

BEFORE THE GOVERNING BOARD OF THE
HAYWARD UNIFIED SCHOOL DISTRICT
COUNTY OF ALAMEDA, STATE OF CALIFORNIA

In the Matter of the Certificated Reduction
in Force, Hayward Unified School District;

Certain Certificated Employees,
(listed on Appendix A, attached)

Respondents.

OAH No. N2004020397

PROPOSED DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Hayward, California on April 28 and 29, 2004.

Karen M. Rezendes and Cynthia A. Schwerin, Attorneys at Law, Lozano Smith, 2000 Crow Canyon Place, Suite 200, San Ramon, California 94583, represented the Hayward Unified School District.

Dale Brodsky and Mandy G. Leigh, Attorneys at Law, Beeson, Tayer & Bodine, 1404 Franklin Street, Fifth Floor, Oakland, California 94612, represented those respondents listed on Appendix A in *bold italics*.

Except for Andrew Kevy, who was present and represented himself at the hearing on April 28, no appearance was made by or on behalf of any of the remaining respondents.

After the hearing, all exhibits not previously admitted were received in evidence by agreement of the parties. The matter was submitted on April 29, 2004.

FACTUAL FINDINGS

1. On February 25, 2004, the governing board of the Hayward Unified School District adopted Resolution No. 0304-21, in which the board resolved to reduce or discontinue specified particular kinds of services (PKS) for the 2004-2005 school year and directed the superintendent or his designee to send notice to certificated employees that their services would be terminated at the end of the 2003-2004 school year. A subsequent amendment added more positions to the list. As amended, the board resolved to reduce or discontinue the following services:

SERVICE**FULL TIME EQUIVALENT
POSITION/FTE****A. Administration**

Director – Elementary Education	1.0
Elementary Principal	1.0
Elementary Vice Principals	2.0
Vice Principal on Special Assignment	.5
Principals on Special Assignment	2.0
C.W.A. Supervisors	2.0
Coordinator – Latchkey	1.0
Manager – Y.E.P.	<u>1.0</u>

Total: 10.5**B. Instructional****Elementary**

K-3 Classroom Teachers	142.0
1-6 Preparation Teachers/7-8 Project School	62.0
K-8 Classroom Teachers	2.0
5-6 Music	1.5
Latchkey Teachers	14.5

Secondary

Math	6.5
English	6.5

Special Education

RSP Teachers	2.0
SDC Teachers (LH)	1.0
SDC Teachers (HI)	<u>3.0</u>

Total: 241.0**C. Teachers on Special Assignment**

Program Resource Teachers (PRT's)	16.0
Special Education Inclusion Specialist	1.0
Bilingual Education	1.0
District Librarian	1.0
TUPE & Drug-Free Program Coordinator	1.0
P.A.R. Teachers	3.0
Bilingual Resource Teachers	3.0
Language Resource Teacher	<u>1.0</u>

Total: 27.0**D. Student Services**

Counselors	7.2
Nurses	<u>3.75</u>

Total: 10.95**GRAND TOTAL: 289.45**

2. Before the date of the hearing, the board deleted from the service reduction list the categories of K-3 Classroom Teachers, 1-6 Preparation Teachers/7-8 Project School, Latchkey Teachers, and Nurses. Those categories totaled 222.25 FTE, reducing the number of positions still subject to reduction in this proceeding to 67.2.

3. The superintendent gave written notice to respondents that it had been recommended that notice be given them that their services would not be required for the 2004-2005 school year. Respondents are all deemed to have filed timely requests for hearing and notices of defense. The parties stipulated that all jurisdictional requirements of Education Code sections 44949 and 44955 have been met.

4. Respondents have challenged a number of the PKS reductions, arguing either that they are mandated by law and cannot be eliminated, or that the planned reductions in those services will preclude the district from being able to comply with state or federal mandates.

The 2.0 FTE reduction of CWA (Child Welfare and Attendance) Supervisors and the 3.0 FTE reduction of PAR (Peer Assistance and Review) Teachers will result in the elimination of those services in their current forms. Respondents contend that both are mandated by law and cannot, therefore, legally be eliminated. Education Code section 48240 states that the board of a school district "shall appoint a supervisor of attendance and such assistant supervisors of attendance as may be necessary to supervise the attendance of pupils in the district." However, section 48244 provides that a district may provide this service through a contract with the county office of education. A district is not, therefore, mandated to employ its own supervisors of attendance. Nor is a district mandated to create and operate a PAR program. Education Code section 44500 is permissive, providing only that a district "may develop and implement" such a program. The district intends to continue providing the kinds of support services now provided under PAR through the BTSA (Beginning Teacher Support and Assessment) program.

