agreed he did not retake the test in November 2010 or in January 2011.

Respondent is currently scheduled to take the CSET on May 7, 2011. If successful, respondent will then be highly qualified to teach English under his supplementary authorization next year. Respondent also testified that he took and passed the multiple subject CSET and is now NCLB compliant to teach elementary school in a self-contained classroom. Respondent acknowledges that passage of the CSET will not give him a single subject credential in English or a multiple subject credential. Based on his conversations with Superintendent Roberts, respondent believes the District would hire him to teach ELA classes next year once he is certified.

LEGAL CONCLUSIONS

1. Education Code section 44949 provides, in pertinent part, as follows:
 - (a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his

³ A teacher with an MS credential generally teaches K through fifth grade self-contained classes but may be assigned to teach classes at the middle school level, such as ELA or social studies in sixth through eighth grades, for up to fifty percent of the assignment. The same flexibility is not available to single subject credential holders like respondent who can only teach in their credentialed area.

or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

[¶]. . . [¶]

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. . . If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision.

2. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. As set forth in Factual Findings 1 through 9, all notices and jurisdictional requirements contained in those sections were satisfied. The District has the burden of proving by a preponderance of the evidence that the proposed reduction or elimination of particular kinds of services and the preliminary notice of layoff served on respondent are factually and legally appropriate.

3. The Governing Board may reduce, discontinue or eliminate a particular kind of service and then provide the needed services to the students in another manner. (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571; *California Teachers Association v. Board of Trustees of Goleta Union School Dist.* (1982) 132 Cal.App.3d 32.) A school board may reduce services within the meaning of the statute either by determining that a certain type of service shall not be performed at all or by reducing the number of district employees who perform such services. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.) As set forth in Factual Finding 10, PE is a particular kind of service that may be reduced or eliminated.

4. *Education Code section 44955*: Subdivisions (a) and (b) of section 44955 provide in pertinent part as follows:

(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever in any school year . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, . . . and when in the opinion of the governing board of the district it shall have become necessary by reason of any 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. 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. . . .

5. *Skipping and Bumping:* As set forth in section 44955, subdivisions (b) and (c), economic layoffs are generally to be carried out on the basis of seniority. A teacher with more seniority typically has greater rights to retain employment than a junior teacher. The District has an affirmative obligation to reassign senior teachers who are losing their positions into positions held by junior teachers if the senior teacher has both the credentials and competence to occupy such positions. That displacement of a junior teacher is known as “bumping.” The seniority rule is not absolute, and a junior teacher with a needed credential or skills may be retained even if a more senior teacher is terminated. “Skipping” a less senior employee from inclusion in a layoff proceeding is authorized by statute. In order to depart from a seniority-based economic layoff, section 44955, subdivision (d)(1), requires that the District must demonstrate “a specific need for personnel to teach a specific course or course of study... and that the certificated employee (to be skipped) has special training and experience necessary to teach that course or course of study...which others with more seniority do not possess.”

6. Section 44955, subdivision (a), limits the circumstances under which a permanent employee may be deprived of his position to retirement (§ 44907), termination of extra assignments of full-time employees (§ 44923), and dismissal for cause (§§ 44932 through 44947). Section 44955, subdivision (b), authorizes a layoff where “a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year. . .” As set forth in Factual Finding 11, there was no PKS reduction or elimination of the English language arts program in which respondent has been assigned since 2007, pursuant to his valid California supplementary authorization.

7. The prospective reassignment of a language arts teacher who has repeatedly failed to become “highly qualified” under the NCLB into a particular kind of service that is being reduced or eliminated for the express purpose of maintaining compliance with federal law is not a permissible use of the layoff statutes. Rather, the District’s act of transferring respondent into a PKS for layoff appears to be disciplinary in nature. Section 44932, subdivision (a), prohibits the dismissal of a permanent employee except for enumerated causes, which include “unprofessional conduct”, “unsatisfactory performance”, and/or “persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her.” (§ 44932, subd. (a)(1), (a)(4),(a)(7).)

8. As set forth in Factual Findings 18 through 23, respondent's conduct of failing to comply with the Superintendent's directives and violating Board policies regarding becoming NCLB compliant arguably falls within the "for cause" dismissal statutes. (See *Ripon Unified School District v. Commission on Professional Competence* (2009) 177 Cal.App.4th 1379.) In *Ripon Unified School District*, a music teacher's persistent refusal to become certified to teach English language learners was lawful ground for termination proceedings, and a requirement that all teachers within a school district become certified to teach English learners or face termination was a proper condition of continued employment. In this case, the District has enacted policies to comply with the "highly qualified" requirements of the NCLB. The District chose not to enforce these policies in August 2007 when it hired respondent to teach ELA classes during its time of expanding need and it continued to assign respondent to teach these classes. Since Riverside was placed on school improvement status, the District has renewed its efforts to attain 100 percent "highly qualified" status and it has attempted to gain respondent's compliance since April 2010. The District's need to do so is not questioned. The District may appropriately make NCLB compliance a "competence" requirement for teachers subject to layoff who wish to bump into the assignments of less senior teachers. For example, if respondent had been assigned to PE during the 2010-2011 school year and laid off for 2011-2012, he would not have been able to "bump" into the ELA program as "certificated and competent to render" such services. This is not what has occurred here.

9. As set forth in the Factual Findings and Legal Conclusions as a whole, the use of the layoff proceeding to, in effect, discharge respondent from his permanent certificated position is inconsistent with section 44955 and deprives respondent of the procedural protections of the "for cause" dismissal statutes. (§§ 44932 through 44947.) For this reason, the Accusation against respondent must be dismissed.

RECOMMENDATION

The Accusation against respondent is dismissed.

DATED: April 26, 2011

MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings