

BEFORE THE
BOARD OF EDUCATION OF THE
ESCONDIDO UNION SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of
Certain Employees of the Escondido Union
School District Identified in Appendix A.

OAH No. 2011020738

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Escondido, California, on April 1, 2011.

Dean T. Adams, Fagen Friedman & Fulfroost, LLP, represented the Escondido Union School District ("District").

Jon Vanderpool, Tosdal, Smith, Steiner & Wax, represented 26 of the Respondents listed in Appendix A, attached hereto and by this reference incorporated herein. Each Respondent is a certificated employee of the district.

No appearance was made by or on behalf of Respondents Diane Dewindt, Kelly Ewing, Lorena Kirk, Kim Klockenteger, Lena Morales, Francis Quiogue, Julie Schafer, Nancy Sotello, Kelly Thornton and Monica Trujillo.

Respondents Joseph Benson, Joseph Rota and Scott Soucy requested a hearing but did not appear and were not represented.

Before the hearing the Accusation served on Kristen Whitney was withdrawn and her lay-off notice rescinded. During the hearing the Accusation served on Monica Trujillo was withdrawn and her layoff notice rescinded.

The matter was submitted on April 1, 2011.

FACTUAL FINDINGS

1. Jennifer Walters, Superintendent, Escondido Union School District, made and filed the accusation in her official capacity.

2. Respondents are identified in Appendix A, attached hereto and by this reference are incorporated herein. Each respondent is a certificated employee of the District.

3. On March 7, 2011, the Governing Board of the Escondido Union School District adopted Resolution No. 2010-11-18 (“Resolution”), reducing particular kinds of services and directing the Superintendent to give appropriate notices to certificated employees whose positions would be affected by the action. The resolution identified 39.4 FTEs to be reduced.

4. The Resolution directed the District to use “criteria within Education Code section 44955, subdivision (d)” to “deviate from terminating certificated employees who may otherwise be terminated by order of seniority” as follows:

“Teachers of Felicita School constitute a special and specific need in this District and shall be considered for this purpose as personnel teaching a specific course or courses of study, and teachers teaching at Felicita have special training and experience necessary to teach the identified goals of Felicita School for purposes of Education Code section 44955, subdivision (d).”¹

5. Consistent with the Board’s Resolution, the District identified certificated employees for layoff. The decision to reduce or discontinue a particular kind of service is a matter reserved to the district’s discretion and is not subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.) A school district’s decision to reduce a particular kind of service must not be fraudulent, arbitrary or capricious. (*San Jose Teachers Association v. Allen* (1983) 144 Cal. App. 3d 627, 637.)

6. The District implemented a bump analysis to determine which employees could bump into a position held by a junior employee. 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, 473-474.) No evidence was introduced that the District had improperly “bumped” any employees.

¹ There is no legal requirement mandating that skipping criteria be contained in a governing board’s resolution.

7. The District considered attrition, resignations, retirements and requests for transfer 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.

8. On or before March 15, 2011, the District timely served on Respondents a written notice that the Superintendent had recommended that their services would be terminated at the close of the current school year. The reasons for the recommendation were set forth in these preliminary layoff notices.

9. An accusation was served on each respondent. All prehearing jurisdictional requirements were met.

10. The layoffs will not reduce any of the District's offerings in code mandated courses below the level required by law.

Tie-Breaking Issue

11. The District established tie-breaking criteria to determine the order of termination for those employees who shared the same seniority dates. The District used that criterion for a group of teachers who shared an August 23, 2006, seniority date. After considering all tie-breaking criteria, the District identified seven teachers for whom it was necessary to use a lottery to break the tie. The names of those seven teachers were entered into the lottery and four teachers² received lay-off notices.

12. During the hearing, the District determined that respondent Sylvia Garcia's seniority date was incorrect and should be August 23, 2006. This correction resulted in a determination that Sylvia Garcia should have been included in the lottery with the seven teachers. The parties stipulated that the names of the four teachers who lost the lottery and Sylvia Garcia's name would be entered in a new lottery and the name drawn would have their Accusation dismissed and lay-off notice rescinded. A lottery was performed and respondent Monica Trujillo's name was drawn. The District dismissed her Accusation and rescinded her lay-off notice.

Felicita School Skipping Issue

13. Education Code section 44955, subdivisions (b) and (c), set forth a general rule requiring school districts to retain senior employees over more junior employees and to retain permanent employees over temporary employees. Any exception to this general rule must be

² Those teachers were identified as respondents Veronica Carrillo, Kim Klockenteger, Alejandra Mendoza, and Monica Trujillo.

based on statute. Education Code section 44955, subdivision (d) provides:

“(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.”

14. Under Education Code section 44955, subdivision (d)(1), the District may skip a junior teacher being retained for specified reasons. (*Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 131.) Junior teachers may be given retention priority over senior teachers only if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.) A junior employee possessing special competence can be retained over a senior employee lacking such competence. (*Alexander v. Delano Joint Union High School District* (1983) 139 Cal.App.3d 567.) The Resolution skipped 13 certificated employees at Felicita School who were junior to respondents.

15. Deputy Superintendent Robert Leon testified that in March 2010, the California Department of Education (CDE) identified Felicita School as a “persistently lowest-achieving school,” a designation given to the lowest 5% of schools in California. When the CDE identifies a school as “persistently lowest achieving,” a school district must implement remedial measures to improve the school’s performance. CDE requires that a district implement one of four intervention models beginning the following school year.

16. At its May 12, 2010, meeting, the Board voted to implement the “Turnaround Model” as the model the District would use at Felicita School. That model required the District to replace the principal at Felicita School, rehire no more than 50 percent of the school’s staff, adopt a new governance structure, and implement an instructional program that was research based and vertically aligned from one grade to the next, as well as aligned with California’s adopted content standards.

17. Deputy Superintendent Robert Leon testified that Kathy Morris was hired as the new principal at Felicita School and about the remedial measures implemented at the school to comply with the CDE mandates. Leon testified that no respondent could bump a teacher at Felicita School because none had undergone the level of training or detailed kind of work that had been implemented at Felicita School. Leon testified that all staff at Felicita

School were being retained. On cross-examination Leon acknowledged that both the Administrative Regulation and the Board Policy pertaining to teacher qualifications applied to all employees in the District, regardless of their site assignment. Nothing in those documents contradicted Leon's testimony regarding the District's need to retain all staff at Felicita School.

18. Principal Kathy Morris testified about her hiring of new staff, the changes that have taken place at the school and the intense training her staff have undergone. Felicita School staff reported to school two weeks before other employees in the District to begin their training. She testified about the numerous nightly meetings her staff has with parents as they attempt to change the home and school environment. Principal Morris testified about the seven Foundational Principles that were created as part of the process of improving Felicita School. Principal Morris testified that the District has three years to improve the school or there will be adverse consequences, although no one has ever stated what those will be. The basis for understanding of the three year time frame is that the District's \$5.5 million grant from CDE was for three years, school years 2010-11, 2011-12, and 2012-13. Principal Morris testified that if the District's skip is not upheld, she will lose half of her staff which will negatively impact the changes that have taken place at Felicita School and will make it all but impossible to comply with the three year time frame that CDE has given the District to turn around Felicita School. On cross-examination Principal Morris acknowledged that six of her employees are temporary employees who are being released, but testified that she will be able to achieve her objectives with the current staff after those releases because of next year's expected decline in enrollment. Principal Morris also acknowledged that it was never publicly stated that if a teacher transferred to Felicita School they would be exempt from layoff.

19. The testimony of Deputy Superintendent Robert Leon and Principal Kathy Morris and the documents introduced at hearing established that unique training has been offered to teachers at Felicita School, training not offered elsewhere in the District; that Felicita School is the only school in the District designated as a "persistently lowest-achieving school;" that CDE has very stringent requirements the District must implement to improve student performance at Felicita School; that teachers at Felicita School have participated in a unique community outreach program; that Felicita School is the only school in the District under the auspices of a Turnaround Model; and that the needs of the District justified its decision to skip the certificated employees at Felicita School because of CDE's designation and attendant mandates.

20. Several Respondents whose seniority date was senior to teachers skipped at Felicita School alleged that they were certificated and competent to teach at Felicita School. They argued that they were able to perform the same services as the junior teachers skipped at Felicita School. However, no evidence was introduced that any of them have participated in the training and the programs that teachers at Felicita School have undergone, although some have participated in similar courses.

21. Respondent Karen Grissom is a teacher at Pioneer Elementary, a Program Improvement School. She testified that this is an important year for staff at Pioneer as they must maintain student scores in order to stay off the Program Improvement list. Grissom testified about the training she has attended and the collaboration with colleagues, similar to the staff at Felicita School. However, although much of that training was similar or equivalent, none of it was identical to the training and programs that Felicita School staff has attended.