In February 2004, the California Department of Education completed a Coordinated Compliance Review in which the district was found to have 10 out-of-compliance items in its English Learners program. And a February 2004 evaluation of the district's special education programs by School Services of California found a number of problems with the district's maintaining compliant special education services. Respondents contend that the planned service reductions in the special education and bilingual program areas will only make it more difficult for the district to provide mandated services. That may or may not be the case. But it does not show that services will fall below any mandated levels. The district intends to meet all such service levels for the 2004-2005 school year.

5. As indicated above, the number of positions subject to reduction in this proceeding is 67.2 FTE. Yet 83 individuals remain as respondents. Respondents maintain that this "over-noticing" is an abuse of discretion. No abuse was shown. In some instances, individuals to be laid off share a seniority date with other employees who, by virtue of the application of tie-breaking criteria, will not be laid off. In other instances, more than one

employee may have been noticed for a single reduction because of the uncertainties of bumping rights. These are valid reasons for over-noticing respondents. The district is prepared to rescind the notices sent to all respondents who will not, in fact, be subject to layoff in this proceeding.

6. The district created a bumping chart as a tool for determining which certificated employees would be laid off as a result of the various service reductions. The number of employees shown on the chart as being subject to layoff is less than the number of service reductions because the district took into account certain positively assured attrition. In particular, the district considered the retirements or resignations of certificated employees serving in the targeted PKS areas. Each such retirement or resignation was deemed to create a vacancy, which meant that fewer respondents needed to be terminated. Respondents stipulated that the district had properly computed the number of retirements and resignations.

In addition to the retirements and resignations, 13 probationary employees were non-reelected. Michael Janvier, the district's director of certificated personnel, testified that these non-reelections would have been considered as attrition in the same manner as the retirements and resignations but for the fact that a grievance had been filed against the district concerning non-reelections. The district takes the position that until the grievance is resolved, it cannot be assured that the non-reelections will create vacant positions. The grievance, filed by six of the 13 non-reelected employees, alleges that "[t]he District violated the contract by discriminating against the grievants and releasing them through the non-reelect process." The district views this as a challenge to the non-reelection process itself, and therefore maintains that all non-reelections remain uncertain until the grievance is resolved. However, the evidence showed that the grievance is based upon alleged discrimination against the named grievants only and is not a challenge to the non-reelection process itself or to the non-reelection of the non-grievants. Therefore, the non-reelection of the remaining seven probationary employees created attrition that was as positively assured as that created by the retirements and resignations. To the extent those seven non-reelected employees serve in positions in which respondents are entitled to serve, the number of respondents who may be terminated in this proceeding must be reduced.

7. Janvier testified that the 6.5 FTE reductions in both math and English at the secondary level are due to the elimination of the 9th grade class size reduction program. Under that program, classes are limited to a maximum of 20 students. With the elimination of the program, class sizes can increase to the collective bargaining contract maximum of 29 students. Respondents assert that enrollment figures demonstrate that far fewer than 6.5 FTE reductions in each math and English will be necessary to implement this change. During the current school year, there are a total of 1662 9th graders at the district's three comprehensive high schools. At a student:teacher ratio of 20:1, slightly more than 83 sections of math and English must be staffed. Since a full-time teacher has six sections per day, this equates to 13.85 FTE in each discipline. If enrollment were to remain static (and evidence shows it is actually likely to increase because there are more 8th graders than 9th graders), staffing classrooms at a 29:1 ratio would require about 57 sections, or 9.55 FTE, in each discipline. This is 4.3 FTE less than the current year. Other figures presented by respondents show that

the district had only 73 sections of 9th grade English and 81 sections of 9th grade math during the current school year. (The reason why there were fewer sections than the enrollment would seem to require was not established.) Using these figures, respondents maintain that the service reduction required to increase class sizes to 29 students would actually be only 2.6 FTE in English and 3.95 in math. Whichever set of figures is used, respondents argue that the district has abused its discretion by cutting math and English more than is rendered necessary by the elimination of the class size reduction program. The district, citing *San Jose v. Allen*¹, argues that in a PKS reduction, a service cut need not be related to any statistical computation. Rather, "[t]he number of terminations made necessary by PKS reductions depends totally upon the district's decision as to how many services to reduce."²

The proposition stated by the district is generally true: PKS reductions need not be related to any statistical computation related to enrollment figures. But where a district explicitly states that the basis for a particular cut is related to student population numbers, then the reduction it proposes should be justified by a statistical computation. Here, the computation used by the district shows projected 9th grade enrollment of 1,361 in English and 1,314 in math. The district computation then shows that 12.74 "additional classrooms/teachers" are needed to operate the class size reduction program. It was apparently this figure that resulted in the proposed reductions of 6.5 FTE in each program. But no calculations were provided to show how this number was reached. Dividing these lower enrollment figures by 29 would result in a reduction in math of 6.3 FTE, but a reduction in English of only 4.5.

