

BEFORE THE
BOARD OF TRUSTEES
WOODVILLE UNION SCHOOL DISTRICT
COUNTY OF TULARE
STATE OF CALIFORNIA

In the Matter of the Layoff of:

Rosie Alton and other certificated employees
of the Woodville Union School District,

Respondents.

OAH Case No. 2013030601

PROPOSED DECISION

Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 18, 2013, in Porterville, California.

Carol L. Laird, Deputy County Counsel, Tulare County, represented Dagoberto Garcia (Garcia), Superintendent of the Woodville Union School District (District).

Joshua F. Richtel, Attorney at Law, represented Rosie Alton (Alton), Bridgette Celata (Celata), Melinda DeCoito (DeCoito), Kaile Timmons (Timmons), and Lisa Wilsey (Wilsey), collectively referred to as Respondents.

The District has decided to reduce or discontinue certain educational services and has given Respondents notice of its intent not to reemploy them for the 2013-2014 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2013-2014 school year.

Oral and documentary evidence was presented at the hearing. The record was left open for the submission of closing argument. Opening briefs were received on April 22, 2013, and have been marked as Exhibits 12 (District) and D (Respondents). Reply briefs were received on April 24, 2013 (District) and April 25, 2013 (Respondents), and have been marked as Exhibits 13 and E, respectively. The matter was submitted for decision on April 25, 2013.

FACTUAL FINDINGS

1. Superintendent Garcia filed the Accusation in his official capacity.

2. Respondents are certificated employees of the District.
3. On February 2, 2013, the Board of Trustees of the District (Governing Board) adopted Resolution Number 02-12-13-05, reducing or discontinuing eight full-time equivalent (FTE) positions in elementary classroom instruction services for the 2013-2014 school year.
4. On February 12, 2013, Superintendent Garcia provided written notice to the Governing Board that he recommended the termination of Respondents' services for the 2013-2014 school year due to the reduction of particular kinds of services.
5. On February 14, 2013, the District provided notice to Respondents that their services will not be required for the 2013-2014 school year due to the reduction of particular kinds of services. Respondents filed timely requests for hearing.
6. On March 8, 2013, the District filed and served the Accusation and other required documents on Respondents. Respondents thereafter timely filed notices of defense, seeking a determination of whether cause exists for not reemploying them for the 2013-2014 school year.
7. All prehearing jurisdictional requirements have been met.
8. The services set forth in factual finding number 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.¹
9. The Governing Board took action to reduce the services set forth in factual finding number 3 primarily because of an anticipated reduction in State funding. The District has been losing students and the revenue provided by the State of California to provide instruction to students. The District has been withdrawing money from the reserve fund over the past two years to cover the revenue shortfall. The District anticipates that the trend of fewer students will continue in the next school year, and that its revenue shortfall will reach \$750,000. The decision to reduce or discontinue the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.
10. The reduction of services set forth in factual finding number 3, given the anticipated reduction in State funding, is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

¹ All further references are to the Education Code.

11. The District provided notice of layoff to eight individuals, Respondents and three others. It did not adopt criteria to determine seniority among employees who first rendered paid service in a probationary position on the same date (tie-breaking criteria) because it was not necessary to determine relative seniority for the purpose of determining who would be subject to layoff. With the exception of two junior individuals retained to render services for which Respondents are not certificated or competent to render, the eight individuals selected for layoff are the District's most junior employees.

12. The District provides instruction through eighth grade in a single school. Respondents, as well as three other individuals who did not request a hearing, Jesus Hernandez (J. Hernandez), Maria Hernandez (M. Hernandez), and Marisa Sanders (Sanders), hold multiple subject credentials and teach at the elementary school in self-contained classrooms. All have authorizations to teach English Learner students. The seniority dates of the laid off certificated employees are as follows: August 15, 2005 (Alton and Wilsey); August 6, 2006 (Celata and DeCoito); August 6, 2007 (J. Hernandez and Timmons); August 3, 2010 (Sanders); and August 8, 2011 (M. Hernandez).

13. The reduction in certificated employees will result in larger class sizes and in additional classes containing more than one grade.

14. a. Despite the reduction in services, the District anticipates that it will have three new certificated positions for the 2013-2014 school year. These positions are the Academic Literacy/Intervention Resource Teacher, the English Language Learners Resource Teacher, and the Migrant Resource Teacher, and were created to support the remaining certificated employees.

b. The positions were posted for certificated employees to apply. All require a multiple subject teaching credential. Teaching experience in academic intervention is desired for the Academic Literacy/Intervention Resource Teacher. Teaching experience is required for the English Language Learners Resource teacher. "A deep understanding of Migrant Students, their parents and the community" is listed as the experience required for the Migrant Resource Teacher position. All eight laid off certificated employees are certificated and competent to fill the three positions.

c. The District anticipates funding the new positions from funding from other sources specifically designated for the services at issue, often referred to as categorical funding, or from other restricted funding. The District is specifically seeking categorical funding for the Migrant Resource Teacher, which has not been finalized. The District plans to offer the positions as temporary ones, although the job announcements do not indicate that the

positions will be filled on a temporary basis or that they will be funded from special or temporary program funds.

15. Three individuals applied for the vacant positions, J. Hernandez, M. Hernandez, and Sanders. J. Hernandez and M. Hernandez are related to two Governing Board members. Respondents did not apply for the position. Interviews were held on April 13, 2013, and hiring decisions have not been made.

16. After Respondents were given notice of layoff, the District received notice of one resignation and of one retirement, both of which are effective June 1, 2013. Superintendent Garcia did not rescind any layoff notices and does not plan to because these vacancies provide additional savings.

17. The District did not retain any certificated employee junior to any Respondent to render a service which any Respondent is certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 7.

2. The services listed in factual finding number 3 are determined to be particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 3 and 8.

3. Cause exists under sections 44949 and 44955 for the reduction of the particular kinds of services set forth in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 17.

4. The number of certificated employees to be given final layoff notice depends on the service reductions. As Section 44955, subdivision (b) states, "[w]hen a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . and when in the opinion of the governing board of the district it shall become necessary to decrease the number of permanent employees of the district, the governing board may terminate the services of not more than a *corresponding percentage of the certificated employees* of the district, permanent as well as probationary, at the close of the school year. . . ." (Emphasis added.) In this case, the Governing Board has reduced or discontinued particular kinds of services that account for eight FTE positions. Because of the two resignations, only six additional reductions need to occur to achieve the intended eight FTE reductions. Cause, therefore, does not exist to terminate the services of the two most senior certificated employees, namely, Respondents Alton and Wilsey.

5. Section 44955, subdivision (c), requires: “The governing board shall 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. . . .” Respondents argue that an additional three vacancies exist by virtue of the newly created certificated positions, and rely on *Wellbaum v. Oakdale Joint Union High School District* (1977) 70 Cal.App.3d 93 (*Wellbaum*) for the proposition that reassignment to the new positions can be made in layoff proceedings. The District argues that these are new positions that it plans to fill on a temporary basis. Respondents may qualify for such temporary positions, but such matters are to be resolved in connection with preferential hiring proceedings pursuant to section 44956, which is not the subject of the instant proceeding. In its view, to allow Respondents the opportunity to be reassigned to the temporary position will require that they maintain their existing status in the new positions and will deprive the District of the flexibility afforded by section 44909.

In *Wellbaum*, a teacher was given notice that her services would not be required for the following school year because of a reduction in foreign language services. On April 30, 1974, one day after the governing board had adopted a proposed decision upholding her layoff, the teacher obtained a credential that allowed her to teach English. She promptly notified the district of her qualifications, and demanded to be hired. The district denied her request since as a probationary employee she did not have preferential rehire rights.² An English teacher was laid off in the same layoff proceeding as the teacher in question, and, in addition, the district received notice that one teacher was retiring and that another was resigning. The district thereafter advertised for and hired three new English teachers. The court held “[t]hat the board’s duty to reassign [under the quoted portion of the predecessor to section 44955, subdivision (c)] arises when it becomes aware of voluntarily vacated positions for the ensuing year and that the position does not as of the time have to be technically vacant. . . .” (*Wellbaum*, supra, 70 Cal.App.3d 93, at p. 99.) The District distinguishes *Wellbaum* as involving vacancies, not new positions created for the following school year.

The reasoning of *Wellbaum* is persuasive and applicable to new positions available for reassignment on the following year, whether they arise from vacancies in existing positions or from new positions. Neither *Wellbaum* nor section 44955, subdivision (c), the successor of the section it construed, makes a distinction regarding the duty to reassign as between vacancies or other new openings. As the court pointed out, a district’s focus is on the staffing needed to provide services during the following year. There is no reasonable basis to restrict the broad language of the statute as the District seeks. Accordingly, three new positions are available for

² At the time, the preferential rehire statute, section 13448, which was the predecessor to 44956, did not provide for preferential rehire rights for probationary employees. The statute has since been amended so that probationary employees have the same preferential rehire rights as permanent employees following an economic layoff.

Respondents to fill for the 2013-2014 school year and the District must make the necessary assignments and reassignments for Respondents to be able to fill them.

6. The District nevertheless argues that reassignment into what are expected to be temporary categorically funded positions will deprive it of the flexibility afforded by section 44909. The statute provides, in its entirety: “The governing board of any school district may employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted under contract with public or private agencies, or categorically funded projects which are not required by federal or state statutes.

“The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the governing board and such agreement shall be reduced to writing. Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of the district by which he is employed are maintained and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications. Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees other than Section 44918.

“Whenever any certificated employee in the regular educational program is assigned to a categorically funded project not required by federal or state statute and the district employs an additional credentialed person to replace that certificated employee, the replacement certificated employee shall be subject to the provisions of Section 44918.

“This section shall not be construed to apply to any regularly credentialed employee who has been employed in the regular educational programs of the school district as a probationary employee before being subsequently assigned to any one of these programs.”

In *Stockton Teachers Association v. Stockton Unified School District* (2012) 204 Cal.App.4th 446, the court noted that the purpose of section 44909 was to allow districts some flexibility in staffing specially funded projects and concluded that in certain circumstances new employees could be hired on a temporary basis.

The District argues that if Respondents are reassigned as permanent employees into the new categorically funded positions, then they would not be subject to termination pursuant to section 44909 and the District would lose the flexibility afforded by the statute. However, this

argument is disposed of by the plain language of the statute. The penultimate paragraph makes clear that a permanent employee may be assigned to a categorically funded program and that the District may “backfill” the permanent employee’s position with a temporary employee. The last paragraph permits the permanent employee to retain protections afforded by his/her regular employment, but such protections do not turn an otherwise temporary position into a permanent one or deprive the District of its flexibility to backfill the permanent position with temporary employees. As the statute contemplates, a permanent employee has the opportunity to return to his/her prior position, but if, as in the case of Respondents, there is no position available the District cannot be forced to create one for the employee terminated in accordance with section 44909.³

7. Courts have held that teachers subject to layoff pursuant to sections 44949 and 44955 may not bump into categorically funded positions because the grounds for terminating each class of employees is different. (See, *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal. App.3d 831, 849-850; *Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 180). However, these cases are distinguishable because Respondents do not seek to bump anyone already hired to work in a categorically-funded program. Rather, they seek to be retained for vacancies to which their seniority and qualifications entitle them.

8. The next two senior certificated employees are Respondents Celata and DeCoito, and cause does not exist to terminate their employment should they choose to accept two of the new positions. The third position will go to either J. Hernandez or Respondent Timmons, who share a seniority date of August 6, 2007, and who are the next most senior employees. Inasmuch as no tie-breaking criteria were created or used during the initial determination to lay off the eight teachers at issue, the District will be given the opportunity to select and apply tiebreaking criteria pursuant to the requirements of section 44955, subdivision (b).

9. Cause does not exist to terminate the services of Respondents Alton, Celata, Decoito, Wilsey and either J. Hernandez or Respondent Timmons because they are certificated and competent to render services in the vacant positions and they are senior to other employees who were also given layoff notices, by reason of factual finding numbers 1 through 17 and legal conclusion numbers 1 through 8.

10. Cause exists to terminate the services of either J. Hernandez or Respondent Timmons, and Sanders and M. Hernandez for the 2013-2014 school year, by reason of factual finding numbers 1 through 17 and legal conclusion numbers 1 through 8.

³ As the District correctly points out, another statutory provision permits laid off employees to occupy a temporary position while a permanent one is unavailable, as section 44956 gives employees on a preferential hiring list the option to fill temporary substitute positions.

ORDER

1. The Accusation is sustained in part, and the District may notify either J. Hernandez or Respondent Timmons, and Sanders and M. Hernandez that their services will not be needed during the 2013-2014 school year due to the reduction of particular kinds of services.

2. The Accusation is dismissed against Respondents Alton, Celata, DeCoito, Wilsey and either J. Hernandez or Respondent Timmons.

DATED: _____

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings