

BEFORE THE
BOARD OF TRUSTEES
THERMALITO UNION ELEMENTARY SCHOOL DISTRICT
OROVILLE, CALIFORNIA

In the Matter of the Accusations Against:

KAREN BROWN
JULIE CARR
HAIDEE DONATI
KATHRYN EAGLE
CAROL GRANGER
THOMAS HILDEBRAND
DIANE IMHOFF
LISA KITTLE
ANGELA MCLEAN
JEFFREY MITCHELL
SUSAN RUSSELL
SUZANNE STARKS
KERRIE SUNDERMAN
KRIS THAO

OAH No. 2012030305

Respondents.

PROPOSED DECISION

This matter was heard before Rebecca M. Westmore, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 11, 2012, in Oroville, California.

James Scot Yarnell, Attorney at Law, Atkinson, Andelson, Loya, Ruud & Roma, represented the Thermalito Union Elementary School District.

Andrea Price, Attorney at Law, Langenkamp, Curtis & Price, represented the respondents.

Evidence was received and the parties offered oral closing arguments. The record was then closed, and the matter was submitted for decision on April 11, 2012.

PRELIMINARY MATTERS

1. Pursuant to stipulation, several respondents were dismissed from the proceeding due to: (1) withdrawal of their Notice of Defense; and (2) the district's rescission of their Notice of Non-Reemployment. The following respondents withdrew their Notices of Defense: Kathryn Eagle, Carol Granger, Thomas Hildebrand, Diane Imhoff, Jeffrey Mitchell, Suzanne Starks, and Kerrie Sunderman. The district rescinded the Notices of Non-Reemployment issued to respondents Julie Carr, Haidee Donati, and Angela McLean.

2. The hearing proceeded against the remaining respondents: Susan Russell, Lisa Kittle, Karen Brown, and Kris Thao.

FACTUAL FINDINGS

1. Julian Diaz is the Superintendent of the Thermalito Union Elementary School District (district). His actions, and those of the district's staff and governing body, the Board of Trustees (board), were taken solely in their official capacities.

2. The district is facing a budget shortfall for the 2012-2013 school year.

3. On March 8, 2012, the board adopted Resolution No. 2011-12-07 (AMENDED), reducing or eliminating particular kinds of services (PKS) of the district, affecting 12.98 Full Time Equivalent (FTE) certificated positions.

4. The Resolution states that it will be necessary to reduce the following PKS of the district, and to decrease a corresponding number of certificated employees in the district not later than the beginning of the 2012-2013 school year:

SERVICE	F.T.E.
<u>Elementary</u>	
K-5 Multiple Subject Instruction	7.15
K-5 Counseling Services	0.50
<u>Middle School</u>	
6-8 English Language Arts Instruction	1.84
6-8 Math Instruction	0.66

7-8 Physical Education Instruction	0.50
7-8 Science Instruction	0.66
7-8 Social Studies Instruction	0.33
EL/Intervention/Assessment Facilitator	0.34
<u>Administration</u>	
Middle School Dean of Students	1.00
Total	12.98

5. As a result of the above PKS reductions and/or eliminations, the board determined that it was necessary to decrease 12.98 FTE positions for certificated employees in the district at the close of the 2011-2012 school year, in accordance with Education Code section 44955.¹

6. On March 9, 2012, Superintendent Diaz timely served a letter entitled “Notice of Recommendation that Certificated Services Will Not Be Required” (Preliminary Notice) on each of the permanent and probationary certificated employees affected by the PKS reductions and/or eliminations set forth in the Resolution.² The Preliminary Notice advised that it had been recommended to the board that the recipient be given preliminary written notice that his/her services might not be required for the 2012-2013 school year, due to reductions in PKS.

7. On March 12, 2012, Superintendent Diaz gave the board written notice that he had given notice to respondents that their services would not be required for the ensuing school year, and the reasons therefore.

¹ All statutory references are to the California Education Code unless otherwise indicated.

² “Precautionary” Preliminary Notices were served on Lisa Kittle and Kris Thao, advising them that the district’s initial determination, after reviewing the seniority list, was that they be retained. The notice advised Lisa Kittle and Kris Thao that they may be challenged by other employees at hearing and it may be determined that the recipient should be laid off.

8. All the respondents in this action timely filed a Request for Hearing to determine whether there was cause for not reemploying them for the 2012-2013 school year.