It is true that the enrollment figures and calculation methods used by respondents produce a lower needed service reduction than those used by the district. It is also true that even using the district's figures, the proposed English reduction is overstated by 2.0 FTE. But considering the impossibility of determining the most accurate calculation method and the relatively small difference produced, it cannot be found that the district abused its discretion in reducing math and English by 6.5 FTE each. The board would be well-advised, however, to carefully examine the district's calculations before finally determining how large a service reduction to make.

8. The district's bumping chart shows that respondent Anthony Delsener is being bumped from his 1.0 FTE position by senior employee Sharon Friedman. However, Friedman only occupies a 0.5 FTE position and is on leave for 0.5 FTE. The district stipulated that Delsener is therefore subject to layoff only for half of his full-time position.

9. Respondent Andrew Kevy has served as a CWA supervisor with the district since 1994. He was originally hired in a temporary position, and then into an administrative

¹ (1983) 144 Cal.App.3d 627.

² *Id.*, at p. 635.

position in 1995. He is classified on the seniority list as a permanent management employee. He has not been given a seniority date. Kevy seeks a seniority date of February 28, 1994.

Although he holds a Pupil Personnel Services credential that would allow him to work as a school counselor, Kevy has never been assigned to a school site. Under Education Code section 44956.5, for employees initially hired as administrators the time spent in an administrative position is not included for determining seniority for purposes of layoff, except that three years' seniority credit may be earned while serving as a school site administrator. Because Kevy was initially hired as an administrator and has never served at a school site, he is not entitled to the seniority date he seeks.

10. The district has classified certificated employees who are not fully credentialed, i.e., those serving under emergency permits or provisional or intern or pre-intern credentials, as "Prob 0" employees. Prob 0 employees are not included on the district's seniority list. A separate Prob 0 list is maintained, ranking those employees in order of their hire date. Regardless of their years of service, Prob 0 employees are considered junior to all fully-credentialed employees.

11. Respondent Jose Cantu is a Prob 0 employee with a hire date of January 29, 2001. Cantu teaches bilingual history classes at the English Language Center. His students are all recently-arrived immigrants and his classes are taught in Spanish. Cantu does not have any clear credentials. He holds an emergency single subject credential in social science. Cantu is currently working toward completing the requirements for a CLAD certificate. He expects to obtain that certificate in the fall. Until he receives it, he is ineligible to take the tests for a BCLAD certificate, which authorizes the teaching of bilingual classes.

According to the bumping chart, Melanie Morsy, a counselor whose position is being eliminated, is bumping Cantu. In addition to a counseling internship credential, Morsy holds a single subject credential in social science and a temporary CLAD certificate. Cantu contends Morsy is not competent to bump into his bilingual teaching position, and that he must therefore be retained.

That Morsy is shown bumping Cantu on the bumping chart does not necessarily mean that she will be serving in the same position in which he serves for the current school year. Under Education Code section 44955(c), the board is obligated to 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. Morsy has a full social science credential; Cantu has only an emergency credential. Morsy is entitled to be retained over Cantu. If Morsy is unable to teach the bilingual class in which Cantu now serves, and if that class will be offered next year, the district may have to make reassignments to cover it. But as the "least senior" remaining social science teacher, Cantu is subject to being bumped.

12. Respondent Evelyn Kunkel is a Prob 0 employee who teaches fine arts at Mt. Eden High School. She has an internship credential in art and is currently finishing the final three weeks of her credential program, after which she expects to receive her preliminary single subject credential. According to the bumping chart, Susan Olsen, a senior teacher whose Program Resource Teacher position is being eliminated, is bumping Kunkel. Olsen holds a multiple subject credential with a supplementary authorization for art in grades K-9. Because Kunkel's current assignment is to teach art in mixed classes that include 9th through 12th grade students, she asserts that Olsen is not credentialed to bump her. However, for the same reasons expressed in the preceding finding, Kunkel may be bumped by Olsen.

13. Respondent Soledad Padilla-Hernandez is a Prob 0 employee. She has been credited with a hire date of August 26, 2002. Padilla-Hernandez does not hold any clear credentials. She currently holds an internship credential and is in training for a BCLAD certificate. She was first hired by the district in October 1997 to teach a bilingual kindergarten class. For the following three school years, she taught a bilingual fourth grade class. All of these assignments appear to have been under emergency permits. In the 2001-2002 school year, Padilla-Hernandez initially taught as a long-term substitute under a 30-day substitute permit. She did substitute work for the remainder of the year, during which she worked fewer than 75% of the school days. She also received a stipend of some sort for extra duty services. In the 2002-2003 and 2003-2004 school years, Padilla-Hernandez was again hired to teach bilingual classes, once more with an emergency permit. She asserts she has never had a break in service with the district since 1997 and is therefore entitled to be credited with a hire date in October 1997.

The evidence shows Padilla-Hernandez did have a break in service when she worked as a substitute for fewer than 75% of the school days in the 2001-2002 school year. She is not entitled to a hire date any earlier than August 26, 2002.

14. All contentions made by respondents not specifically addressed above are found to be without merit and are rejected.

LEGAL CONCLUSIONS

1. Cause for the elimination of 67.2 FTE positions exists in accordance with Education Code sections 44949 and 44955. Except as set forth below, cause further exists to give respondents notice that their services will not be required for the 2004-2005 school year. This cause relates to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

2. As set forth in Finding 6, the non-reelection of seven probationary employees shall be considered as positively assured attrition used to reduce the number of respondents who may be terminated in this proceeding to the extent those non-reelected employees serve in positions in which respondents are entitled to serve.

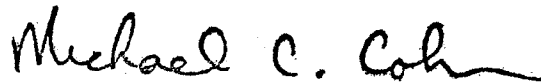
3. As set forth in Finding 8, respondent Anthony Delsener is subject to layoff only for a 0.5 FTE position.

4. The district shall rescind the layoff notices sent to all respondents who will not, in fact, be subject to layoff in this proceeding.

ORDER

Except as limited by Legal Conclusions 2, 3, and 4, notice may be given respondents that their services will not be required for the 2004-2005 school year.

DATED: May 5, 2005



MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings

APPENDIX A

List of Respondents

<u>LAST NAME</u>	<u>FIRST NAME</u>
1. ASHLEY	JANET
2. BACH	KATHRYN
3. BLACKSHIRE	SUBERIA
4. BOLLWEG-CLEARY	STEPHANIE
5. BOROVSKY	DAVID
6. CADILE	LINDSAY
7. CANIZALES	CLAUDIA
8. CANTU	JOSE
9. CASTILLO	JESSICA
10. CATO	KEVIN
11. CHALA-KUBITZ	ADELFA
12. CHANG	KELLY
13. CHENAULT	ADRIANA
14. CHOVNICK	AMY
15. CLARK	MATHEW
16. CROOM	KAHLELAH
17. CROSBY-YOUNG	YVONNE
18. DAILEY	ELIZABETH
19. DAILEY	MATTHEW
20. DELSENER	ANTHONY
21. DO	FLORENCE
22. ESCOBEDO	ROSA
23. FORMAN	MICHAEL
24. FREYRE	TRACEY
25. GILMETE	ADRIANA
26. GONSALVES	PAUL
27. GRIZZLE	DAVID
28. HAVEN	RYAN
29. HAYES	ANDREA
30. HODGES	PATRICIA
31. JENSEN	JENNESIS
32. JOHNSTON	KRISTINE
33. KANG	TOMMY
34. KELLOGG	COURTNEY
35. KEVY	ANDREW
36. KIM	SANDRA
37. KUDENOV	AMY

38. KUNKEL	EVELYN
39. LACEBAL-VALDEZ	MARIA
40. LAI	PAUL
41. LEISER-WILLIAMS	CARRIE
42. LONG	GIA
43. LOPEZ	LOURDES
44. MACIAS	ARSELIA
45. MAGALLON	ELIZABETH
46. MAGINNIS	SHELLEY
47. MARCONI	JOHN
48. MARES	MICHAEL
49. MARTIN	TERESA
50. MATTEIS	LAUREN
51. MC NEIL	DAMION
52. MITCHELL	TRACI
53. MORENO	FRANK
54. MUNKELT	JENNIFER
55. O'BRIEN	AARON
56. OLSON	PETER
57. PABLEY	HARRY
58. PADILLA-HERNANDEZ	SOLEDAD
59. PATRICK	PHILIP
60. PATTERSON	IRMA
61. PERDUE	WILLIAM
62. PINEDA	HILARY
63. PLAGMAN	CHANTEL
64. POINTER-DEWHIRST	MICHELE
65. RAMIREZ	BELINDA
66. REYES-RIVERA	MARIA ELENA
67. RILEY	CHRISTIAN
68. RODRIGUEZ	SONIA
69. ROSE	LORETTA
70. SHARUFA	SHERRY
71. SICKLER	JUDSON
72. SKIBBINS	HEATHER
73. SMITH	TERRY
74. SPARLING	JULIE
75. SUHOVA	TATYANA
76. TOFANELLI	CHRISTOPHER
77. TRAN-RAZZARI	NHUNG
78. VALDEZ	YVONNE
79. VAZQUEZ	DIANA

80. VON ESCH

81. WEST

82. WOODS

83. YACOUN

KERRY

CASEY

ROBERT

SABRINA