

BEFORE THE  
GOVERNING BOARD OF THE  
KLAMATH-TRINITY JOINT UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against:

DENNIS DOIRON, SHERRI HICKS,

Respondents.

OAH No. N 2007030990

**PROPOSED DECISION**

On April 20, 2007, in Eureka, California, within the facilities of the Humboldt County Office of Education at 901 Myrtle Avenue, Eureka, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter.

Stephen L. Hartsell, Attorney at Law, of School and College Legal Services of California, 901 Myrtle Avenue, Eureka, California 95501-1219, represented Superintendent Douglas Oliveira.

Paul Hagan, Attorney at Law, of Bragg, Perlman, Russ, Stunich, Rudolph & Eads LLP, 434 Seventh Street, P. O. Box 1248, Eureka, CA 95502-1248, represented respondents Sherri Hicks and Dennis Doiron.

On April 20, 2007, the parties submitted the matter and the record closed.

**FACTUAL FINDINGS**

1. On April 6, 2007, in his official capacity, Douglas Oliveira, Superintendent (the Superintendent), Klamath-Trinity Joint Unified School District (the District), made and filed the Accusation regarding Respondents Sherri Hicks and Dennis Doiron (respondents).

2. Respondents are fully credentialed and certificated employees of the District. The District extends designation to each respondent as a permanent teacher.

3. On March 7, 2007, the Superintendent presented the District's Board of Trustees a recommendation that the District give notice that particular kinds of services (PKS), then offered through the District, be reduced or eliminated by the District for the ensuing school year (2007-2008).

4. On March 7, 2007, the District's Governing Board unanimously adopted Resolution number 2007-02.

The resolution recites that, pursuant to Education Code sections 44949 and 44955, it has become necessary for the District to reduce and/or to eliminate, no later than the beginning of the 2007-2008 school year, particular kinds of services in the form of 9.79 full time equivalent (FTE) certificated positions as follows:

3.0	FTE	Kindergarten to 5 <sup>th</sup> Grade Elementary Teaching positions;
1.4	FTE	Continuation High School Teacher
0.2	FTE	School Nurse
0.2	FTE	K-8 Music Teacher
0.5	FTE	Reading Specialist Teacher
0.7	FTE	Junior High Elective Wheel
0.34	FTE	Fine Arts
0.34	FTE	Keyboarding
0.17	FTE	Spanish
0.17	FTE	Leadership
0.17	FTE	Athletic Director
1.0	FTE	Elementary School Principal
0.5	FTE	Continuation High School Principal
1.0	FTE	Elementary School Assistant Principal
0.5	FTE	High School Assistant Principal

5. By individual letters, dated March 8, 2007, the District's Superintendent dispatched preliminary notices to a number of FTE position holders, including each respondent, that the District's Board of Trustees had an intention to reduce or to eliminate the particular service provided by each person who received the notice. Hence, due to the prospective elimination or reduction of the particular kind of service now rendered to the District, each of the respondents learned the District would not reemploy the named individuals in the certificated positions each had worked over the past school year.

Also the letter, dated March 8, 2007, which had attached to it the Board's resolution and other pertinent documents, conveyed to each respondent that no certificated employee of the District having less seniority than each respective respondent would be retained for the 2007-2008 school year to render a service that each respondent was credentialed and competent to render to students under the District's competency criteria.

6. The written preliminary notice to Respondents from the Superintendent and the Governing Board's resolution set out legally sufficient reasons of the District's Board's intent to eliminate the course as taught by respondents.

7. Respondents each timely requested in writing a hearing to determine whether or not cause exists for not reemploying each respondent for the ensuing school year.

8. The Superintendent timely served upon each respondent the Accusation, dated April 6, 2007, and related documents. Each respondent filed a timely notice of defense.

9. All pre-hearing jurisdictional requirements were met.

10. Douglas Oliveira, in his capacity as the Superintendent, appeared at the hearing. He provided credible and persuasive evidence.

The prospective elimination of particular kinds of services for the 2007-2008 school year directly results from a prospective shortfall in money for the District's budget. Also, the prospective elimination of particular kinds of service is due to the declining pupil census for the district for the ensuing school year. And, the District has found low enrollment of pupils in certain elective classes that were prescribed for reduction. Furthermore, the District lost a funding source from the Secure Rural Schools and Communities Act in an approximate amount of \$539,000. In order to partially aid the District in crafting a reasonable budget for the ensuing school year, the District's Superintendent recommended that certain certificated positions be eliminated due to lack of funds as well as lack of teachers' work within District schools.