9. On March 20, 2012, Superintendent Diaz made and filed the Accusation, and caused it to be served on respondents or their legal counsel. With the exception of Carol Granger, all respondents timely filed a Notice of Defense requesting a hearing in this matter.

Implementation of Layoff Procedure

10. In anticipation of the PKS reduction, Superintendent Diaz and his staff began updating the district's seniority list. In December 2011, they sent the seniority list to the teachers to allow them to report inaccurate information and request corrections to their date of hire, credentials and certificates on or before February 16, 2012.

11. Superintendent Diaz identified the individuals serving in the positions affected by the PKS reductions. District staff used the updated seniority list to identify vacant positions and to identify the least senior persons occupying the positions affected by the PKS reductions. District staff took into account known attrition and existing vacancies.

12. When the least senior persons occupying the positions affected by the PKS reductions were identified, Superintendent Diaz looked at each individual's credentials to determine whether he or she could displace any less senior certificated employees. On March 15, 2011, district staff served the Preliminary and Precautionary Notices identified in Factual Finding 6, on the most junior employees affected by the PKS reduction.

Skiping Certain Junior Employees

13. The district seeks to skip certain certificated employees pursuant to section 44955, subdivisions (b), (c) and (d)(1). These sections provide in pertinent part:

(b) ... 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....

(c) ...services of such employees shall be terminated in the inverse of the order in which they were employed...

(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 ... 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.

[¶] ... [¶]

14. In Resolution No. 2011-12-07 (AMENDED), the board defined “competency” for the purposes of Education Code sections 44955, 44956 and 44957 as:

current possession of a preliminary or clear credential or supplemental authorization for the subject matter and/or grade level to which the employee shall be assigned at the beginning of the 2012-2013 school year.

15. In its Resolution No. 2011-12-07 (AMENDED), the board stated:

That due to the need of the District to retain those individual teachers in the specific courses or courses of study identified below due to their specialized training and experience related to those courses which more senior employees do not possess, the Superintendent and/or his designee is authorized to deviate from terminating those certificated employees in order of seniority in instances where they are currently assigned to teach those courses and will be assigned to teach those courses again for the next school year and more senior employees do not possess the same specialized training and experienced related to the course:

a. Instructors in Elementary Reading Program who hold specialized reading certification; and

b. Instructors in English who hold a BCLAD (Hmong) certification.

Skipping Lisa Kittle

16. Susan Russell and Lisa Kittle were noticed for layoff due to the 7.15 FTE reductions in K-5 Multiple Subject Instruction. They were each noticed for a .75 FTE reduction of their assignments. Susan Russell has a seniority date of 1/3/05, and holds a Clear Multiple Subject Teaching Credential, a Clear Reading Certificate,³ and a R242 Embedded EL Authorization. Lisa Kittle has a seniority date of 8/19/05, and holds a Clear Specialist Instruction (Reading) Credential, a Multiple Subject: Supplemental (Math) Credential, and CLAD Authorization. The district proposes to skip Lisa Kittle, and layoff Susan Russell, pursuant to section 44955, subdivision (d)(1).

17. The district has adopted a new elementary reading program for the 2012-2013 school year, which will enable it to improve reading and literacy standards by providing reading instruction to the students, as well as coaching and staff development for the teachers. According to Superintendent Diaz, a special credential is not required to teach the reading program itself; however, the coaching and staff development pieces of the program require a specialist credential in reading, which Ms. Kittle possesses.

18. Principal, Ed Gregorio, testified at hearing that it is the goal of every elementary school to ensure that students exit the first and second grades as proficient readers. At Thermalito Union, however, there is a “gap” between the proficient students and their target goal. Principal Gregorio attributes this “gap” to the insufficient training of teachers and the inability to maintain ongoing implementation of the training. Accordingly, the district’s leadership team drafted and internally posted the following: Position: Reading Specialist/Instructional Reading Coach description, which requires a Reading Specialist Credential and/or Clear Specialist Instruction Credential (Reading), and comprises the following major duties:

Provide small-group and individual direct services to students performing below grade level in reading.

Facilitate the development and coordination of school-wide reading program.

Plan and conduct reading staff development especially in the areas of guided reading and reading comprehension.

Assist and support classroom teacher and grade level teams in reading instruction and teaching strategies.

³ Ms. Russell’s Clear Reading Certificate was issued by the California Commission on Teacher Credentialing on February 23, 2012.

Assist teachers in implementing reading strategies via the coaching process.

Assist in the assessment of student progress and monitor student achievement in reading using various site and district data.

19. Principal Gregorio believes that when teachers listen to a trainer, there is only a five percent chance that the teacher will implement what they have learned; however, when teachers continue to receive subsequent coaching, there is a 95 percent chance that the teacher will implement what they have learned. Principal Gregorio asserted that “it is imperative that one of the reading positions include ongoing support and teaching for the teachers,” and due to the coaching and staff development portions of the reading program, the instructor must hold a Reading Specialist Credential or a Clear Specialist Instruction Credential. Principal Gregorio does not believe that the holder of a reading certificate is authorized to serve in this position.

20. Ms. Kittle’s Clear Specialist Instruction Credential (Reading) authorizes her to:

assist and support the classroom teacher in reading instruction and teaching strategies, select and adapt reading instruction materials, plan and conduct reading staff development, assess student progress and monitor student achievement in reading, provide direct reading intervention work with students, and develop and coordinate reading programs at the school site, school district, or county level in grades twelve and below, including preschool, and in classes organized primarily for adults.

21. Ms. Russell’s Clear Reading Certificate authorizes her to provide the following services to students at one or more school sites, at the grade levels authorized by the prerequisite credential:

(1) provide student assessment in reading, and student instruction that is responsive to the assessments;

(2) develop, implement and adapt reading instruction, and assist teachers with respect to the prevention and intervention of reading difficulties; and

(3) develop, implement and adapt instruction, and assist teachers, to enable all students to read and comprehend the content of the curriculum.

22. Ms. Kittle asserted at hearing that her specialist credential “requires double the amount of classes than a reading certificate.” She identified the key differences between the credential and certificate are the ability to “assist and support the classroom teacher”; “plan and conduct reading staff development”; and “develop and coordinate reading programs.” In addition, Ms. Kittle also asserted that the reading certificate can only teach reading programs at one or more school sites in the district. However, her reading credential enables her to go to multiple school sites to support the classroom teacher in reading instructions and strategies. Finally, Ms. Kittle asserted that for the past three years she has maintained a “book wall” for teachers to access “whole sets of books” to work with small groups in their classroom. Ms. Kittle believes that because the district will provide training using those books in the 2012-2013 school year, she can provide guided reading for the primary teachers. Ms. Kittle does not believe that the holder of a reading certificate can provide guided reading to primary teachers.

23. Ms. Russell asserted at hearing that since January 2005, she has been a K-5 reading intervention teacher using small group instruction, has taught English language, has participated on the curriculum intervention and assessment district committee, and worked on the site computer support system for EduSoft to assist other teachers in inputting data and operating the system to obtain student scores. Ms. Russell has also served as the intervention lead at Plumas Avenue School, the site testing administrator, and conducted trainings for SCELDT testing. She served as a first grade teacher in the 2009-2010 school year; a third grade teacher in the 2010-2011 school year, and is currently serving as a long-term substitute in a 2/3 combination class. Prior to this hearing, Ms. Russell had not heard about the job posting for the Reading Specialist/Instructional Reading Coach set forth in Factual Finding 17.

24. The district has identified the Elementary Reading Program as a specific course or course of study that will be taught at Thermalito Union Elementary School District beginning in the 2012-2013 school year. However, the district has not demonstrated that Ms. Kittle has special training and experience to teach that class which others with more seniority do not possess. Superintendent Diaz admitted that a Clear Specialist Instruction Credential (Reading) is not necessary to teach the program itself (Factual Findings 18 and 19), and as evidenced by the details of their credentials (Factual Findings 20 and 21), the coaching and staff development pieces of the reading program can be taught by either Ms. Russell or Ms. Kittle, or other senior teachers with a reading certificate or reading credential. Ms. Russell’s and Ms. Kittle’s credentials enable them to assist the teachers, develop and adapt reading instruction, and assess and monitor student progress. Although the district believes Ms. Kittle may be the “best candidate” to fill the position of teacher to the teachers, the Education Code does not permit districts in a layoff proceeding to weigh the qualifications of its teaching staff and retain junior employees it believes have superior qualifications. The district must show that the skipped teacher has special

training and experience necessary to teach the specific course or course of study. The district has not met that burden, and therefore Ms. Kittle may not be skipped.

