

BEFORE THE GOVERNING BOARD OF THE
SHASTA UNION HIGH SCHOOL DISTRICT
COUNTY OF SHASTA
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE SHASTA UNION
HIGH SCHOOL DISTRICT,

Respondents.

OAH No. 2010031422

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California, heard this matter in Redding, California at the District Office of the Shasta Union High School District on April 26, 2010.

Dana Reginato, Associate Superintendent, appeared as the representative of the Shasta Union High School District (District). The District was represented by Roman J. Muñoz, Attorney at Law, of Kronick, Moskovitz, Tiedemann & Girard, Attorneys at Law.

Certificated teacher respondents named in Attachment A were represented by Donald Selke, Attorney at Law, and Karen Smith, Attorney at Law, Law Office of Donald Selke.

Evidence was received, the hearing was closed, and the matter was submitted for decision on April 26, 2010.

FACTUAL FINDINGS

1. All respondents are, and at all times relevant to this Decision were, certificated permanent or probationary employees of the District.

2. On or just before March 9, 2010, in accordance with Education Code section 44949 and 44955, Dana Reginato, Associate Superintendent of the District (Associate Superintendent) notified the Governing Board of the District (Board) in writing of her recommendation that certain particular kinds of services (PKS) would have to be reduced or eliminated for the upcoming school year. The Associate Superintendent's recommendation specified the PKS to be reduced or eliminated, as set forth below. The Associate

Superintendent also notified the Board that a corresponding number of certificated employees of the District, would have to be laid off to effectuate the PKS reduction or elimination. The Associate Superintendent notified the Board that respondents had been identified as persons to whom notice should be given that their services would not be required for the ensuing school year. The recommendation that respondents' services for the District would not be required for the upcoming school year was not related to their skills, abilities or competencies as teachers.

REDUCTIONS/ELIMINATIONS OF PARTICULAR KINDS OF SERVICES

3. The Board adopted Resolution No. 10-072 on March 9, 2010. The Board resolved to follow the Associate Superintendent's recommendation to reduce 20.10 FTE PKS. The Resolution authorized and directed the District Superintendent or designee to give notice to a corresponding number of certificated employees of the District that their services would not be required for the upcoming school year in order to effectuate the reduction. The Resolution authorized the elimination of the following services now offered in the District:

PARTICULAR KINDS OF SERVICES (PKS) TO BE REDUCED OR ELIMINATED AT CLOSE OF 2010/2011 SCHOOL YEAR¹

5 Days from Assistant Principal Work Year – 6 employees reduced from 219 days to 214 days.²

3.00 Full Time Equivalent Administrative Interns
2.00 Full Time Equivalent ROTC Instructors
0.60 Full Time Equivalent Work Experience Instructor
3.00 Full Time Equivalent English Instructor
3.00 Full Time Equivalent Math Instructor
1.00 Full Time Equivalent Construction Instructor
1.00 Full Time Equivalent Agriculture Instructor
1.00 Full Time Equivalent Art Instructor
1.00 Full Time Equivalent French Teacher
1.00 Full Time Equivalent Music/Voice Instructor
2.00 Full Time Equivalent Social Science Instructor
0.70 Full Time Equivalent Speech Therapist
0.20 Full Time Equivalent Russian Instructor
0.60 Full Time Equivalent – Student Activity Instructor

TOTAL: 20.10 FTE (not including Assistant Principal reduction)

¹ Copied verbatim from the Resolution.

² In addition to FTE reductions in PKS, the Board approved a reduction in the number of days to be worked by six assistant principals, by reducing each assistant principal's employment contract by five work days.

4. The Associate Superintendent caused each of the respondents listed in Attachment A to this Decision to be served with a written Notice of Intention to Dismiss (preliminary notice of layoff) on or before March 15, 2010. The written preliminary notices of layoff advised each respondent that his or her services would not be required for the upcoming school year. The preliminary notice set forth the reasons for the Associate Superintendent's recommendation and the Board's action.

5. All respondents timely filed Requests for Hearing in response to receipt of preliminary notice of layoff.

ACCUSATIONS

6. The Associate Superintendent made and filed the Accusations in her official capacity.

7. The District timely served Accusations on each respondent identified in Exhibit A, each of whom had timely filed a Request for a Hearing with the District. Each respondent timely filed a Notice of Defense to the Accusation.

8. Notice of the date, time and place of the evidentiary hearing was timely served on all respondents and counsel. All respondents appeared at the evidentiary hearing.

JURISDICTION

9. All prehearing jurisdictional requirements were met. Jurisdiction exists for this matter.

10. Counsel for the represented respondents represents all individuals who received a preliminary notice of hearing, other than for brief periods during time which certain respondents testified individually and advanced claims personal to themselves that conflicted with the interests of other respondents. During these brief periods, these individual respondents were treated as representing themselves.

11. At the outset of the evidentiary hearing, the District rescinded Preliminary Notices of Layoff that had been issued to respondents as follows:

Rebecca Sue Jenkins; and
Erik White

The District operated alternative/continuation education programs, including independent study programs. The District's alternative/continuation programs are operated at North State, Freedom, Pioneer and Wilderness. The respondents identified above were rescinded because they were the most senior employees receiving a preliminary notice of layoff who also consented to receiving an assignment to teach in the District's alternative/continuation education programs in the upcoming school year.

12. Near the close of the evidentiary hearing, the District rescinded the preliminary notice of layoff issued to Tamra Bennett, upon her consent to teach in the upcoming school year in the District's alternative/continuation education program.

13. Upon the approval and adoption of this Proposed Decision by the Board pursuant to Government Code section 11517, subdivision (b), the rescission of preliminary notices of layoff issued to each person listed above shall be endorsed and approved.

14. All remaining respondents listed below are the proper subject of these proceedings. The remaining respondents still subject to this layoff and whose preliminary notices remain in full force and effect after the rescissions are as follows:

1. Tim Arnett;
2. Travis Bassham;
3. Richard Bonnano;
4. Matt Clarke;
5. Lisa Ferguson;
6. Karin Fitzhugh;
7. Jamie Fleming; and
8. Susan Whitaker.

TEMPORARY TEACHERS

15. Some of the PKS reductions were effectuated by serving certificated employees serving in the District under temporary contracts notice that their contracts would terminate at the end of the current school year and that their services would not be required for the upcoming school year. In this manner, release of temporary teachers reduced 2.0 FTE of the 3.0 FTE of English slated to be reduced; 1.0 of the 3.0 FTE mathematics; and all of the 1.0 FTE of Art.

TIE-BREAKING CRITERIA

16. On January 12, 2010, the Board adopted Resolution No. 10-024, which set forth criteria to determine "the relative seniority for layoff purposes of certificated employees first rendering paid probationary service to the District on the same date" (tie-breaking criteria). The following criteria were listed in Resolution No. 10-024:

1. Criteria for Determining Seniority for Layoff:
 - A. Seniority is determined by the unit member's first day of paid service as a probationary certificated employee.
 - B. The criteria and numerical scale to determine the seniority of probationary and permanent employees having the same first

day of paid service as a probationary employee shall be the following:

1. Professional Preparation
 - a. Each teaching and support credential (includes supplemental credentials) held for services
3 points
 - b. Each subject area of teaching competency established by the teacher's major (i.e. 2 majors in teach are = 4 points)
2 points
 - c. Each subject area of teaching competency established by the teacher's minor
1 point
 - d. Each Master's Degree held
1 point
 - e. Additional coursework of at least 15 semester hours (Up to a maximum of 60 hours)
1/2 point
2. Experience
 - a. Each year of previous in-district experience as a certificated employee which reflects of [sic] years of service other than the most recent first day of paid service as a probationary certificated employee. This section covers certificated employees who may have resigned and been rehired at a later date. 1/2 point
 - b. Each year of out-of-district public school experience (excludes charter schools, private schools, etc) up to five years as a certificated employee will be equal to
1/2 point
3. Specialized training
 - a. CLAD/SDAIE/BLCAD/CTEL
5 points
 - b. Resource Specialist Certificated
3 points
 - c. Reading Specialist Certificate
3 points
 - d. Other California State Recognized Certificates (3 points per certificate)
3 points
4. Others (maximum 1/2 point may be applied per Section 4)

- a. Intern Support Provider/PAR Consulting Teacher
1/4 point
 - b. Site Council 1/4 point
 - c. Assigned/Paid district Committees 1/4 point
 - e. [sic] District/Dept.-level Curriculum Committees
1/4 point
 - f. [sic] District Coaching/Intramural Sports/Clubs
1/4 point
- C. As between certificated employees with the same first day of paid service as a probationary certificated employee, seniority shall be based upon the number of points earned by the application of the criteria set forth in Item B above. Employees with the fewest points shall be terminated before employees with more points. The association shall be afforded the right to review the application of the criteria.
- D. If any two or more certificated employees who first rendered paid probationary certificated service on the same date still has the same number of points after application of points provided above, the ranking of such employees shall be determined by a lottery conducted by the Superintendent or designee, in the presence of the Association.

APPLICATION OF TIE-BREAKING CRITERIA

17. The District applied the tie breaking criteria to four certificated employees because each has a seniority date of August 17, 2006. Tie break points were awarded as follows:

- 1. Karin Fitzhugh 18 points;
- 2. Travis Bassham 17 points;
- 3. Jamie Fleming 14.7 points; and
- 4. Matt Clarke 14.25 points

18. Each of the tied employees were reranked for seniority purposes in order of the points earned by the application of the tie breaking criteria. There were no challenges to the tie breaking criteria or to the relative award of points by any of the three affected employees.

19. Another employee, Ms. Borden, as well as several other District employees, also have a seniority date of August 17, 2006. Ms. Borden has a single subject credential in Art. She currently teaches either a 1.0 FTE of Independent Study at North State in the alternative education program, or a split assignment of .50 FTE Independent Study and .50

Art in the same program (it was not clear in the evidence how her assignment was allocated). The records were not entirely clear on this point and testimony only briefly touched upon Ms. Borden's assignment. There was no evidence Ms. Borden was subjected to the tie breaking criteria, and was not served with a preliminary notice of layoff, even though she has the same seniority date as the four who were subjected to the tie breaker. It was not clear why Ms. Borden was not subjected to the tie break criteria with the other employees, all of who are certificated and competent to teach Independent Study. It was also not clear why she did not receive a preliminary notice of layoff. It may be that Ms. Borden did receive a preliminary notice of layoff and did not request a hearing, as the District evidence only includes information for those who requested a hearing. It was not entirely clear, but it appears that Ms. Borden is being displaced from her Independent Study assignment, and being retained instead to teach .50 FTE Art at North State.

EFFECTS OF APPLICATION OF TIE BREAKING CRITERIA

20. Three of the employees listed above were served preliminary notices of layoff as part of the District's reduction of the 2.0 FTE of Social Sciences. Respondent Hayes was also subject to this reduction, but is one day senior to the four tied employees.

21. There are evidently 2.5 FTE assignments remaining in the District's alternative/continuation education program available for the most senior respondents to assume by bumping a more junior employee out of those positions. According to the Associate Superintendent's testimony, it appears that Mr. Bassham is able to bump into 1.0 FTE of the alternative/continuation education program. Ms. Fleming is able to bump into .70 FTE in alternative education. Ms. Fitzhugh lost .60 FTE of physical education by being bumped by a more senior employee with a physical education credential who was displaced by the PKS termination of the .60 FTE Work Experience Program. Ms. Fitzhugh is able to bump into the remaining .20 FTE of the alternative education program. Ms. Pullen Ferguson lost .60 FTE of Student Activity Instructor due to the PKS reduction of this program, leaving her with a .20 FTE.

INDIVIDUAL RESPONDENTS

22. Several individual respondents testified. Each described a considerable number of educational achievements, extra-curricular services rendered to the District, services to students well over and above the requirements of their positions and other desirable qualifications. Several bring rather unique work, academic and athletic experiences from outside the teaching profession to the District, offering enrichment for students well beyond what would normally be expected of second and third year teachers. Respondents are understandably frustrated with what they view is a relative devaluation of their unique backgrounds and experiences being actively offered to the District butting up against a direct conflict with the seniority system that provides no recognition for the strength and breadth of these valuable experiences and services these employees are offering to the District.

MR. BASSHAM

23. Mr. Bassham contended that there were certificated employees serving in the District junior to him who were not served preliminary notices of layoff. He failed to identify any such person. There was no evidence that any employee junior to Mr. Bassham is being retained to render a service Mr. Bassham is certificated and competent to provide. He listed his impressive qualifications and extracurricular service to the District, all of which was credited to him in his high finish in the tie breaker. It appears he is being retained to serve in alternative education, but that was not entirely clear.

MS. FITZHUGH

24. Ms. Fitzhugh is a PE teacher and credentialed as such. She contends she cannot be laid off because the PKS Resolution does not reduce or eliminate PE. She is partially correct. The PKS Resolution does not eliminate PE. But it does eliminate Work Experience .60 FTE, and the person staffing that position is both credentialed in PE and is quite a bit senior to her. She is losing .60 of her PE because this employee is losing his .60 Work Experience and is bumping into that portion of her PE position. She also wanted to make it clear she consents to teach in alternative education.

MR. BONANNO

25. Mr. Bonanno brings a wealth of real world experience in engineering to his mathematics teaching in the District. He has a Bachelor of Science in Electrical Engineering and 20 years working as an engineer before taking up teaching in the District. Despite his education and experience, he is the least senior mathematics teacher in the District. Mr. Bonanno identified Mr. Beaudette as teaching mathematics in the District, even though the District's Seniority List shows Mr. Beaudette possessed of a clear single subject credential in PE with an authorization in Introduction to Science. Mr. Beaudette is teaching algebra and mathematics laboratory pursuant to "E.C. 44258.3." This section of the Education Code provides the District authority issue a special authorization to assign a teacher outside of his or her credential, upon proof satisfactory to the District that the teacher to be assigned outside his or her credential areas can demonstrate satisfactory knowledge of the subject matter and the ability to teach it.

MS. FLEMING

26. Ms. Fleming made another compelling case pointing out how the seniority system can result in failure to credit and recognize exceptional academic and athletic achievements and extraordinary service to the District by a rather junior employee in coaching multiple varsity sports and providing guidance and leadership in a variety of student activities. These activities and contributions were recognized to her benefit in the tie breaker. It appeared from the Assistant Superintendent's testimony that Ms. Fleming is to be retained for part of a FTE in alternative education, but this was not entirely clear, and her preliminary notice was not rescinded as of the end of the hearing.

MR. CLARKE

27. Mr. Clarke has made some valuable contributions to the District worthy of recognition. He claimed his seniority date should be August 14, 2006, and claimed his pay records prove it. His claim was unpersuasive and lacks merit. In order to make his claim, he sought to impeach a fully executed written settlement agreement with the District that he signed and from which he benefitted, both financially and by attaining status toward seniority he did not have previously. In exchange for those benefits, he negotiated away his right to his seniority date of August 17, 2006, as reflected in the fully executed settlement agreement.

28. Mr. Clarke and others similarly situated to him previously taught in the District as temporary teachers in alternative education, paid hourly by submission of time sheets. The settlement agreement reflects that Mr. Clarke started his service to the District pursuant to a temporary contract where he was paid hourly from August 17, 2006.

29. The pay records Mr. Clarke claims show his date should be earlier than that reflected in the settlement agreement are irrelevant and inadmissible. Mr. Clarke signed the settlement agreement on January 20, 2009. As part of that agreement, Mr. Clarke received \$2,781.03 for salary in exchange for his agreement, with the others in the group bringing the lawsuit, that his status and seniority would be adjusted as of the first day of work for the District as reflected in the settlement documents, for Mr. Clarke, August 17, 2006. Mr. Clarke negotiated his seniority date to be August 17, 2006, and his status as of that date as probationary first year, in exchange for the compensation and attaining tenure track status in the District. Mr. Clarke's effort to impeach the settlement documents with extrinsic documents such as his pay records is disallowed.³ If the date was an error, the time for correcting it is long past, especially after Mr. Clarke has already accepted all the other benefits of the settlement agreement. He is bound by the agreement.

FAILURE TO PROVIDE TENTATIVE ASSIGNMENT LIST

30. Respondents generally advanced the contention that the layoff is unlawful and must fail because the District indisputably failed to provide a tentative assignments list for the upcoming school year that would have enabled respondents to exercise their rights to bump a more junior employee in an informed fashion. Respondents contend the District's failure to provide a tentative assignments list denied respondents due process of law and is required by *Daniels v. Shasta-Tehama-Trinity Joint Community College District* (1989) 212 Cal.App.3d 909, 925-927, and Education Code section 44949, subdivision (c), regarding assignments and reassignments. The District did not dispute that it has not provided respondents such a list, because no such list of tentative assignments exists. The District contends production of a list of tentative assignments for the upcoming school year for a layoff proceeding is not required, and there is no legal authority that requires the District to

³ Evidence Code section 622 provides that facts recited in a written instrument are conclusively presumed to be true as between the parties or their successors.

assemble and produce such a list for a layoff. The District's contentions have merit, respondents' do not.

31. Respondents' contention is founded upon an improperly narrow reading of section 44955, subdivision (c). Additionally, the *Daniels* decision does not stand for the proposition that the District is mandated to produce a list of tentative assignments for the upcoming school year as a matter of due process, or that failure to do so denies respondents an opportunity to fairly exercise their bumping rights.

In pertinent part, section 44955, subdivision (c) provides:

[¶] ...[¶]

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.

