

**BEFORE THE
BOARD OF EDUCATION OF THE
SAN DIEGO UNIFIED SCHOOL DISTRICT**

**In the Matter of the Reduction in Force Involving:

Certain Certificated Employees, Respondents**

OAH No. 2020030868

PROPOSED DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter telephonically on May 4, 2020 from San Diego, CA. This matter was converted to a telephonic hearing by OAH's April 23, 2020, order without objection in light of the Governor's proclamation of a State of Emergency and Executive Orders N-25-20 and N-33-20 arising out of the COVID-19 pandemic.

Kari D. Sullivan, Deputy District Counsel, San Diego Unified School District, represented the San Diego Unified School District (district).

Fern Steiner, Attorney at Law, of Smith, Steiner, Vanderpool, represented respondents Rex Calvin and Manuel Diaz.

Prior to the hearing the Statement of Reduction in Force action was rescinded against Brittany Parrish. The remaining respondents who requested hearings waived their right to a hearing and the matter proceeded as a default against them under Government Code section 11520.

The matter was submitted on May 4, 2020.

FACTUAL FINDINGS

Jurisdictional Matters

1. On March 10, 2019, the District's Governing Board (board) adopted a resolution to reduce particular kinds of certificated services (PKS) and directed the Superintendent or his designee to give appropriate notices to certificated employees whose positions would be affected by the reduction. The resolution called for the reduction or discontinuation of 135 full-time equivalent (FTE) positions with 55 notices. The following chart describes the PKS proposed to be eliminated with the number of notices issued to employees:

<u>PKS (Total: 135)</u>	<u>Number of Notices</u>
Business Education 1	1
Child Development 29	25
Foreign Language French 1	0
Foreign Language Spanish 6	6
General Subjects/Elementary 88	18
Social Science 7	2
Visual and Performing Arts: Art 3	3
Total Number of Notices	55

The resolution referenced Exhibit "A," which identified those PKS and FTEs that were to be discontinued and reduced, and Exhibit "B," which established the tie-breaking criteria for employees who first rendered paid probationary service to the district on the same date.

2. The decision to reduce or discontinue a particular kind of service is a matter reserved to the district's discretion and is not subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.) School districts have the discretion to determine particular kinds of services that will be eliminated, even though a service continues to be performed or provided in a different manner by the district. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.) A school district's decision to reduce a particular kind of service must not be fraudulent, arbitrary or capricious. (*San Jose Teachers Association v. Allen* (1983) 144 Cal. App. 3d 627, 637.)

3. On March 11, 2020, the district sent notices to employees advising them that their services would not be required for the 2020-2021 school year. The reasons for that decision were set forth in the attached resolution. On April 10, 2020, the district served Statements of Reduction in Force and other documents on the employees who requested a hearing. Of the 11 employees identified in the reduction in force action, eight waived their right to a hearing and the district rescinded the proposed action against Brittany Parrish. Gonzalo Ruiz, Mary Taylor and Gretchen Weidner were added to the list of teachers who waived their hearing rights during the hearing. (Exhibit 8, ALJ 1, as amended, and Appendix 1.) Two respondents, Mr. Calvin and Mr. Diaz, proceeded with the hearing. All prehearing jurisdictional requirements have been met.

Testimony of District Witnesses and Evidence

4. Gregory Ottinger is the district's Chief Business Officer and testified at this hearing. Mr. Ottinger is responsible, among his other duties, for the district's operational budget. He supervised the preparation of a First Interim Financial Report and Second Interim Financial Report and certified the accuracy of information

contained in them. On December 10, 2019, and March 10, 2020, he presented these financial reports to the board.

5. As detailed in the Second Interim Financial Report he presented to the board on March 20, 2019, the district is facing an excess of \$84 million budget shortfall for the 2020-2021 calendar year due to increased health care, pension, operational and other costs; declining student enrollment; and a further anticipated \$106.8 million shortfall for the 2021-2022 calendar year. (Exhibit 4, pages 6 to 8.) As a result of these anticipated shortfalls, Mr. Ottinger recommended, as part of the effort to close these gaps, that the board reduce 135 FTE positions with 50 notices to certificated employees.

6. Erin Houston, the district's Human Resources Director, also testified in this matter. She managed the PKS reduction process, as she put it, and described the steps she took starting in January 2020 for the 2020-2021 calendar year that resulted in the proposed 135 FTE reduction with 50 notices sent to teachers, which the board adopted on March 10, 2020.

In this process, Ms. Houston testified she followed certain principles to guide her. These principles included teaching needs and schedules, student course preferences, the established seniority list (Exhibit 11), and the "contractual" process the district must follow. Ms. Houston said she also took into account teacher attrition based on four years of historical trend data. As she further put it, she did this to ensure that reductions are made only when absolutely necessary.

After following these principles, Ms. Houston determined the district's excess teaching needs to be 135 FTEs. No permanent employee has been proposed for layoff over a non-permanent employee. To determine if there is a teacher proposed for

layoff who can be recalled, she added that staff will continue to look at resignations. If there is a resignation and it is within the teacher's credential area, the district will contact the teacher to see if he or she wants to be recalled. This can include offering the teacher a temporary position if one were to become available. The district will apply the tie-breaking criteria, if applicable, if there is a recall.

7. On cross-examination, Ms. Houston was asked to explain the district's rationale to propose for layoff respondent Mr. Calvin when two other teachers, Mr. Davis and Mr. Chenoweth, are less senior than Mr. Calvin and have the same single subject credential with introductory mathematics credential as Mr. Calvin. A senior employee whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee is entitled to displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469, 473-474.)

Mr. Calvin has a single subject teaching credential and an introductory mathematics credential. Mr. Davis and Mr. Chenoweth hold the same credentials, as also noted immediately above. Mr. Calvin's seniority date is August 26, 1998, and his job title is "Advanced Placement Teacher" at Morse High. He also holds a "No Child Left Behind" certification in "Social Science: History, Economics, Geography, Civics, and Government", which he obtained on July 15, 2005. (Exhibit B.)

Mr. Davis is a regular teacher at a middle school with a seniority date of August 28, 2001. Mr. Chenoweth is a regular teacher at University High with a seniority date of

September 12, 2000.¹ Neither Mr. Davis or Mr. Chenoweth have been proposed to be laid-off. Ms. Houston acknowledged that Mr. Calvin can teach middle school math with the single subject credential and introductory credential to teach math he holds.

8. Ms. Houston explained that, concerning Mr. Calvin, she looked at the PKS business area where a more senior employee than Mr. Calvin was excessed because he teaches only business while Mr. Davis and Mr. Chenoweth do not teach business. When she got to Mr. Calvin, the decision needed to be made whether he would be laid-off or if he could bump into another position. Based on past administrative hearing layoff decisions, Ms. Houston believed that a person cannot bump into a position with a supplemental or introductory credential, such as the credential that Mr. Calvin holds. It was thus determined that Mr. Calvin was not able to move into that "math line" because he only has an introductory math credential, and one cannot bump into something that is less than the full single subject math credential.

Ms. Houston further explained that a teacher has to be able to teach "the whole gamut" in order to bump into a credentialed area because the district is not able to save any types of positions through the staffing process; the San Diego Education Association requires that the district post all vacancies so that persons have a right to move into those positions if they possess the correct credential. As a result, the district is not able to "hold back" any position, particularly in middle school, which is where an introductory credential, such as the introductory credential Mr. Calvin holds, would allow a teacher to teach, generally speaking. Because the district cannot "hold

¹ No evidence was offered regarding the subject area Mr. Chenoweth teaches at University High.

positions back," the teacher has to have that full credential and Mr. Calvin does not have that full credential. As a result, in Ms. Houston's view, Mr. Calvin was not able to "bump into math" at the middle school. Ms. Houston did not address why Mr. Calvin was not able to bump into Mr. Chenoweth's teaching position.