11. The Superintendent further established that on learning that the District was required to initiate lay-off proceedings for teacher employees of the District, the Superintendent, with his staff, took reasonable and lawful steps to develop the District's seniority list for the District's teachers.

The Superintendent accurately attended to identifying the District's teachers who were properly designated as District teachers. He studied and set forth on the District's seniority list dates calculated as the hire dates or first date of paid service for each teacher of the District.

The Superintendent noted the teacher position held by Respondent Doiron would be adversely affected as follows: 0.2 FTE elimination of K-8 Music teacher position; part of the 0.7 elimination of Junior High School Elective Wheel teaching position; part of the 0.34 elimination of Fine Arts teacher position; and part of the 0.34 elimination of Keyboarding teacher position. The aggregate FTE eliminations that impact Respondent Doiron amount to time equal to 0.7 FTE of a teacher's position with the District.

The Superintendent noted the teacher position held by Ms. Hicks would be adversely affected as follows: part of the 0.34 elimination of Fine Arts teacher position; part of the 0.17 elimination of Leadership teacher position; and part of the 0.7 elimination of Junior High Elective Wheel teacher position. The aggregate FTE eliminations that impact Respondent Hicks amount to time equal to 0.5 FTE of a teacher's position with the District.

On March 8, 2007, the Superintendent caused to be delivered to teachers, who were affected by the Board's resolution, notices to affected permanent and probationary teachers that their services would not be needed by the District for the next school year.



12. The Superintendent identified that for the ensuing year District will retain Mike Wright to teach Health and Driver Education classes. Mr. Wright has a credential that includes a supplemental authorization of Health. Mr. Wright has a date of hire of August 31, 1995. For the current year, Mr. Wright holds an assistant principal administrator position with the District. As to seniority, he is junior on the seniority list to Respondent Doiron; however, Mr. Wright has a health credential to teach the courses that the District will retain him to hold.

*Respondents' Contentions and Arguments*

13. Respondents contend the District's action is procedurally defective and improper insofar as the prospective layoff of the subject credentialed employees does not fully account for seniority of those persons in light of the District's retention of credentialed employees who are being retained to teach subjects that are "outside the credentials" of those other teachers. Respondent Doiron proclaimed that even though he is a credentialed music teacher he could competently teach health classes, drivers' training classes, computer keyboarding and computer classes at the District high schools, which will be offered by the District for the ensuing school year. Respondent Doiron understood the principal of the high school, where he teaches, to indicate that Respondent Doiron would be considered for the positions that other credentialed employees are to teach next year, even though they do not hold credentials in the subject areas to which they are to be retained to teach. Respondent Hicks heard the principal of the high school, where she teaches, to suggest that Respondent Hicks might be retained to teach subjects that fall outside her English credential because probationary, less senior teachers are now assigned to teach those subjects, such as health and drivers' education. Also, she believes that a new class called Independent Studies may be created. And, Respondent Hicks noted that a colleague named Ms. Vicki Kurtz, (who holds a higher position on the seniority list than Ms. Hicks) may be assigned to teach a Physical Education class and hence will "free up" part of an English FTE so as to permit Respondent Hicks to hold onto a full teacher's position with the District.

Respondents further argue that the process that led to the lay-off proceedings could have been communicated to the affected teachers in a manner that would have caused less stress and diminished anxiety to be sustained by respondents.

Respondents' contentions and arguments are without merit and are rejected as bases to dismiss any aspect of the accusations.

## *Individual Respondents*

### *Dennis Doiron*

14. Respondent Dennis Doiron (Respondent Doiron) has a first date of paid service with the District as a probationary-one teacher as of August 30, 1990. He now holds a clear, single subject credential in music.

Respondent Doiron teaches at Hoopla Valley High School, where he instructs pupils during three-periods of keyboarding and a period of computer applications. He teaches the music portion of the 7<sup>th</sup>/8<sup>th</sup> grade Junior High School Elective Wheel. Also he teaches band and drama classes. In the past, Respondent Doiron has taught choir classes.

Respondent Doiron is affected by the District's prospective reduction of services by the loss of 0.7 FTE time, and commensurate salary, as a music teacher.

Respondent Doiron has 17 years of teaching experience at the high school to which he has been assigned as a music teacher. Only two other teachers have longer tenures at the subject high school than Respondent Doiron.

Respondent has been a teacher of drama. However, the District has not afforded him the opportunity to become a "highly qualified" drama teacher within the scope of the No Child Left Behind statute.