22. Katrina Lieber is currently a teacher at Felicita School. She transferred there from Mission Middle School seeking a new challenge. She testified that at Felicita School she uses many of the techniques she previously employed at Mission Middle School. She identified many of the foundational principles at Felicita School as also being implemented at other schools, but conceded that Principle 7, Culture/School Environment, was unique to Felicita School. Lieber's testimony did not contradict that offered by the District's witnesses.

Other Issues

23. Respondent Lisa Elliott, R.N, is a school nurse within the meaning of Education Code section 49426. Ms. Elliott testified as to her belief that the District does not employ a sufficient number of school nurses to maintain fundamental school health services at a level that is adequate to accomplish the matters set forth in Education Code section 49427. Elliott testified in support of her opinion that the California average ratio is one school nurse for every 2,200 students, but the lay-off will result in the District's ratio being 1:6,044, ranking the District 49 out of 50 states surveyed. Elliott spoke with eloquence, sincerity, passion, and care in support of her opinion. However, the evidence presented did not establish that the District acted arbitrarily or capriciously with regard to its decision to reduce its school nurses by 1.0 FTE. Instead, the District's action constituted a proper exercise of its discretion.

24. The District skipped Michael De Neve, a teacher with a multiple subject credential, who is assigned to teach eighth grade math for the current school year. Official Notice was taken of the Board's Decision, OAH No. 2009020583, in which it found that "Effective July 1, 2007, pursuant to Board Resolution 2007-08-06, in accordance with Education Code section 44256, subdivision (b), 44258.2 or 44263, Mr. De Neve was authorized to teach math, a course outside of his major or minor. Further, Mr. De Neve has been deemed competent to teach math pursuant to the "HOUSSE" (High, Objective, Uniform State Standard of Evaluation) method by virtue of his five years prior experience in teaching that subject. Respondents have neither alleged nor presented evidence that Mr. De Neve does not have special training and experience necessary to teach math, which others with more seniority possess, or that for any other reason the skipping of Mr. De Neve was improper." No evidence was introduced that the District's decision to skip De Neve in this proceeding was improper.

25. The District skipped Carrie Toorop, a teacher at the Community Day School, an alternative learning center for students with discipline and/or behavior issues who are unable to attend a regular school setting. Toorop has undergone specialized training and possesses special experience to teach at Community Day School which respondents do not possess.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to sections 44949 and 44955, and all notices and other requirements of those sections have been provided as required.

2. 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.)

3. Because of the reduction of particular kinds of services, cause exists pursuant to Education Code section 44955 to give notice to respondents that their services will not be required for the 2011-2012 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949. The district has identified the certificated employees who are providing the particular kinds of services that the Governing Board directed be reduced or discontinued. It is recommended that the Governing Board give respondents notice before May 15, 2011, that their services will not be required by the District for the school year 2011-12.

4. A preponderance of the evidence sustained the charges set forth in the accusation.

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RECOMMENDATION

It is recommended that the governing board give notice to the respondents whose names are set forth below that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2011-2012 school year.

DATED: April 12, 2011

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings

Appendix A

1. BARBANI, ASA J
2. BENSON, JOSEPH
3. BLAKE, CHRISTY
4. BRINKLEY, MICHAEL
5. CARRILLO, VERONICA
6. CHRISTENSEN, KRISTINE B
7. CUNNINGHAM, CORY
8. DAVIS, CHRISTINE MARIE
9. DEWINDT, DIANE
10. DWYER, MICHAEL
11. ELLIOTT, LISA
12. ESCALONA, SARAH
13. EUSEBIO, OSCAR
14. EWING, KELLY
15. GARCIA, SILVIA
16. GILARDONE, CARRIE
17. GRISSOM, KAREN
18. HUDSON, BRIAN
19. KIRK, LORENA
20. KLOCKENTEGGER, KIM
21. MENDOZA, ALEJANDRA
22. MORALES, LENA
23. ONTIVEROS, KIMBERLY
24. ORTIZ, BRANDI
25. PARK, JULIE
26. PRESLEY, CHARLOTTE CAROLINE
27. QUIOGUE, FRANCIS
28. REYES, LAURA
29. ROBERTS, MARK
30. RODRIGUEZ, YADIRA
31. ROTA, JOSEPH
32. SANUDO-THOMAS, MIRIAM
33. SCHAFER, JULIE
34. SOTELO, NANCY
35. SOUCY, SCOTT
36. STEWARD, ROBERT
37. THORNTON, KELLY
38. VITTEK, VANESSA