9. Manuel Diaz is a "Regular Teacher" at Point Loma High. He holds a Single Subject Teaching credential and has a seniority date of August 27, 2014. No evidence, or argument, was presented to challenge the district's proposed decision to lay-off Mr. Diaz or that the district's decision was incorrect and violated the Education Code.

10. The district's decision to dismiss teachers was based solely on the welfare of the district and its students.

Parties' Arguments

11. The district in closing asked that its decision to lay-off the identified teachers be affirmed. With respect to its decision concerning Mr. Calvin, the District relied on Ms. Houston's testimony and referenced previous administrative hearing layoff decisions for support. However, these decisions were not offered into the record and their underlying rationale under the Education cannot be assessed for application to Mr. Calvin's specific circumstances.

12. Mr. Calvin argued that because he is more senior than Mr. Davis and Mr. Chenoweth, he should have been "bumped" into one of these teaching positions. Mr. Calvin cited Education Code section 44955, subdivision (b), in support of his position. This section provides, in pertinent part, "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."

13. Mr. Calvin's argument is persuasive. The district should have allowed Mr. Calvin to bump into Mr. Davis's middle school position; he is more senior than Mr. Davis and has the required certification and competency to teach the middle school introductory math subject Mr. Davis teaches. The district's arguments to the contrary are not found persuasive.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955, and all notices and other requirements of those sections were provided as required. A district may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

The district has the burden of proof by a preponderance of the evidence in this matter to show that its decision to reduce or discontinue PKS complied with the Education Code.

2. Education Code section 44955, subdivision (b), provides, in pertinent part, that, "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."

3. Education Code section 44955, subdivision (c), provides that:

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.

Cause Does Not Exist to Affirm the Layoff Notice Issued to Rex Calvin

4. Cause does not exist to affirm the layoff notice issued to Mr. Calvin under Education Code section 44955, subdivision (b). The evidence established that the district plans to have a middle school mathematics course and Mr. Calvin is certificated and competent to teach such a course, is more senior than Mr. Davis who teaches this course, and has the same credentials.

Cause Exists to Affirm the Layoff Notices Issued to Mr. Diaz and the Other Teachers Identified in Appendix 1

5. Cause exists to affirm the layoff notices issued to the teachers identified in Appendix 1 below whose services are proposed for reduction or discontinuance per the district's resolution, except for Mr. Calvin and Ms. Parrish. A preponderance of the evidence sustained the district's statements of reduction in force served on respondents concerning the PKS that will not be required. The district's action to

reduce or discontinued particular kinds of services relates solely to the welfare of the district's schools and the pupils thereof within the meaning of Education Code sections 44949 and 44955.

ORDER

The layoff notice issued to Brittany Parish is rescinded. The district's Statement of Reduction in Force against Ms. Parish is dismissed.

The layoff notice issued to Rex Calvin is rescinded. The district's Statement of Reduction in Force against Mr. Calvin is dismissed.

According to, and within the limits of, the Resolution identifying PKS for reduction or elimination by Full Time Equivalents, notices may be given to the remaining respondents identified in Appendix 1 that their services will be reduced or will not be required for the 2020-2021 school year.

DATE: May 6, 2020

DocuSigned by:

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ABRAHAM M. LEVY

Administrative Law Judge

Office of Administrative Hearings

Appendix 1

- ~~1. 111563 Calvin, Rex~~
2. 118524 Cisneros, Jose Alberto
3. 126156 Diaz, Manuel
4. 143015 Dunne, Heidi Sohee
5. 162757 Lopez Santillanes, Arely
6. 128044 Ruiz, Gonzalo
7. 162056 Taylor, Mary
8. 147254 Guiles II, Ronald Gene
- ~~9. 171460 Parrish, Brittany Lauren~~
10. 160064 Brady, Anne Katherine
11. 165411 Weidner, Gretchen Anne