However, Respondent Doiron provided no competent evidence that the District has retained any teacher junior to him for which Mr. Doiron possesses a credential and is currently competent to teach. Nor did Respondent Doiron establish that the Superintendent committed a procedural error in the initiation of the lay-off action that adversely affects his teacher position with the District.

### *Sherri Hicks*

15. Respondent Sherri Hicks (Respondent Hicks) has a first date of paid service with the District as a probationary-one teacher as of August 27, 2003. She holds a clear, single-subject credential in English and a CLAD credential. (She understands that during the coming summer she will earn a Reading Certificate credential).

Respondent Hicks teaches at the high school, where she instructs pupils on subjects identified as: World Literature for eleventh and twelfth grade students; English One for ninth grade students; and English Two for tenth grade students. In past school years, Respondent Hicks has taught Composition classes, Journalism classes, and Reading Literacy classes.

Respondent Hicks is affected by the District's prospective reduction of services by the loss of 0.5 FTE time, and commensurate salary, as an English teacher

However, Respondent Hicks provided no competent evidence that the District has retained any teacher junior to her for which Ms. Hicks possesses a credential and is currently competent to teach. Nor did Respondent Hicks establish that the Superintendent committed a procedural error in the initiation of the lay-off action that adversely affects her teacher position with the District.

*District's Reasonable Basis to Proceed*

16. During the immediate past school year, the Board has found that the District faces a prospective budget shortfall in that the amount of funding from the State of California may be markedly reduced for the upcoming school year. Hence, the Board has determined that sufficient money is not available to operate the same number of teacher and administrator positions and programs during the ensuing school year so that the District must prospectively reduce or eliminate a number of FTE of particular kinds of services, including the positions held by respondents.

17. No competent and credible evidence establishes that as a result of the proposed elimination of the full time equivalent positions respectively held by respondents, the District will retain any teacher who is junior to respondents to perform services for which respondents have been certificated or found to be competent to teach in such FTE positions for the next school year.

18. The recommendation of the Superintendent and the Board's decision to eliminate or discontinue a total of 9.79 FTE positions, including the positions held by each respondent, were neither arbitrary nor capricious. Rather, the Superintendent's recommendation and the Board's decision were within the proper exercise of the District's discretion.

19. The District's proposed elimination or discontinuation of a number of FTE positions, including the positions respectively held by respondents, for the ensuing school year is related to the welfare of the District and its overall student population.

20. The Board determined that it will be necessary, due to the elimination of particular kinds of services, to decrease the number of teachers before the beginning of the next academic year. The Board lawfully directed the notification to respondents of the elimination of the certificated positions held by each respondent.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955.

2. The District provided all notices and other requirements of Education Code sections 44949 and 44955. This conclusion of law is made by reason of the matters set forth in Factual Findings 1 through 9, inclusive.



3. Evidence Code section 664 establishes a presumption that the action or official duties of a public entity, such as the District and its governing board, have been regularly performed. Respondents offer no evidence to rebut the presumption that the District has properly performed actions related to the procedures that seek the non-reemployment of respondents.

4. Respondent Hicks alludes to the concept of "inverse bumping" when she argued that the District may assign her fellow credentialed English teacher-Vicki Kurtz- to teach a Physical Education class so as to shift part of an English teaching position to Respondent Hicks. To refute Respondent Hicks, the superintendent cites *Duax v. Kern Community College Dist.*, (1987) 196 Cal.App.3d 555 . The *Duax* court said "what [the affected teacher] proposes is the reassignment of a senior employee, employee A, to a position held by a junior employee, employee B, to open up a position for [the affected teacher]. Clearly [the affected teacher] could "bump" employee B and just as clearly cannot "bump" employee A. [The affected teacher 's] proposal is known as "inverse bumping." [The affected teacher] cites no authority to support his argument that he has any inverse bumping rights. We conclude that [the controlling statutory provision] does not contemplate "inverse bumping rights." Such "rights" would allow a junior employee to affect the employment of senior employees, "bumping" them out of their classroom positions and compelling their transfers to other classrooms or other types of assignments. Respondent's obligation to make assignments and reassignments as provided in section [the controlling statutory provision] is limited to attempting to place an employee who would otherwise be terminated in a position being held by another employee with less seniority. (*Duax v. Kern Community College Distr.*, *supra*, 196 Cal.App.3d at pp. 568-569.) The argument by Respondent Hicks is not binding on the District.

Even though the District is retaining teachers to perform services that are "outside" the parameters of particular credentials held by the retained teachers the District acts in compliance with Education Code section 44256. That Education Code provision allows a school district's governing board to assign a teacher, with the consent of that person, to teach a subject that is not within the scope of the affected teacher's credential where the teacher has 12 undergraduate credit hours of study, or six graduate level credit hours of study. Such district action is wholly discretionary as the practice was designed by the Legislature to bestow flexibility upon small high schools in meeting certain needs, but, a district cannot be compelled to so act.

5. Board Resolution 2007-02, as adopted on March 7, 2007, stated that it was the Board's determination that it was necessary to reduce or eliminate particular kinds of services for the 2007-2008 school year. A decline in average daily attendance was not cited as a basis for eliminating 9.79 full-time equivalent certificated positions in the District's corps of teacher positions.

The preliminary layoff notice, dated March 8, 2007, stated that the reason for the notice was due to a decision "to reduce particular kinds of services in the District beginning

not later than at the commencement of the 2007-2008 school year. In the opinion of the Governing Board, it therefore will be necessary to decrease the number of full-time equivalent (FTE) certificated employees in the District." The preliminary notice did not mention a decline in average daily attendance.

Education Code section 44955, subdivision (b), authorizes a district's governing board to terminate the services of not more than a corresponding percentage of employees whenever in any school year the average daily attendance for all schools in the first six months has declined below the corresponding period of either of the previous school year or whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year.

Education Code section 44949, subdivision (a) requires that no later than March 15 and before an employee is given notice that his or her services will not be required for the ensuing year, the governing board and the employee will be given notice by the superintendent that it has been recommended that preliminary notices be given to employees and the reason for that recommendation.

The preliminary notice is intended to insure that affected employees are informed of the facts upon which they can reasonably assess the probability that they will not be reemployed. The preliminary notice must state the reasons for the recommendation. (*Karbach v. Bd. of Education* (1974) 39 Cal.App.3d 355)

A notice that specifies both grounds, that is PKS reduction/elimination and declining average daily attendance, is suspect. (See, *Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App. 3d 648.) And, where a notice specifies one of the two statutory reasons for a teacher layoff, a governing board may not later attempt to justify dismissal on the other ground. (*Karbach v. Bd. of Education, supra*, 39 Cal.App.3d 355<sup>1</sup>.)

A governing board's decision to reduce or eliminate particular kinds of services need not be tied to any statistical computation, such as a projected decline in the number of students in the affected district. The number of terminations by a PKS reduction of certificated employees depends entirely on the district's governing board's decision regarding how many, or which, services to reduce or to eliminate. It is wholly within the Board's discretion to determine the numbers by which the District will reduce a particular service. (*San Jose Teachers Assn. v. Allen, supra*, 144 Cal.App.3d 627.)

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<sup>1</sup> In *Karbach*, the governing board gave notice to probationary teachers that such employees would not be reemployed for the ensuing school year on the ground of a decline in average daily attendance. But, at the administrative adjudication hearing, the presiding officer allowed the board to present evidence justifying the decision to eliminate positions of the affected probationary teachers on the new theory of reduction in particular services. The Court of Appeal held that the governing board had no authority to terminate the teachers for any reason not specified in the original preliminary notice and that the proposed terminations on the ground of reduction in services were not valid.



The District's Governing Board did not propose layoffs for any reason not specified in the preliminary notice as sent to certificated employees. The projection of declining pupil attendance or enrollment, as offered in evidence by the superintendent, was one of a few reasons for consideration by that professional education administrator offered as the ground for teacher lay-off to the subject governing board for its decision to eliminate particular kinds of services. In this matter, the reduction of particular kinds of services was not a fraudulent, arbitrary or capricious action. (*Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796.)

The Klamath-Trinity Joint Unified School District Governing Board's decision to eliminate 9.79 F.T.E. positions for the 2007-2008 school (which may have been based in some measure on a projected decline in enrollment of pupils for the 2006-2007 school year) was a discretionary decision that constituted a valid basis for reduction in particular kinds of service under the Education Code.

6. Pursuant to Education Code sections 44949 and 44955 cause exists to give respondents notice of the discontinuation of full-time equivalent positions in the particular kinds of services rendered by respondents, by reason of the matters set out in Factual Findings 10 to 12 inclusive, 16 to 18 inclusive and 20.

7. The discontinuation of the subject particular kinds of service provided by each respondent relates solely to the welfare of the District and its students within the meaning of Education Code sections 44949 and 44955, by reason of the matters in Factual Finding 19.

#### ORDER

1. The Accusation served on each respondent is sustained.
2. Final notice may be given to Respondents Dennis Doiron and Sherri Hicks that their respective services will not be required for the 2007-2008 school year because of the reduction or discontinuance of the particular kinds of services by the District.

DATED: May 3, 2006

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PERRY O. JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings