

BEFORE THE
GOVERNING BOARD
LAKE TAHOE UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

CINDY PASTORE-WALKER, CHERYL
WILLIAMS, RENE NEWARD, GEOFF
BLACHMAN, CRYSTAL DENNIS,
KATRINA SANFORD, SUSAN
McALLISTER, MARGARET WHITFIELD,
JESUS CORTES-ACOSTA, VIVIAN
RIDER, RHONDA RIGGS, JENNIFER
DALY, H. ROBERT COMLOSSY,
CONNIE LaCROIX, DEBORAH
CENTANNI, DENISE PRESTON,
KRISTIN WILSON, ELIZABETH BRYAN,
NANCY COLE, ROBIN HALL, KAREN
NIGHSWONGER, NANCY DALTON,
NANNETTE NIVEN, TISHA SIEMS,
BETH MICHELLE BOTTO, SABRINA
ZALLES, GEORGE ALLISTER,
JENNIFER SEELY-HAMBURG, AMBER
STEPHEN, GINI GUNSCH, WENDY
GANSBERG-SMALLEY, LINDA
WYSONG and LAURA CURATOLO.

Respondents.

OAH No. N2004030062

PROPOSED DECISION

On April 8, 2004, in South Lake Tahoe, California, Leonard L. Scott, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Allen R. Vinson, Attorney at Law, represented the Lake Tahoe Unified School District (School District).

Lesley Beth Curtis, Attorney at Law, represented respondents.

In addition, Vivian Rider, Connie LaCroix, Nancy Cole, Elizabeth Bryan, H. Robert Comlossy, Kristin Wilson, Wendy Gansberg-Smalley, Geoff Blachman and Crystal Dennis represented themselves in the limited areas where they had conflicts with other teachers.

Evidence was received, the record was closed and the matter was submitted.

FACTUAL FINDINGS

1. The parties stipulated that:
 - a. On or before March 15, 2004, Dr. Diane Scheerhorn (Dr. Scheerhorn), Superintendent of the School District (Superintendent), served written notices on respondents that pursuant to Resolution of the Governing Board of the School District their services would not be required for the ensuing school year and set forth the reasons therefor, as required by Education Code sections 44949 and 44955.
 - b. Respondents timely filed Requests for Hearing [pursuant to Education Code section 44949(b)].
 - c. The Superintendent had the Accusation timely served upon respondents. (Dr. Scheerhorn acted in her official capacity in making, signing and serving the Accusation.)
 - d. Respondents timely signed and served their Notice of Defense [pursuant to Education Code section 44949(c)(1) and Government Code section 11506].
2. Respondents are certificated employees of the School District.
3. On February 10, 2004, the Superintendent sent a written recommendation to the Governing Board for the reduction of particular kinds of services for the ensuing school year. She made the recommendation solely for the welfare of the schools and the pupils of the School District.
4. On February 10, 2004, the Governing Board found that there had been a decline in average daily attendance during the first 6 months of the current school year and that it was necessary, in the best interests of the School District and the students, to reduce particular kinds of services. As a result, the Governing Board adopted Resolution No. 2003/04-14 reducing particular kinds of services by 42.3 full-time equivalent certificated positions at the end of the 2003-2004 school year. The Governing Board acted pursuant to the requirements of Education Code section 44955. And pursuant to the requirements of

Education Code sections 44949 and 44955, the Governing Board instructed the Superintendent to give Notices of Recommendation Not to Re-Employ to the affected certificated employees (teachers).

On February 24, 2004, the Governing Board reconsidered the matter and again found that there had been a decline in average daily attendance (ADA) during the first 6 months of the current school year and that it was necessary, in the best interests of the School District and the students, to reduce particular kinds of services. As a result, the Governing Board adopted Amended Resolution No. 2003/04-14 reducing particular kinds of services by 42.3 full-time equivalent (FTE) certificated positions at the end of the 2003-2004 school year. The Governing Board acted pursuant to the requirements of Education Code section 44955. And pursuant to the requirements of Education Code sections 44949 and 44955, the Governing Board instructed the Superintendent to give Notices of Recommendation Not to Re-Employ to the affected certificated employees.

The certificated positions to be reduced or discontinued are as follows:

Preschool Special Education Teacher.....	0.5 FTE
K-5 Self-contained Classroom Teachers	33.0 FTE
K-5 Elementary Title I Teachers	1.5 FTE
K-5 Resource Specialist Teacher.....	0.5 FTE
Grades 6-8 Offerings	
6 th Grade Teacher.....	1.0 FTE
Opportunity Class Teacher	1.0 FTE
Special Day Class Teacher	1.0 FTE
Grades 9-12 Offerings	
Physical Science Teacher	0.2 FTE
English (1-2) Teacher	0.2 FTE
English (3-4) Teacher	0.2 FTE
9 th Grade Fundamentals of Algebra Teacher.....	0.2 FTE
Computer Literacy Teacher	0.2 FTE
Independent Study Teacher	0.8 FTE
Mount Tallac Teacher.....	1.0 FTE
Elementary Principal	1.0 FTE

5. At the commencement of the hearing, the parties stipulated that the School District would withdraw the Accusation against a number of respondents, with the agreement that the remaining respondents with the same first date of paid service would not contest the placement of those former respondents above the remaining respondents on the seniority list. With that agreement, the Accusation was withdrawn in the amounts shown against:

- a. Lisa Irving-Peterson, # 228 on Seniority List, 0.8 of 1.0 FTE;
- b. Nannette Niven (Nivens), # 201 on Seniority List, 0.8 of 1.0 FTE;

- c. Nancy Dalton, # 249 on Seniority List, 0.8 of 1.0 FTE;
- d. Beth Botto, # 204 on Seniority List, 0.6 of 1.0 FTE;
- e. George Allister, # 234 on Seniority List, 1.0 FTE;
- f. Susan McAlister, # 180 on Seniority List, 1.0 FTE;
- g. Cheryl Williams, # 185 on Seniority List, 1.0 FTE;
- h. Tisha Siems, # 256 on Seniority List, 1.0 FTE;

These withdrawals total 7.0 FTE certificated positions, which thereby reduce the total number subject to the layoff from 42.3 FTE to 35.3 FTE certificated positions.

Later in the hearing, the parties stipulated that the School District had over noticed the layoff by 0.4 FTE positions but had not determined who was affected. The School District will rescind (withdraw) 0.4 FTE of the Accusation against the most senior respondent who is credentialed and competent to teach the class. This stipulation reduced the layoff from 35.3 FTE to 34.9 FTE certificated positions.

During the hearing, it was discovered that three certificated staff members had turned in notices of retirement in early March of 2004 and those retirements had been accepted by the Governing Board on March 9, 2004. As a result, the parties stipulated that the School District would rescind (withdraw) the Accusations against the three most senior respondents who are credentialed and competent to teach the classes taught by the retirees. Two of the positions are in self-contained classes and the other is an 8th grade history and elective position. This stipulation reduced the proposed layoff from 34.9 FTE to 31.9 FTE certificated positions.

6. With the above change the School District has considered all positively assured attrition when determining which teachers will be laid off due to the reduction in particular kinds of services and the decline in average daily attendance. The decline in average daily attendance causes a decline in revenues, so the School District needs to reduce the certificated staff (teachers) because of the decline in revenues.

7. The reduction in particular kinds of services will not cause those services to fall below the level necessary to provide such services to the students nor will the reduction violate any mandate regarding the provision of such services.

8. The Governing Board adopted Resolution No. 2003/04-12 and created a system to break ties among certificated staff (teachers) with the same first date of paid service. The Governing Board acted within its discretion in creating the tie breaking criteria.

After soliciting input from the teachers regarding: their first date of paid service; their credentials; their graduate hours, advanced degrees and specialized training; their bilingual skills; their years of teaching experience; and their assistance with extracurricular activities, the School District applied the tie breaking criteria to those with the same first date of paid service to determine their individual ranking and thus created a seniority list on which it noted all of the above information. The application of the tie breaking criteria was fair and appropriate.

To determine which teachers would be affected by the lay off, the School District first bumped those teachers in temporary or provisional positions, then worked its way up the seniority list.

9. Beth Delacour, the School District's Director of Human Resources, testified that it has been the School District's practice to bring appropriately credentialed teachers off the rehire list to temporarily fill the positions of those on leaves of absence.

10. The reduction of particular kinds of services is for the welfare of the schools and the pupils, and is the sole cause for not re-employing respondents. The particular kinds of services can be reduced under Education Code section 44955. The Governing Board's decision to reduce the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

11. With the changes noted above, especially in Factual Finding number 5, no permanent or probationary certificated employee junior to respondents is being retained to perform a service which respondents are credentialed and competent to render. Those certificated employees junior to respondents being retained will provide services which respondents are not certificated and competent to perform.

LEGAL CONCLUSIONS

1. Education Code section 44949 provides:

(a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

Until the employee has requested a hearing as provided in subdivision (b) or has waived his or her right to a hearing, the notice and the reasons therefor shall be confidential and shall not be divulged by any person, except as may be necessary in the performance of duties.

However, the violation of this requirement of confidentiality, in and of itself, shall not in any manner be construed as affecting the validity of any hearing conducted pursuant to this section.

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. A request for a hearing shall be in writing and shall be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified in that subdivision, which shall not be less than seven days after the date on which the notice is served upon the employee. If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

(2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefor within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section as may be necessary to effectuate this section.

(d) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee.

(e) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Section 11524 of the Government Code, the dates prescribed in subdivision (c) which occur on or after the date of granting the continuance and the date prescribed in subdivision (c) of Section 44955 which occurs after the date of granting the continuance shall be extended for a period of time equal to the continuance.

2. Education Code section 44955 provides in relevant part:

(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in 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. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render. In computing a decline in average daily attendance for purposes of this section for a newly formed or reorganized school district, each school of the district shall be deemed to have been a school of the newly formed or reorganized district for both of the two previous school years.

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the

group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year. 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. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(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.

3. In the course of reducing or discontinuing a particular kind of service, the Governing Board may retain certificated employees junior to respondents to perform services which respondents are not certificated and competent to render, see *Moreland Teachers Ass'n v. Kurze* (1980) 167 Cal.Rptr. 343, 109 Cal.App.3d 648.

4. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of those sections have been met.

5. Cause exists for the reduction of the particular kinds of services and for the reduction of 31.9 full-time equivalent certificated positions at the end of the 2003-2004 school year pursuant to Education Code sections 44949 and 44955. Therefore, cause exists pursuant to Education Code sections 44949 and 44955 to give notice to the affected respondents that their services will not be required for the ensuing school year, 2004-2005.

ORDER

Notice shall be given to respondents in 31.9 full-time equivalent certificated positions at the end of the 2003-2004 school year that their services will not be required for the ensuing 2004-2005 school year because of the reduction in the particular kinds of services.

Notice shall be given in the inverse order of seniority

Dated:

April 16, 2004



LEONARD L. SCOTT

Administrative Law Judge

Office of Administrative Hearings