

BEFORE THE
GLENN COUNTY SUPERINTENDENT OF SCHOOLS
STATE OF CALIFORNIA

In The Matter of the Accusation against:

PHILLIP DUNNING,

Respondent.

OAH No. N2008040046

PROPOSED DECISION

Trevor Skarda, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 28, 2008, in Willows, California.

Janna Lambert, Attorney at Law, of School and College Legal Services of California, represented the Glenn County Superintendent of Schools (County).

A. Eugene Huguenin, Jr., Attorney at Law, of Huguenin Law Office, represented respondent Phillip Dunning.

The matter proceeded in respect to the Lay Off Notice issued to Phillip Dunning, as he filed a Request For Hearing, was issued an Accusation, and filed a Notice of Defense to the Accusation.

The matter was submitted and the record closed on April 28, 2008.

FACTUAL FINDINGS

1. The County operates a charter school called William Finch Charter School (William Finch). William Finch is a "home study" high school whereby the bulk of instruction is provided by students' parents in the home. Some teachers provide services in the home. Others, including respondent, teach at one or both of two William Finch school locations, where, much like a typical school, the students come to the classroom to receive all instruction for various subjects.

2. Merrilee G. Johnson is the Assistant Superintendent of Human Resources for the County. Her actions, and the actions of Superintendent Arturo Barrera, who is the Glenn County Superintendent of Schools, were taken in their official capacities.

3. On March 13, 2008, Assistant Superintendent Johnson submitted a letter with her recommendation that certificated and other employees holding 1.5 full-time equivalent (FTE) positions be given notice that their services would not be required for the next school year and stating the reasons for that recommendation. Her letter recommends that the following particular kinds of services be reduced or discontinued:

- 1) Eliminate the equivalent of .10 F.T.E. Lead Teacher Position
- 2) Eliminate the equivalent of 40/100 (.40) F.T.E. William Finch High School Teacher Position
- 3) Eliminate the equivalent of one (1) F.T.E. Home Study Teacher Position

4. On March 13, 2007, the Superintendent of Schools adopted Resolution No. 11, providing for the reduction or elimination of the following particular kinds of services, and to decrease a corresponding number of certificated employees in the District, as follows:

Eliminate the equivalent of .40 F.T.E. Home-Study Teacher Position.

Although the resolution does not match Assistant Superintendent Johnson's recommendation, she testified that ".40 F.T.E. Home-Study Teacher Position" is synonymous with her recommendation that the County "eliminate the equivalent of 40/100 (.40) F.T.E. William Finch High School Teacher Position."

Resolution 11 additionally states that the County had resolved to not reemploy the equivalent of "2.5 full time equivalent certificated employees." Apparently this was an error, as the County only seeks to reduce a total of 1.5 FTE, according to the Assistant Superintendent.

5. Before March 15, 2008, the County personally served on respondent a written notice that it had been recommended that notice be given to him pursuant to Education Code sections 44949 and 44955 that his services would not be required for the next school year. The written notice sets forth the reasons for the recommendation and notes that the Glenn County Superintendent of Schools had adopted a resolution reducing the certificated staff by 2.5 FTE. Similar to the reference to 2.5 FTE in Resolution 11, the reference to 2.5 FTE was also an error. The County only seeks to reduce 1.5 FTE.

6. Respondent timely requested in writing a hearing to determine if there is cause for not reemploying him for the ensuing school year.

7. The interim Superintendent made and filed the Accusation against respondent. The Accusation with required accompanying documents and blank Notices of Defense were served on respondent. The notice of hearing was served in a timely manner. One of the accompanying documents referenced in the Accusation is described as follows:

Cause exists within the meaning of the Education Code sections 44949 and 44955 not to reemploy respondent for the ensuing school year because, by Resolution of the County Superintendent adopted on or about the 13th day of March, 2008, a copy of which is marked Exhibit "A" attached hereto and is by reference incorporated herein as though fully set forth, said County Superintendent determined it was necessary to reduce or eliminate certain particular kinds of services ...

However, the Exhibit "A" attached to the Accusation is not Resolution 11. Instead, the County mistakenly attached Resolution 13, which describes the County's criteria for establishing a specific need to retain junior personnel.

8. Respondent timely filed a Notice of Defense.

9. The facts did not establish whether respondent is a permanent or probationary certificated employee of the County. Indeed, respondent produced an "offer of employment" from when respondent was first hired as a high school teacher at William Finch Charter in 2005; the offer of employment indicates that respondent's employment status was "temporary" and that he was hired on a "part time" basis. Respondent's "temporary" contract was then renewed the following two school years.

10. Nonetheless, because the County proceeded as if respondent was either permanent or probationary and never raised the argument that as a temporary employee, he was not entitled to a hearing regarding the layoff notice, the County waived any objection to respondent's employment status. For purposes of this decision, it is assumed that respondent is permanent or probationary.

11. The County is experiencing financial difficulties due to budget reductions. The County's resolution to eliminate and reduce teaching services was made in order to balance its budget for the welfare of students.

12. Assistant Superintendent Johnson was responsible for implementation of the technical aspects of the layoff.

13. The County maintains a Seniority List which contains employees' seniority dates (first date of service), current assignment and salary. The current assignments are mostly abbreviations representing one of five employment categories, "S.E." [which stands for special education], "Home St." [which stands for home study], "Oppor." [which stands for opportunity], "Court" and "Music."

14. It is unclear whether the County circulated the seniority list in anticipation of issuing layoff notices as this fact was not established by the evidence.

15. Respondent's current assignment is designated as "Home St." However, he is not the most junior "Home St." teacher, according to the seniority list. There are two

individuals who are junior to respondent, Joanne Payer and Rebecca Hanson. According to the list, Payer and Hanson's date of hire was December 17, 2007.

Moreover, there are 15 other employees junior to respondent, according to the County's seniority list. While the bulk of these individuals are designated as "S.E.," one individual named "John Tade," is currently assigned to "Opportunity" and has a hire date of January 18, 2007.

16. According to the Assistant Superintendent, the County used the seniority list to develop a proposed layoff list of the least senior employees currently assigned in the various services being reduced. She further testified that the County identified the least senior teachers who could not teach other classes because they lacked the necessary credentials.

17. However, the Assistant Superintendent's testimony is contradicted by the County's own seniority list, which indicates that at least three individuals have seniority dates junior to respondent. These three individuals' credentials and employment status are unknown, and it is unclear why these individuals should be "skipped."

18. Accordingly, it was not established that the County's proposed layoff of respondent will satisfy the requirement that the County layoff individuals in the inverse order of seniority.

19. The County issued three layoff notices. Only respondent was identified at the hearing, so it is unclear who the other two individuals are, and whether they are junior or senior to respondent. Two teachers requested hearings. One of the layoff notices was rescinded due to "an error in determining her seniority." Only respondent, representing .40 FTE, remains.

DOES RESPONDENT REPRESENT THE .40 FTE "HOME-STUDY TEACHER POSITION" THE COUNTY SEEKS TO ELIMINATE?

20. Respondent maintains that he is not a "home-study teacher" as was identified in the Superintendent of Schools' Resolution No. 11.

21. Respondent is a retired teacher, who draws retirement benefits from the State Teacher Retirement System (STRS). Prior to his retirement, he worked for decades as a teacher.

22. Respondent is currently assigned to teach at William Finch Charter School, a County-operated high school. He was first hired in August 2005, and has held the position continuously since that time. When he was hired, the position was advertised as "High School Teacher-William Finch Charter School." The job announcement indicated that the responsibilities of the position include "teaching Algebra, Geometry and Math Lab *in a classroom setting for Junior/High School.*" [Emphasis added.] Since he was hired,

respondent has continuously taught Algebra, Geometry and Advance Math, and always in two classrooms located at the two William Finch Charter School locations in the County.

23. While other teachers assigned William Finch to go into homes, respondent has never done so. The teachers that go into the homes are "home-study teachers" according to respondent, because they meet with students on a bi-weekly basis in their homes to go over homework and to administer tests. Instruction for these students is provided by parents. In contrast, respondent testified that he is a regular high school teacher who provides instruction only in the classroom.

24. Ann Lambert was the former principal of William Finch Charter. She retired in August 2007. She hired respondent in 2005 as a classroom teacher. She testified that respondent was hired specifically to teach math courses at the charter school locations to meet State mathematics requirements which apply to all High School students, specifically, that they receive two years of high-school math.

25. Susan Zell McClelland Domenighini replaced Ann Lambert as William Finch Charter School's principal beginning in October 2007. She testified that the phrase "home-study" teacher applies to all William Finch teachers, whether they work at the school or go into the home. She testified that she believed that she could reassign respondent to go into homes, like the other teachers, whether he consents or not. Ms. Domenighini was not certain, however.

26. The County failed to establish that respondent represents the .40 FTE identified in the Superintendent's resolution. The Assistant Superintendent's recommendation to the Superintendent differentiates between "high school teachers" and "home-study teachers," and her testimony regarding what the Superintendent's resolution actually means was not persuasive. Respondent's testimony, mirrored by the Ann Lambert's, that he is a "high school teacher" as opposed to a "home-study teacher" was persuasive.

OTHER MATTERS

27. There was no evidence that the County's decision to eliminate .40 FTE of "home-study" teachers was arbitrary or capricious.

LEGAL CONCLUSIONS AND DISCUSSION

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met. While there were numerous errors related to the number of FTE positions reduced or eliminated, attachment of the wrong exhibit to the Accusation which was served on the respondent, and the lack of proof that the County circulated the seniority list, these errors were not prejudicial to respondent.

2. The anticipation of receiving less money from the state for the next school year is an appropriate basis for a reduction in services under section 44955. As stated in *San Jose Teachers Assn v. Allen* (1983) 144 Cal.App.3d 627, 638-639, the reduction of particular kinds of services on the basis of financial considerations is authorized under that section, and, "in fact, when adverse financial circumstances dictate a reduction in certificated staff, section 44955 is the only statutory authority available to school districts to effectuate that reduction." The County must be solvent to provide educational services, and cost savings are necessary to resolve its financial crisis. The Superintendent's decisions were a proper exercise of its discretion.

3. The services identified in the Superintendent's Resolution 13 are particular kinds of services that could be reduced or discontinued under section 44955. His decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of his discretion. Cause exists to reduce the number of certificated employees of the County due to the reduction and discontinuation of particular kinds of services. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949.

4. A 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* (1976) 64 Cal.App.3d 167, 178-179.)

5. The notice sent to respondent indicated the statutory basis for the reduction of services and, therefore, was sufficiently detailed to provide him with due process. (*San Jose Teachers Association v. Allen*, supra, 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) The description of services to be reduced, both in the Resolution and in the notices, adequately describe particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838; see, also, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

6. Nonetheless, as discussed in Factual Finding 26, it was not established that respondent represents the .40 FTE "Home-Study Teacher" that the County seeks to layoff.

7. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or 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.) 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 v. Governing Board*, supra, 116 Cal.App.3d 831.)

8. The County may deviate from terminating certificated employees in order of seniority, pursuant to Education Code section 44955, subdivision (d).¹ The County must prove that it has a specific need for personnel to teach a specific course and that certificated employees it seeks to retain have special training and experience necessary to teach that course of study, which others with more seniority do not possess. As determined in Factual Finding 18, it was not established that the County is laying off employees in the inverse order of seniority. There are at least three employees junior to respondent (not counting the numerous special education teachers) who teach at William Finch Charter School or "opportunity."

9. The County has not met this burden; it has not established that it has a specific need to retain all of the junior teachers it seeks to retain because they possess the special training and experience necessary to teach "Opportunity" or "Home-study."

10. The County argued that because respondent is a STRS retiree, he has no property right to his current position, and cannot challenge his layoff notice. The County cites Education Code section 242616.5, which describes limitations on compensation earned by STRS retirees.

11. Education Code section 24216.5 is not applicable to this proceeding. Education Code sections 44949 and 44955 apply to the instant proceeding and those sections require that respondent receive due process because he is either a permanent or probationary employee. Again, as determined in Factual Finding 10, the County waived the argument that respondent is a temporary employee.

12. Cause does not exist to layoff respondent.

¹ Education Code section 44955, subdivision (d) states:

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

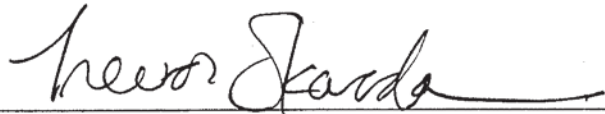
(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training 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.

ORDER

The Accusation against Phillip Dunning is dismissed.

DATED: May 1, 2008

A handwritten signature in cursive script, reading "Trevor Skarda", written over a horizontal line.

TREVOR SKARDA

Administrative Law Judge

Office of Administrative Hearings