

BEFORE THE GOVERNING BOARD
OF THE EMPIRE UNION SCHOOL DISTRICT
COUNTY OF STANISLAUS
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

OAH No. 2011040123

MIKE CARDOZA; MALIA
COLOMBO; KIMBERLY KIDD;
MONIQUE NEWTON; PAMELA
RENTZ; GIANNA SMITH, and
MATTHEW WEINHEIMER,

Respondents.

PROPOSED DECISION

Marilyn Anne Woollard, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 28, 2011, in Modesto, California.

Roman J. Munoz, Attorney at Law, Kronick, Moskovitz, Tiedemann & Girard, represented the Empire Union School District (District). Assistant Superintendent for Human Resources, Dr. Michael Gonzales, Ed. D., was present on the District's behalf.

Ernest Tuttle, IV, Attorney at Law, Law Offices of Ernest Tuttle, IV, represented all respondents.

Testimony was heard, documents were introduced, and the parties offered oral closing arguments. The record was then closed and the matter was submitted for decision on April 28, 2011.

FACTUAL FINDINGS

1. The District provides education to approximately 3,000 students in kindergarten through the eighth grade (K-8). It currently operates four K-6 elementary schools, one K-8 elementary school, and one middle school for seventh and eighth grade students.

2. Dr. Michael Gonzales is the District's Assistant Superintendent for Human Resources. His actions and those of the District's Governing Board (Board) were performed in their official capacities.

3. On March 10, 2011, Dr. Gonzales provided a written recommendation to the Board that notice be given to respondents that their services would not be required for the 2011 through 2012 school year, pursuant to Education Code sections 44949 and 44955.¹

4. In response to this recommendation, on March 10, 2011, the Board passed three resolutions: Resolution No. 185-031011 "Reduction and Elimination of Particular Kinds of Service for the 2011-2012 School Year" (PKS Resolution); Resolution No. 186-031011 "Establish Criteria for Order of Certificated Layoff and Reemployment Following Layoff for Employees with Equal Seniority" (Tie-Breaking Resolution); and Resolution No. 187-031011 "Regarding Definition of Competence for Assignments in the 2011-2012 School Year" (Competence Resolution).

5. Before March 15, 2011, Dr. Gonzales provided written notice to 13 certificated employees, including respondents, of his recommendation to the Board that their services would not be required for the 2011-2012 school year, as required by section 44949.

6. In response to this notice, respondents filed timely requests for hearing as required by section 44949, subdivision (b), to determine if there is cause for not reemploying them for the next academic year.

7. Six certificated employee failed to file a request for hearing: Luke Hibbard, Rya Hibbard, Stacie Macias, Tim Smart, Angelica Stanfield, and Roberta Torvend. Each of these employees waived his or her right to a hearing, and may be laid off by the District. (§ 44949, subd. (b).)

8. On April 7, 2011, Dr. Gonzales signed the Accusation against respondents, who are presently certificated permanent or probationary employees of the District. The Accusation requested that the Board be authorized to give respondents final notice that their services would not be required for the 2011-2012 school year, pursuant to sections 44949 and 44955. Respondents were served with the Accusation, the PKS, Tie-Breaking, and Competence Resolutions, blank Notice of Defense, and copies of relevant statutes and related documents.

9. On April 10, 2011, Mr. Tuttle filed a Notice of Defense on behalf of the respondents. The matter was then set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

¹Unless otherwise indicated, all statutory references are to the California Education Code.

10. All jurisdictional requirements have been met. Respondents do not contend that there are any procedural defects with the Board's notice of the reduction in force mandated by its PKS Resolution.

11. *Particular Kinds of Services:* Pursuant to PKS Resolution, the Board resolved to eliminate the following particular kinds of services, totaling 14 full time equivalent (FTE) positions, for the 2011-2012 school year:

Reduction of the K-8 Self Contained Teaching program,
resulting in the elimination of 11 FTE certificated teacher services.

Reduction of the Departmentalized Teaching Program,
resulting in the elimination of 2 FTE certificated teacher
services in Physical Education.

Reduction in the Counseling Program, resulting in the elimination
of 1 FTE certificated counselor.

12. No evidence or argument was presented that the services identified for reduction or elimination in the PKS Resolution are not appropriate services for this layoff proceeding. The services identified in the Board's Resolutions are particular kinds of services that may be reduced or discontinued.

13. *Competence Definition:* In its Competence Resolution, the Board established the following definition of "competence" for senior teachers affected by the reduction in force who wish to bump into a position held by a less senior employee.

Competence to provide a particular kind of service is defined as:

- (1) Holding a preliminary, professional clear, lifetime or other full credential in the subject matter which the employee intends to displace another employee.

As discussed below, respondents challenge the District's competence definition.

14. *District's Tie-Breaking Criteria:* In its Tie-Breaking Resolution, the Board adopted criteria to be used to break ties for permanent or probationary certificated employees sharing the same seniority date, as well as to establish the order of reappointment. Pursuant to this Resolution, if a tie between certificated employees still exists after considering all the listed criteria, "then seniority will be determined by a draw of numbers."

Dr. Gonzales testified that he had to apply the Tie-Breaking Resolution for three employees with a shared seniority date of August 26, 2002: Respondent Michael J. Cardoza, Beth A. King, and Anthony M. Monjure. Neither Ms. King nor Mr. Monjure was issued a preliminary layoff notice. After application of these criteria, Mr. Cardoza is considered to be

less senior than either Ms. King or Mr. Monjure. No evidence or argument was presented by Mr. Cardoza or other respondents challenging the Tie Breaking criteria or its application.

15. *District's Seniority List:* The District's seniority list was generated from data pertaining to certificated employees that is contained in its computerized position control system. Dr. Gonzales testified that, as in previous years, the District distributed its seniority list to each of its school sites and certificated employees. All employees either signed to indicate that the information contained in the seniority list was correct or provided current information. The seniority list was then finalized.

The seniority list was used by Dr. Gonzales and his staff to identify individuals subject to layoff. An "Implementation of Layoff Resolution-March 10, 2011" Chart (Chart) was developed. The Chart identifies which certificated employees are affected by the PKS reduction, either directly through the reduction or elimination of a particular kind of service or as a result of being displaced by a more senior employee. The Chart identifies the PKS being reduced, the name of the individual currently performing those services, their seniority date, status as permanent or probationary, credentials, and years of experience outside of the District. Individuals subject to layoff were identified in the inverse order of seniority after their seniority and credentials were considered in light of the PKS, Competence and Tie-Break Resolutions.

16. *Attrition:* As indicated in the PKS Resolution and in Dr. Gonzales's testimony, in determining which certificated employees were affected by the reduction in force, the Board considered all positively assured attrition, including all deaths, resignations, retirements, non-reelections, and other permanent vacancies for 2011-2012.

Bumping and the District's Competence Criteria

17. As set forth in section 44955, subdivisions (b) and (c), economic layoffs are generally to be carried out on the basis of seniority. A teacher with more seniority typically has greater rights to retain employment than a junior teacher. The District has an affirmative obligation to reassign senior teachers who are losing their positions into positions held by junior teachers if the senior teacher "*is certificated and competent*" to occupy such positions. (Italics supplied.) That displacement of a junior teacher is known as "bumping." The seniority rule is not absolute. A junior teacher with a needed credential or skills may be retained ("skipped") even if a more senior teacher is terminated. As described by section 44955, subdivision (d)(1), to depart from a seniority-based economic layoff the District must demonstrate "a specific need for personnel to teach a specific course or course of study... and that the certificated employee has special training and experience necessary to teach that course or course of study...which others with more seniority do not possess."

18. Dr. Gonzales testified that none of the certificated employees being laid off by the District has any displacement ("bumping") rights, after considering their relative seniority and credentials in light of the PKS, Competence and Tie-Break Resolutions.

19. *Competence Definition:* As previously indicated, the Competence Resolution requires that senior employees attempting to bump junior employees must hold “a preliminary, professional clear, lifetime or other full credential in the subject matter which the employee intends to displace another employee.” Dr. Gonzales explained that this definition of competence eliminates those senior employees who are seeking to bump into a position using their “supplementary authorizations” to teach a particular subject.

20. During the previous year’s reduction in force, the Board also defined competence in this manner, but added a second part to the definition. Specifically, for the 2010-2011 layoff, competence was further defined as: having “successfully taught one complete school year in the subject matter within the past ten school years, utilizing the full credential referenced above in #1.” In the Decision issued following a hearing for the 2010-2011 layoff, the District’s competence definition was determined not to be an abuse of discretion.

21. Respondents argue that the District’s definition of competence for bumping purposes is arbitrary and capricious. Respondents Malia Colombo and Pamela Rentz assert that the definition is arbitrary and capricious as applied to them. Using this definition, the District determined that Ms. Colombo and Ms. Rentz were unable to bump junior employees because they had supplementary authorizations to teach in the area they sought to bump into rather than full credentials. Respondents note that the competence definition is different from that approved last year because the District has removed the second prong, experience requirement. In respondents’ view, the District is invading the exclusive territory of the Commission on Teacher Credentialing by, in effect, collapsing the “certificated” and “competence” standards of section 44955, subdivision (b), and then stating that a Commission-approved supplementary authorization is not an appropriate certificate or credential.

22. *Malia Colombo* is a permanent employee with a seniority date of August 25, 2003. She is currently teaching second grade at Empire Elementary School. Ms. Colombo received a preliminary layoff notice as part of the 11 FTE reduction in the K-8 Self Contained Teaching program.

Ms. Colombo holds a multiple subject credential and a single subject math foundational credential, with a supplementary authorization in physical education (PE). Ms. Colombo was laid off for the 2010-2011 school year, while she was in the process of finalizing her PE supplementary authorization. During the 2010-2011 reduction in force hearing, Ms. Colombo was found not to be certificated or competent to bump into a PE position held by a less senior employee based on her failure to meet either component of the competency definition. Ms. Colombo’s supplementary authorization was completed after the hearing, in May 2010, and now authorizes her to teach PE up to the ninth grade. Once she takes and passes the California Subject Examination for Teachers (CSET), Ms. Colombo will be eligible for a single subject PE credential, which allows her to teach grades K through 12.

Ms. Colombo believes that certificated employees Karin Kreutzer and Miguel Gomez have less seniority than she does but are being retained in PE. Karin Kreutzer is a permanent employee with a seniority date of August 22, 2005. Miguel Gomez is a permanent employee with a seniority date of August 20, 2007. Both Ms. Kreutzer and Mr. Gomez hold single subject credentials in PE and are currently assigned to teach PE at Glick Middle School.

23. *Pamela Rentz* is a permanent employee with a seniority date of August 25, 2003, who currently teaches kindergarten at Capistrano Elementary School. She received a preliminary layoff notice as part of the 11 FTE reduction in the K-8 Self Contained Teaching program.

Ms. Rentz holds a multiple subject credential and a supplementary authorization to teach English. Ms. Rentz does not hold a single subject English credential. Rather than obtaining a full English credential, she chose to pursue a master's degree in cross-cultural education which she completed. Ms. Rentz's master's degree focuses on language development for English language learners and is in addition to her CLAD. Ms. Rentz has not been assigned to teach English using her supplementary authorization during the regular school year, but has taught summer school English in the sixth to eighth grades.

Ms. Rentz contends that she should be able to bump Javier Villanueva, based on her seniority. Javier Villanueva is a permanent employee with a seniority date of August 17, 2006, who is currently assigned to teach Language Arts at Glick Middle School. Mr. Villanueva holds a single subject English credential with an emphasis in cross cultural, language and academic development.

24. Dr. Gonzales agreed that a teacher with a supplementary authorization is "certificated" by the Commission to teach within the subject authorized and that the District has assigned many teachers to teach based solely on their supplementary authorizations rather than single subject credentials. The requirements for such authorizations are strictly a matter for the Commission working in conjunction with the universities who offer courses to satisfy these requirements.

Dr. Gonzales testified that the sole reason Ms. Colombo and Ms. Rentz could not bump into positions of junior employees was that there is a difference between a "full" credential and a "supplementary authorization." The situation where a district is growing and hiring is different from that of a layoff. In a direct hire situation, if the District needed to fill a position and the best person had a supplementary authorization, Dr. Gonzales would consider that in making a hiring decision. When the District is in the position of releasing employees, however, it needs to keep the most qualified employees.

Discussion

25. There is no dispute that certificated employees with supplementary authorizations appended to valid credentials are “certificated” by the Commission to teach the subjects so authorized.² It is also undisputed that District’s only reason for not allowing Ms. Colombo and Ms. Rentz to bump junior employees was that they did not possess “full” credentials to teach PE or English. Thus, Ms. Colombo is certificated to teach PE and has, respectively, two and four more years of seniority than Ms. Kreutzer and Mr. Gomez. Ms. Rentz is certificated to teach English and has three more years of seniority than Mr. Villanueva.

26. As discussed in Factual Finding 17, under section 44955, the District has an affirmative obligation to reassign senior teachers who are losing their jobs into positions held by junior teachers if the senior teacher “is certificated and competent” to occupy such positions. Section 44955 expresses a legislative intent to protect the seniority rights of certificated employees within the context of economic layoffs. Consequently, school districts may not erode the statute’s seniority protections by imposing unreasonable competence requirements on the ability of senior employees to bump into positions held by junior employees. Under the statute, a senior employee wishing to bump a junior employee must establish both that she holds the appropriate certificate for the position and that she is “competent.” Section 44955 does not define “competent”; however, from its use of the conjunctive, it is apparent that the term “competent” means more than merely holding the certificate necessary to teach a position held by a junior employee.

27. The courts have given school districts discretion to determine what constitutes “competence” for purpose of layoff and rehire. (*Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 299; *King v. Berkeley Unified School Dist.* (1979) 89 Cal.App.3d 1016, 1023.) In *Duax v. Kern Community College District* (1987) 196 Cal. App. 3d 555, 564, the court reexamined the meaning of the term “certificated and competent,” which it characterized as “a watershed inquiry.” The competence standard under review required one year of full-time experience teaching or providing service in the particular subject area within the last 10 years. The court concluded that “a board’s definition of competency is reasonable when it considers the skills and qualifications of the teacher threatened with layoff.” The court held the board’s competence standard was one “clearly relating to skills and qualifications to

² Education Code Section 44256 provides for supplementary authorizations to single subject and multiple subject credentials upon completion of 20 semester hours of coursework or 10 semester hours of upper division or graduate coursework approved by the commission at an accredited institution in the following areas: (a) for holders of single subject credentials, “in any subject commonly taught in grades 7 to 12, inclusive, other than the subject for which he or she is already certificated to teach,” and (b) for holders of a multiple subject teaching credential “in any subject commonly taught in grades 9 and below...” The course requirements for adding supplementary authorizations to multiple subject teaching credentials are further defined in California Code of Regulations, title 5, § 80057.5.

teach,” and did not too narrowly define competence. While “other factors might have been taken into consideration” and other competency standards “might have been imposed by the board, there is no mandate that the board do so.” (*Id.* at 567.)

28. In this case, the Board’s competence definition focuses solely on a particular type of credential beyond that which is required to teach the courses into which Ms. Colombo and Ms. Rentz seek to bump. There are no other “competence” requirements that relate to or consider the skills and qualifications of the teachers subject to layoff. The gist of Dr. Gonzales’s testimony was that the District wishes to retain the best qualified teachers. There is nothing wrong with that goal. However, this is contrary to section 44955’s clear mandate that senior teachers be retained wherever possible. This mandate is reiterated in subdivision (c), which imposes a duty on districts 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.”

29. The District’s concern with retaining the most qualified employees can be accommodated where employees have common seniority dates. In these situations, as expressly authorized in subdivision (b), the district may select tie-breaking criteria “solely on the basis of needs of the district and the students thereof.” In its current Tie-Breaking Resolution, for example, the District addressed its needs by the inclusion of these two criteria: “credentials that authorize instruction in two or more desired areas such as math, science, special education” (which would include supplementary authorizations) and “possession of a professional clear, preliminary, lifetime, or other full credential in a hard to staff subject area such as math or science” (which would exclude supplementary authorizations). As noted in Factual Finding 14, the Tie-Breaking Resolution was used to retain Beth King, a permanent employee with a seniority date of August 26, 2002, who holds a multiple subject credential with supplementary authorizations in math and science, and who has taught middle school math for the past two years, using her supplementary authorization in math.

30. As set forth in Factual Findings 25 through 28, application of the competence definition to prevent Ms. Colombo or Ms. Rentz from bumping into, respectively, a PE class and an English class would be arbitrary and capricious. The Accusations against these two respondents will be dismissed.

31. None of the other respondents testified or argued that they should have been able to bump less senior employees. None hold supplementary authorizations. The remaining respondents, their seniority dates and credentials are as follows:

Michael Cardoza	8/26/02	Multiple Subject
Kimberly Kidd	8/26/02	Multiple Subject
Monique Newton	7/23/08	Single Subject PE
Gianna Smith	8/26/02	Multiple Subject
Matthew Weinheimer	8/26/02	Multiple Subject

32. The Board's decision to reduce or discontinue the particular kinds of services identified in the PKS Resolution was not arbitrary or capricious, but constituted a proper exercise of discretion.

33. The reduction or discontinuation of particular kinds of services is related to the welfare of the District and its pupils.

34. Except as previously noted, no certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

LEGAL CONCLUSIONS

1. As set forth in Factual Findings 1 through 10, all notice and jurisdictional requirements set forth in sections 44944 and 44945 were met. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide them due process. (*San Jose Teachers Association v. Allen* (1983) 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 Board Resolutions 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.)

2. The Governing Board may reduce, discontinue or eliminate a particular kind of service and then provide the needed services to the students in another manner. (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571; *California Teachers Association v. Board of Trustees of Goleta Union School Dist.* (1982) 132 Cal.App.3d 32.) A school board may reduce services within the meaning of the 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.)

3. The services identified in the PKS/Conforming Resolutions are particular kinds of services that may be reduced or discontinued under sections 44949 and 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. 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. As set forth in the Factual Findings and Legal Conclusions as a whole, and particularly in Factual Findings 25 through 30, application the Competency Resolution against respondents Malia Colombo and Pamela Rentz would be arbitrary and capricious. The Accusations against them will be dismissed.

5. With the exceptions noted above and as set forth in the Factual Findings and Legal Conclusions as a whole, the District has established that no employees junior to respondents are being retained to perform the services which respondents are competent and certificated to render.

RECOMMENDATION

1. The Accusations against respondents Malia Colombo and Pamela Rentz are dismissed. The District shall rescind the preliminary notices serve upon them.

2. The District may give notice to the remaining respondents that it will not require their services for the 2011-2012 school year. Notice shall be given in inverse order of seniority.

DATED: May 6, 2011

MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings