

BEFORE THE
GOVERNING BOARD OF THE
CLOVERDALE UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

LEANN HENRIE, MARY-ELIZABETH
KELLY, JANEL MORRIS, GINA ROMAN,
EDITH SANCHEZ-CARDENAS, REBECCA
VOELKEL AND DEBRA WHITE,

Respondents.

OAH No. N2005030696

PROPOSED DECISION

Administrative Law Judge Cheryl R. Tompkin, State of California, Office of Administrative Hearings heard this matter on April 27, 2005, in Cloverdale, California.

Margaret M. Merchat, Associate General Counsel, School and College Legal Services, 5350 Skylane Boulevard, Santa Rosa, California 95403 represented the Cloverdale Unified School District.

James D. Allen, Attorney at Law, 726 College Avenue, Santa Rosa, California 95404 represented respondents.

The matter was submitted on April 27, 2005.

FACTUAL FINDINGS

1. Claudia Rosatti made and filed the Accusation against respondents in her official capacity as the Superintendent (Superintendent) of the Cloverdale Unified School District (District).
2. Respondents LeAnn Henrie, Mary-Elizabeth "Maribeth" Kelly, Janel Morris, Gina Roman, Edith Sanchez-Cardenas, Rebecca Voelkel and Debra White are all certificated employees of District.¹

¹ Suzanne Charles Engelkel and Marisol Hernandez were also served with layoff notices but did not request a hearing and therefore have waived their right to a hearing.

3. On March 9, 2005, the Superintendent recommended to the Board of Trustees of District that the following particular kinds of services be reduced or discontinued for the 2005-2006 school year:

Title I Elementary Instructional Services grades K-3	2.0 F.T.E.
Elementary Instructional Services prep period coverage	
4 th -6 th grade (.40 F.T.E. P.E. 4 th -6 th grade and	
1.4 F.T.E. Science 4 th -6 th grade)	1.8 F.T.E.
Independent Study Instructional Services	1.0 F.T.E.
Transitional Opportunity Program (TOPS) Instructional	
Services-9 th grade	1.0 F.T.E.
Language Arts/Social Studies (LASS) 7 th /8 th grade	.40 F.T.E.
Physical Education 7 th /8 th grade	.20 F.T.E.
Conversational Spanish 7 th /8 th grade	.20 F.T.E.
Yearbook Elective 7 th /8 th grade	.20 F.T.E.
Physical Education 9 th -12 th grade	<u>.20 F.T.E.</u>
Total	7.0 F.T.E.

The Superintendent proposed a total reduction of seven full-time positions.²

4. On March 9, 2005, the Board of Trustees of District adopted a resolution finding it was necessary to terminate certain employees due to a reduction or discontinuance of the particular kinds of services for the 2005-2006 school year. The resolution authorized the Superintendent to initiate and pursue procedures necessary to not reemploy the equivalent of seven full time equivalent certificated employees of District.

5. On March 11, 2005, the Superintendent gave written notice to respondents, pursuant to Education Code sections 44949 and 44955, of her recommendation that notice be given them that their services would not be required for the ensuing school year. The written notice set forth the reasons for the recommendation.

6. Respondents each made a timely request in writing for a hearing to determine if cause existed for not reemploying them for the 2005-2006 school year.

7. All prehearing jurisdictional requirements have been met.

² At hearing the Superintendent testified that the District is in "dire financial straits." She noted that District has filed a qualified budget and that District's budget for the 2005-2006 school year will be \$300,000 less than the budget for the current school year. Due to District's financial condition, it was determined that a reduction in particular kinds of services was necessary for the upcoming 2005-2006 school year

8. At hearing District withdrew the Accusation against Gina Roman, Edith Sanchez-Cadenas, Rebecca Voelkel and Debra White, all of whom will be retained for the 2005-2006 school year.

9. The Board of Trustees of District has approved criteria for determining the order of layoff of employees having the same first date of paid service. Under the system adopted, more points are awarded to employees holding a BCLAD³ certificate than are awarded to employees holding a CLAD⁴ certificate.

Respondent LeAnn Henrie holds a Multiple Subject Clear Teaching Credential for grades K-12, with CLAD, a Single Subject Credential in English and a Supplemental Authorization in English. District currently employs Henrie as a 1.0 F.T.E. teacher. District has assigned Henrie a seniority date of August 29, 2001. Henrie is being bumped by a more senior employee due to elimination of the 1.0 F.T.E. Independent Study Instructional Services position for grades K through 12.

Henrie has the same seniority date as Jeffrey McCoy, who holds a Multiple Subject Teaching Credential for grades K-12, with BCLAD. McCoy currently teaches English language classes (i.e., primary language instruction) at District's high school. McCoy is listed as senior to Henrie because he has a BCLAD certificate. Henrie contends there is no difference between a BCLAD certificate and a CLAD certificate, and therefore District failed to make a fair assessment of seniority as between her and McCoy.

10. Education Code section 44955, subdivision (b) provides in pertinent part: "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 the needs of the district and students thereof." Section 44955 clearly gives school districts discretion in establishing tiebreak criteria. The exercise of that discretion will be upheld if the criteria established are based upon a good faith evaluation of the needs of the district and its students and is evenly applied. (See *Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 854-855.)

In this case the evidence shows that District engaged in an evaluation of its needs and then established and consistently applied objective written tiebreak criteria. District's interpretation and application of its tiebreak criteria included awarding more points for a BCLAD certificate, which requires fluency in a second language and authorizes the holder to provide primary language instruction to non-English speakers, than for a CLAD certificate, which simply authorizes the holder to provide instruction to English Language Learners. There is no evidence that District's tiebreak criteria was established and applied other than in good faith; therefore the tiebreak criteria and its application must be upheld.

³ Bilingual-Crosscultural, Language and Academic Development.

⁴ Crosscultural, Language and Academic Development.

It is also worth noting that Henrie's CLAD certificate does not qualify her to teach the classes McCoy is currently teaching, which require BCLAD certification. Therefore, even if Henrie were found to be senior to McCoy, she would not be qualified to teach his class.

11. Henrie's Multiple Subject Clear Teaching Credential authorizes her to teach a self-contained class in grades K-12, and her Supplemental Authorization in English authorizes her to teach English in grades seven through nine.

Respondent Janel Morris holds similar credentials. Morris holds a Multiple Subject Clear Teaching Credential for grades K-12, with CLAD, a Single Subject Credential in Physical Education and a Supplemental Authorization in English. The Supplemental Authorization in English authorizes her to teach English in grades seven through nine. District currently employs Morris as a 1.0 F.T.E. teacher. District has assigned Morris a seniority date of August 27, 2002. Morris received a 1.0 F.T.E. layoff notice, which represents 0.4 F.T.E. of the 4th through 6th grade science position that is being eliminated, the 0.40 F.T.E. 7th/8th grade language arts/social studies position that is being eliminated and the 0.20 F.T.E. 7th/8th grade yearbook elective position that is being eliminated. Morris either teaches the eliminated classes or is being bumped from her position by a more senior employee.

Wendy Conner holds a Single Subject Credential in Social Science, with CLAD, and a Supplemental Authorization in Literature and Introductory English. District currently employs Conner as a 0.60 F.T.E. social studies teacher. Conner is less senior than both Henrie and Morris. Conner has been retained by District to teach social studies and English.

Both Morris and Henrie concede that they are not credentialed to teach a departmentalized social studies class; therefore neither is qualified to teach the social studies class currently taught by Conner. However, both contend that they are credentialed and qualified to teach any high school class or English class that Conner is qualified to teach. At hearing District conceded that if it retains Conner to teach a high school class, it will also have to retain Henrie. However, District asserts the high school schedule has not yet been set.

12. When laying off an employee who is certificated to perform services provided by a junior employee, the burden of proof is on the district to establish that the senior employee is not competent to perform those services. (*Davis v. Gray* (1938) 29 Cal.App.2d 403, 408; *Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, 566-567.) District cannot meet that burden. It concedes that Henrie is qualified to teach any high school class Conner is qualified to teach. Henrie's credentials also authorize her to teach any English class Conner is qualified to teach. Accordingly, if Conner is retained to teach a high school class or an English class, Henrie, as the most senior qualified employee noticed for layoff, must also be retained for an equivalent F.T.E. position.

13. Respondent Mary-Elizabeth Kelly holds a Single Subject Physical Education Credential. District currently employs Kelly as a 1.0 F.T.E. physical education teacher at

Cloverdale High School and Washington Middle School. District has assigned Kelly a seniority date of August 28, 1997. Kelly received a 0.8 layoff notice, which represents the 0.40 F.T.E. reduction in physical education services in grades 4 through 6, the 0.20 F.T.E. reduction in physical education services in grades 7 and 8, and the 0.20 F.T.E. reduction in physical education services in grades 9 through 12.

Kelly testified that the size of the physical education classes that she teaches ranges from 28 to 40 students. Her sixth grade class this year is larger than her eighth grade class, therefore Kelly expects there to be a continuing need for her services. Kelly questions whether District will be able to meet the mandated level of physical education services if she is laid off.

District has retained four employees senior to Kelly who are qualified to provide physical education services. It therefore expects to be able to provide the mandated level of services. Moreover, it must be presumed that District will perform its official duties and comply with legislative mandates. If District finds it difficult to provide mandatory services next year, it has the option of changing the manner or method of offering the service. (*Campbell v. Abbot* (1978) 76 Cal.App.3d 796; *Gallup v. Loma School Dist.* (1996) 41 Cal.App.4th 1571.)

14. Keith Bergman holds a Single Subject Physical Education Credential and Supplemental Authorizations in Introductory General Science and Introductory Health Science. He also holds a Certificate of Completion of Staff Development. District currently employs Bergman as a 1.0 F.T.E. teacher. Bergman teaches sports medicine under District's health curriculum. District has assigned Bergman a seniority date of August 28, 2000.

Marsha Bailey-Henning holds a Single Subject Physical Education Credential, a Clear Adapted Physical Education Special Credential, a Clear Special Instruction Credential in Special Education Authorization: Severely Handicapped, and a Clear Resource Specialist Certificate of Competence. District currently employs Bailey-Henning as a 1.0 F.T.E. teacher. Bailey-Henning teaches adaptive physical education. District has assigned Bailey-Henning a seniority date of September 2, 2003.

Both Bergman and Bailey-Henning are less senior than respondent Kelly. Kelly argues she must be retained if either Bergman or Bailey-Henning is retained to provide physical education services. Although Bergman holds a physical education credential, he is not currently teaching physical education. He is teaching sports education under a special credential, which Kelly does not possess. Kelly is therefore not qualified to bump into Bergman's position.

Bailey-Henning is teaching adaptive physical education, which requires a special credential. Kelly does not possess the necessary special credential. Kelly is therefore not qualified to bump into Bailey-Henning's position. Neither Bergman nor Bailey-Henning is being retained to provide services that Kelly is credentialed and qualified to provide.

15. Citing *Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, respondents next contend that District acted arbitrarily and abused its discretion by failing to consider all positively assured attrition. District admits that when it issued preliminary layoff notices it did not consider the resignation of Michelle Frankel, a 0.40 F.T.E. probationary employee who gave notice of her resignation prior to March 15, 2005. However, District maintains it was not required to consider Frankel's resignation because it had not occurred and therefore was not assured prior to March 15, 2005. District also asserts respondents' argument is moot since District has now considered all assured attrition, as evidenced by District's withdrawal of notices equivalent to 2.4 F.T.E. positions (i.e., withdrawal of the Accusation against Gina Roman, Edith Sanchez-Cadenas, Rebecca Voelkel and Debra White) on the day of hearing.

In *Moreland Teachers Association v. Kurze*, *supra*, 109 Cal.App.3d 648, 654, the court held that a school district had to consider all positively assured attrition when calculating the number of employees to be laid off. The court explained that this required the school district to consider assured attrition occurring prior to issuance of the March 15, preliminary layoff notices, as well as "actual attrition occurring between March 15 and May 15," the date of final layoff notices. District's actions in this case were consistent with the requirements *Moreland Teachers Association v. Kurze*. Although District did not consider Frankel's resignation (which was not assured prior to March 15, 2005) during its initial calculation of the number of employees to be laid off, as of the date of the hearing District had considered all assured attrition. It is therefore found that respondents have not been prejudiced by any failure of District to consider Frankel's resignation prior to issuance of preliminary layoff notices.

16. The evidence established that the District will be reducing services for the ensuing school year.

17. No certificated employee junior to any respondent is being retained to perform services which any respondent is certificated and competent to render.

18. The reduction or discontinuance of services is related to the welfare of the District and its pupils.

LEGAL CONCLUSIONS

1. Each of the services set forth in Finding 3 is a kind which may be reduced or discontinued in accordance with applicable statutes and case law. (See Ed. Code § 44955; *Campbell v. Abbo*, *supra*, 76 Cal.App.3d 796; *Degener v. Governing Bd.* (1977) 67 Cal.App.3d 689.) The decision to reduce or discontinue the services is neither arbitrary nor capricious but rather a proper exercise of the District's discretion.

2. Cause exists for termination of 7.0 full-time equivalent positions as a result of the reduction or discontinuance of particular kinds of services pursuant to Education Code

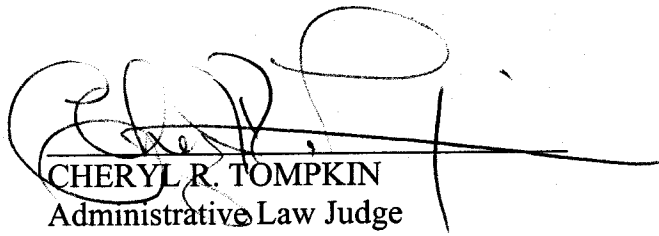
section 44955. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

3. By reason of the matters set forth in Finding 12 notice may not be given to respondent LeAnn Henry for any portion of a F.T.E. position that Wendy Conner is retained to teach which Henrie is also credentialed and qualified to teach.

ORDER

Notice may be given to respondents that their services will not be required for the 2005-2006 school year, except that notice shall not be given to respondent LeAnn Henry for any portion of a F.T.E. position that Wendy Conner is retained to teach which Henrie is also credentialed and qualified to teach.

DATED: May 6, 2005



CHERYL R. TOMPKIN
Administrative Law Judge
Office of Administrative Hearings