25. The district maintains, however, that because Ms. Russell did not obtain her Clear Reading Certificate before the February 16, 2012 deadline for reporting inaccurate information and requesting corrections to the seniority list, the district was not required to consider her certificate in applying skipping criteria during their PKS reduction analysis. The district's argument is without merit. In *Campbell Elementary Teachers Association Inc. v. Abbott* (1978) 76 Cal.App.3d 796, the court held that it is the responsibility of certificated teachers to file their credentials and certificates with the district, and that there would be substantial prejudice to the district and to other certificated employees if the PKS reductions were re-applied and relative seniority re-established because of a teacher's failure to timely file a credential with the district. In this case, however, the California Commission on Teacher Credential issued Ms. Russell's Clear Reading Credential on February 23, 2012, and Ms. Russell notified Superintendent Diaz on March 1, 2012. Notification was provided to Superintendent Diaz seven days prior to the board's Resolution, and eight days prior to the issuance of the preliminary notices to the permanent and probationary certificated employees affected by the PKS reductions and/or eliminations. It is undisputed that the district needs credential information in order to make the proper decisions prior to issuing their preliminary notices. However, by the time Ms. Russell had notified the district of her reading certificate, the board had not adopted the Resolution, and the district had not issued its preliminary notices. There was sufficient time between March 1, 2012 and March 8, 2012, for the district to take into consideration Ms. Russell's newly-acquired reading certificate when conducting their PKS reduction analysis.

26. The district issued a precautionary layoff notice to Lisa Kittle, anticipating that one of the respondents may be able to bump her out of her position. As Ms. Russell established that she is certificated and competent to bump into Ms. Kittle's position, the precautionary layoff notice issued to Lisa Kittle must be sustained.

Skipping Kris Thao

27. Karen Brown and Kris Thao were affected by the 1.84 FTE reduction in 6-8 Language Arts Instruction. They were noticed for a 1.00 FTE reduction of their assignment. Karen Brown has a seniority date of 8/18/03, and holds a Single Subject (English) Credential, and CLAD Authorization. Kris Thao has a seniority date of 1/10/08, and holds a Single Subject (English) Credential, and BCLAD (Hmong) Authorization. The district proposes to skip Kris Thao, and layoff Karen Brown, pursuant to section 44955, subdivision (d)(1).

28. According to Superintendent Diaz, the district is not meeting the minimum standards for its English language learners, and the district has been

encouraged to recruit people who reflect their student population so that the students can benefit from primary language support. The district has a specific need to provide English Language Development (ELD) for its Hmong students, who make up 31 percent of the district's student body. Superintendent Diaz believes that Kris Thao has the special training and experience necessary to teach the Hmong students, which senior employees do not possess. Specifically, the district contends that Kris Thao can provide: (1) English language development; (2) primary language support to enable the Hmong students to "grasp the concepts a little quicker," and (3) translation for teachers and parents.

29. Kris Thao has been teaching ELD since 2005, and taught a Hmong language class for one year in the county. At hearing, she asserted that during the summer over 50 new homes will be built within their school district, and 26 of those homes will be occupied by Hmong families. Because of her ability to speak Hmong, Ms. Thao can provide instructions in Hmong to students who are struggling with idioms or metaphors, and can "bridge the cultural gap" by relating the content to culture so that the students can "better comprehend" the material. In addition, Ms. Thao believes that she can be a role model for the Hmong students because she understands their family structure, knows their cultural differences and responsibilities, can relate to the students, and can translate for their parents. Ms. Thao has served as the parent involvement coordinator for Hmong parents and students in the district. Ms. Thao explained that her knowledge and experiences will create for the Hmong students a safe environment without judgment. According to Ms. Thao, the CLAD Authorization allows the holder to teach ELD and Specially Designed Academic Instruction in English (SDAIE); however, her BCLAD Authorization allows her to teach ELD, SDAIE and primary language support.

