

BEFORE THE
GOVERNING BOARD OF THE
BANGOR UNION ELEMENTARY SCHOOL DISTRICT
BUTTE COUNTY, STATE OF CALIFORNIA

In The Matter Of The Accusation Against:

DARLENE KUKRAL,

Respondent

OAH No. N2005040286

PROPOSED DECISION

Administrative Law Judge M. Amanda Behe, Office of Administrative Hearings, State of California, heard this matter on April 26, 2005, at the Bangor Union Elementary School District, Bangor, California.

Janna L. Lambert, Attorney at Law, School and College Legal Services of California, represented the Bangor Union Elementary School District.

Joan Marie Maredyth, Attorney at Law, Maredyth and Fischer, represented respondent Darlene Kukral who was present at the hearing.

The record remained open for receipt of the parties' closing briefs. Respondent's Closing Brief, Exhibit A, was filed electronically on April 28, 2005. The District's Closing Brief, Exhibit 12, was filed electronically on May 2, 2005.

SUMMARY OF PROPOSED DECISION

The Board of Education of the Bangor Union Elementary School District determined to reduce the particular kind of service of elementary teaching provided by one teacher for budgetary reasons. The decision was not related to the competency and dedication of respondent Darlene Kukral, and the District regrets the necessity of the proposed reduction. Respondent Darlene Kukral is the least senior elementary teacher in the District. The reduction in force was conducted in accordance with the requirements of the Education Code.

FACTUAL FINDINGS

1. The Bangor Union Elementary School District (hereinafter "the District") provides an elementary school in Bangor, California. The student population is approximately 155 at present, and has gradually decreased over the past several years.

2. David Severson, Ed.D., is the District's Superintendent and Principal, as well as a full-time teacher.

3. On March 8, 2005, the Governing Board was given notice in accordance with Education Code section 44949 and 44955 of Superintendent Severson's recommendation that one (1.0) full-time equivalent (FTE) certificated employee be notified that her services would not be required for the ensuing school year and stating the reasons for that recommendation.

4. Board Resolution No. 04-05-7, adopted on March 10, 2005, proposed a layoff of one (1.0) FTE certificated employee. Specifically, the Board Resolution provided for the reduction of the particular kind of service of elementary teaching.

5. On March 11, 2005, by personal delivery the District served teacher Darlene Kukral (respondent) with written notice that it had been recommended that notice be given pursuant to Education Code sections 44949 and 44955 that her services would not be required for the ensuing school year and setting forth the reasons for the recommendation.

The notice further advised the respondent of her right to a hearing, including that such a request must be delivered in writing to the person sending the notice of termination, and that the failure to request a hearing would constitute the waiver of the right to a hearing.

6. On March 16, 2005, the respondent filed a timely and proper Request for Hearing.

7. On April 11, 2005, Superintendent Severson filed an Accusation which was personally served on the respondent on that date as required by the Education Code, and the information that a Notice of Defense must be filed within five days pursuant to Education Code section 44944, subdivision (c).

8. On April 11, 2005, the respondent filed a timely and proper Notice of Defense.

9. On July 31, 2003, Superintendent Severson was employed for four years as the District's Superintendent pursuant to a written "Superintendent/ Principal Contract." In the 2003-2004 School Year he taught eighth grade algebra and song flutes to the fourth graders.

On October 14, 2004, the Board approved an addendum to his contract for the 2004-2005 School Year to provide that "Because of special circumstances, the Superintendent will receive a teaching stipend of \$20,000 for filling a classroom assignment for the entire school year."

10. Superintendent Severson described that Board Resolution No. 04-05-7 was required by the District's need to reduce services to balance its budget for the welfare of students. There are approximately 19 empty seats in the lower grades and a total population of approximately 155 students. The Board is particularly concerned about the inter-district transfer students. There is no assurance that the current level of such transfer students will continue, and at least two will be moving out of state before the next School Year. In addition, 14 eighth graders will matriculate but only 8 kindergarten students are expected.

A teacher's position represents approximately \$40,000-50,000 per year in a District budget of one million dollars. In prudent consideration of the expected student enrollment for School Year 2005-2006 the Board decided to reduce services by one teacher. Including the superintendent, the District has eight full time teachers. Other than the special education teacher, they all teach in multi-age self-contained classrooms. Because the student population for School Year 2005-2006 is unknown, the District at present does not know if combined classes for next year will be kindergarten with first grade, first and second grade, etc.

11. The District maintains a Seniority List which identifies employees' seniority dates (first date of paid service), current assignments, and credentials. Prior to implementing the layoff called for by Board Resolution No. 04-05-7 Superintendent Severson had the Seniority List posted in the staff room and verified with the teachers the information regarding their credentials and first dates of paid service.

The respondent, whose first date of paid service is August 21, 2001, holds a professional clear multiple subject credential and a clear cross-cultural language and academic development (C-CLAD) certificate. She is currently teaching a first and second grade combination class.

Superintendent Severson, whose first date of paid service is August 11, 2003, holds a professional administrative services credential and a professional clear multiple subject credential. In the current School Year he is teaching full-time in grades 6, 7, and 8. A full-time teaching load will be part of his job duties in the upcoming 2005-2006 School Year. His position as Superintendent requires an administrative credential, and his teaching responsibilities require a teaching credential.

12. Superintendent Severson testified that although his seniority date is more recent, respondent was noticed for layoff because he is in an administrative position, holds both administrative and teaching credentials, has special competencies and experience in teaching and administration, and is serving under the multi-year contract described in Finding 9, above. There are no employees proposed for layoff who have Superintendent Severson's administrative credential and experience.

Superintendent Severson acknowledged that an administrative credential is not required for his full-time teaching responsibility, and that work could be performed with a

professional clear multiple subject credential. Respondent is credentialed to provide the teaching services Superintendent Severson will provide next year, but does not have an administrative credential.

13. The respondent acknowledged that except for Superintendent Severson she is the least senior person teaching at the District. In the current School Year she is paid \$43,000.

The respondent expressed her concern that the teacher laid off last year was not brought back for unknown reasons and, although that teacher was on a rehire list, the Board instead put the superintendent in the classroom.

14. The District has no temporary teachers or teachers on leave of absence in the current School Year. For the 2005-2006 School Year the District does not expect any teachers to be on leave of absence or any positively assured attrition.

LEGAL CONCLUSIONS

1. Education Code section 44944 provides that:

(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 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.

Until the employee has requested a hearing as provided in subdivision (b) or has waived his or her right to a hearing, the notice and the reasons therefor shall be confidential and shall not be divulged by any person, except as may be necessary in the performance of duties. However, the violation of this requirement of confidentiality, in and of itself, shall not in any manner be construed as affecting the validity of any hearing conducted pursuant to this section.

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. A request for a hearing shall be in writing and shall be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified in that subdivision, which shall not be less than seven days after the date on which the notice is served upon the employee. 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.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500 of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

(2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefor within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section as may be necessary to effectuate this section.

(d) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee. ...

2. Education Code section 44955 provides in relevant part that:

(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 the ... 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.

...

As 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 needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching cre-

dential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

3. Education Code sections 44949 and 44955 establish jurisdiction for this proceeding. The notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945 were met.

4. Elementary teaching is a particular kinds of service that could be reduced or discontinued pursuant to Education Code section 44955. A school board has the discretion to reduce or discontinue a particular kind of service, and its decision need not be tied to any statistical computation, such as the reduction in the number of students. *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627. A school board may reduce services within the meaning of 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.

A school district may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, 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." *Rutherford v. Board of Trustees*; supra; *California Teachers Association v. Goleta Union School District* (1982) 132 Cal.App.3d 32.

Here the Board's decision to reduce the identified service was neither arbitrary nor capricious, and was reluctantly made for financial reasons. In consequence, the reduction of elementary teaching related to the welfare of the District and its pupils, and was a proper exercise of the Board's discretion.

5. Respondent's Closing Brief argues that: "it would be improper to discontinue her teaching services while allowing the Superintendent to continue to teach." The respondent proposes that the portion of the superintendent's position which she is certificated to perform be severed from the remainder of his post, and that she be retained in that position. The contention is not supported by the facts or the applicable law.

Dr. Severson's position is not severable into an administrative function and a full-time teacher compensated as is the respondent (\$43,000 per year). Rather, his position is a set of responsibilities including full-time teaching, which was added for an additional \$20,000 per year. Factually, there is no portion of his position which consists of a standard teacher's job compensated at \$43,000, as the respondent proposes.

The District persuasively argued in its Closing Brief that the Board in the subject very small District had determined that its Superintendent's job duties cannot and are not to be divided. Teaching has been required as part of his Superintendent/Principal job since he arrived at the District. The respondent does not have the necessary credentials, special expertise, competency and training to be a Superintendent/Principal. As set forth in *Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, "where competency is not demonstrated by a senior employee, a junior employee having the ability to serve the needs of a program may be retained by the school district even though it may result that the senior employee lacking such competence must be terminated." (*Moreland, supra* at p. 655)

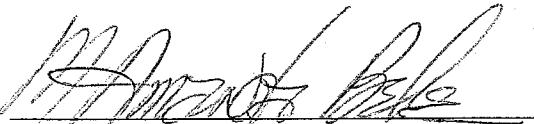
The Board's decisions regarding the tasks and responsibilities of its Superintendent/Principal are a proper exercise of its authority. The Education Code does not require that a fraction of his responsibilities be allotted to an employee to prevent a layoff. The Board's layoff determination is within its authority under Education Code section 44955, subdivision (d)(1), 35160, and 35160.1.

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

ORDER

Notice was properly given to respondent Darlene Kukral that her services will not be required for the 2005-2006 School Year because of the reduction of the particular kind of service of elementary teaching.

Dated: May 4, 2005



M. AMANDA BEHE
Administrative Law Judge
Office of Administrative Hearings