[¶] ...[¶]

32. The statute makes no mention of when these assignments and reassignments must be made. It only requires that when the assignments are made, they conform to the requirements set forth in the provision. These assignments and reassignments may be made at any time during the year. There is nothing in this provision to suggest the creation of a due process right in those facing a layoff to force the District to commit itself to assignments for the upcoming school year for the purposes of the layoff and the exercise of bumping rights. The contention itself reveals its flaw, for it seeks a tentative list of assignments and sets up the list as required by due process. The very nature of the list as tentative means it can change at any time, thus rendering it all but useless for the purpose for which it is being advances as mandatory. *Daniels* provides no help. *Daniels* dealt with a factually peculiar and extraordinary set of circumstances that are wholly unlike those here. Respondents facing layoff are understandably frustrated that they have been unable to find persons on the District seniority list who are junior to themselves who are being retained to perform a service they are credentialed and competent to perform, and despite the fact that they believe there are such persons, the only person identified was Mr. Beaudette by Mr. Bonanno, and it was proved that Mr. Beaudette was both senior to Mr. Bonanno and competent to teach mathematics.

33. The provision cited by respondents does not become inapplicable when these proceedings are concluded. It raises a continuing duty upon the District to insure that what respondents fear, that junior employees might staff positions they are certificated and competent to teach in the upcoming school year, will not occur.

NECESSITY OF PKS REDUCTION/ELIMINATION AND LAYOFFS

34. The District is facing financial pressure necessitating the reduction or elimination of the particular kinds of services set forth in Resolution 10-072.

ALL KNOWN ATTRITION CONSIDERED

35. The Associate Superintendent, on behalf of the District, considered all positively assured attrition, i.e., deaths, resignations, retirements, and other permanent vacancies and leaves of absence, as of the date of Resolution No. 10-072 in determining the actual number of necessary layoff notices to be delivered to its employees.

COMPLIANCE WITH STATE AND FEDERAL MANDATES

36. The District does not propose to eliminate any services that are State or federally mandated.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied. The District has the burden of proving by a preponderance of the evidence that the proposed reduction or elimination of particular kinds of services and the preliminary notice of layoff served on respondent is factually and legally appropriate.⁴

2. The services the District seeks to eliminate in this matter are “particular kinds of services” that may be reduced or discontinued within the meaning of Education Code section 44955. The Board’s decision to reduce or discontinue these particular kinds of services was not demonstrated to be arbitrary or capricious, but constituted a proper exercise of discretion.

3. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The District’s reduction in particular kinds of services proposed is necessary to avert the District operating in a deficit in the upcoming school year.

4. There was no evidence any person receiving a preliminary notice of layoff is being laid off in favor of a junior employee being skipped, or that any employee being laid off is entitled to bump into a position held by a more junior employee where the employee being laid off has the credentials and competence to take the position of the more junior employee being retained. There was no evidence that any certificated employee of the District is being retained to provide a service any of the remaining respondents still subject to this layoff are certificated and competent to render.

⁴ Education Code section 44944.

5. Legal cause exists pursuant to Education Code section 44949 and 44955 for the Lodi Unified School District to reduce or discontinue 20.10 FTE of particular kinds of services, and to reduce the number of work days for assistant principals, as set forth in Resolution No. 10-072. The cause for the reduction or discontinuation of particular kinds of services relates solely to the welfare of the schools and the pupils thereof. Legal cause therefore exists to sustain the remaining Accusations. It was not entirely clear in the evidence whether Mr. Bassham and Ms. Fleming are to be retained, and if so, to what extent of a full or partial FTE. It appeared from the evidence that Mr. Bassham was to be retained 1.0 FTE alternative education and Ms. Fleming for .70 FTE alternative education, but again this was not clear. Their preliminary notices of layoff were not rescinded at the end of the hearing, but the Associate Superintendent's testimony seemed to indicate that these two respondents were to be retained as stated. Other than with respect to these two respondents, the Board may give the remaining respondents still subject to layoff final notices that their services will not be required by the District in the upcoming school year, in inverse order of seniority.

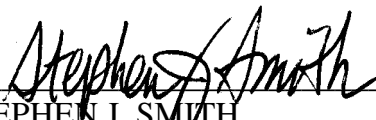
ORDER

The Accusations are SUSTAINED.

The Shasta Union High School District's action to reduce or eliminate 20.10 FTE of particular kinds of services, and to reduce the number of work days for assistant principals from 219 days to 294 days, for the 2010-2011 school year is AFFIRMED.

Final notice may be given by the District to the remaining respondents still subject to this layoff identified above that their services will not be required for the upcoming school year. Notice shall be given in inverse order of seniority.

DATED: May 7, 2010.


STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings

Attachment A

**List of Respondents
Shasta Union High School District**

TIM ARNETT
TRAVIS BASSHAM
TAMRA BENNETT
RICHARD BONANNO
MATT CLARKE
LISA FERGUSON
KARIN FITZHUGH
JAMIE FLEMING
REBECCA SUE JENKINS
SUSAN E. WHITAKER
ERIK WHITE