30. Karen Brown asserted at hearing that she has been teaching English language learner students since 2000. She has taught content and English language development as a long-term substitute at Oroville High School, and has taught long-term English language learners who needed intensive intervention to pass the High School Exit Exam. Ms. Brown has also taught Accelerated Reader, a supplemental reading program, and High Point, an intensive reading program with an ELD component. Ms. Brown has had EL students in her classes every year except the 2009-2010 school year. During her teaching of EL students, over 30 percent of her students increased their SCEDLT levels and seven percent of those students increased by two SCEDLT levels. Ms. Brown believes that she can meet the needs of all of her students by presenting lessons that teach targeted skills. According to Ms. Brown, the ELD approach is to teach English reading and writing by delivering the lessons primarily in English. She also provides SDAIE strategies to increase the comprehensibility of the content, and asserted that her students are acquiring the language, and can move from basic skills to cognitive language proficiency. She emphasizes listening and speaking as the cornerstones for language development, and believes listening and speaking should be overwhelmingly in English so that the student can hear the modeling in English. Ms. Brown has been trained in Guided

Language Acquisition Development, SCEDLDT test administration, and ADEPT. Ms. Brown believes that in the 2012-2013 school year, all of the language arts teachers will be providing ELD instruction whether they hold a BCLAD Authorization or not. However, her CLAD certificate and experience permit her to teach English language learners, and she “feel[s] very confident to provide ELD instruction.” She cannot, however, provide content instruction in Hmong. Ms. Brown has served as the parent involvement coordinator for Hmong parents and students in the district.

31. The district does not contend that Hmong will be a specific course or course of study that will be taught in the district in the 2012-2013 school year. The district has identified a need to provide ELD instruction to Hmong students in the Thermalito Union Elementary District during the 2012-2013 school year. It is undisputed that ELD instruction is provided in the English language, and that teachers in the district will be providing ELD instruction in the 2012-2013 school year whether they hold a CLAD or BCLAD Authorization, and whether they speak Hmong or not. The district has not demonstrated that Ms. Thao has specialized training and experience to provide ELD instruction to Hmong students that Ms. Brown does not possess. Ms. Brown and Ms. Thao hold Single Subject (English) Credentials. Ms. Brown holds a CLAD Authorization, and Ms. Thao holds a BCLAD Authorization. Both Authorizations permit the holder to provide ELD instruction to English language learners. Ms. Brown and Ms. Thao have provided ELD instruction to students for 11 and six years, respectively. Although the district believes Ms. Thao’s ability to provide primary language support to Hmong students makes her the “best candidate” to fill the position, the Education Code does not permit districts in a layoff proceeding to weigh the qualifications of its teaching staff and retain junior employees it believes have superior qualifications. The district must show that the skipped teacher has special training and experience necessary to teach the specific course or course of study. The district has not met that burden, and therefore Ms. Thao may not be skipped.

32. The district issued a precautionary layoff notice to Kris Thao, anticipating that one of the respondents may be able to bump her out of her position. As Ms. Brown established that she is certificated and competent to bump into Ms. Thao’s position, the precautionary layoff notice issued to Kris Thao must be sustained.

Other Defenses to Layoff

33. Any other assertions raised by the parties at hearing which are not addressed above are found to be without merit.

LEGAL CONCLUSIONS

1. As set forth in the Factual Findings, 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's Resolution 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 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 PKS Resolution No. 2011-12-07 (AMENDED) are particular kinds of services that may be reduced or discontinued pursuant to 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 discontinuance of services relates solely to the welfare of the district's schools and pupils within the meaning of section 44949.

4. The preliminary layoff notices issued to respondents Susan Russell and Karen Brown must be rescinded because the district is retaining junior employees to provide services which Ms. Russell and Ms. Brown are certificated and competent to render.

5. Except as set forth in Legal Conclusion 4 and the Factual Findings, no employee with less seniority than any respondent is being retained to render a service which any respondent is certificated and competent to render.

6. Except as set forth in Legal Conclusion 4, the board may give respondents final notice that their services will not be required for the 2012-2013 school year.

RECOMMENDATIONS

1. Except as set forth in Legal Conclusion 4, the Accusations served on respondents are sustained.
2. As set forth in Legal Conclusion 4, the Preliminary Notice issued to certificated employees, Susan Russell and Karen Brown, shall be rescinded.
3. Final Notices shall be given to Lisa Kittle and Kris Thao that their services will not be required for the 2012-2013 school year because of the reduction or discontinuation of particular kinds of services.
4. Final Notices shall be given to respondents in inverse order of seniority.

Dated: May 2, 2012

REBECCA M. WESTMORE
Administrative Law Judge
Office of Administrative Hearings