

BEFORE THE BOARD OF TRUSTEES
WINTERS JOINT UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation (Reduction
in Force) Against:

GEORGE GRIFFIN,

Respondent.

OAH No. 2010030181

PROPOSED DECISION

Administrative Law Judge JoAnn Irwin Eshelman, Office of Administrative Hearings, State of California, heard this matter in Winters, California, on April 22, 2010.

Terry Filliman, Attorney at Law, Atkinson, Andelson, Loya, Ruud & Romo, represented the Winters Joint Unified School District (District).

Respondent George Griffin (respondent) appeared on his own behalf.

Oral and documentary evidence was received, the record was closed and the matter was submitted for decision on April 22, 2010.

FACTUAL FINDINGS

Release from Administrative Position

1. On March 4, 2010, while meeting in closed session, the District's Board of Trustees (Board) passed and adopted Resolution No. 836-10 (Resolution 836), pursuant to Education Code section 44951, releasing respondent from his position as Principal for Winters High School (1.0 FTE¹) for the 2010-2011 school year. The Board directed that respondent be reassigned as a regular certificated employee to a position for which he is "credentialed and qualified to serve" and that the Superintendent notify him of his specific assignment for the 2010-2011 school year prior to June 30, 2010.

¹ FTE is an abbreviation for the term "full-time equivalent." This is the basic unit of employment measurement and staff calculation. The designation 1.0 FTE means that respondent was employed full-time as a principal at Winters High School.

When the Board returned to public session, it reported the action it had taken to release respondent, but did not report the actual roll call vote. The Board's failure to report the vote was non-substantive and had no relevance to the procedural steps required under Education Code sections 44949 and 44955. Respondent first received a copy of Resolution 836 on the day of hearing.

2. On March 8, 2010, Rebecca D. Gillespie, Ed.D., Superintendent of the District (Superintendent), personally hand-delivered to respondent a Notice of Release from Administrative Position (Notice of Release), dated March 5, 2010. The Notice of Release advised him that,

Pursuant to the authority contained in Education Code section 45591, you are hereby notified that at its meeting on March 4, 2010 the Board of Trustees of the Winters Joint Unified School District took action to release you from your administrative position for the 2010-2011 school year. You will be reassigned to a non-administrative certificated teaching position for which you are properly credentialed. You will be notified of your specific assignment for 2010-2011 prior to June 30, 2010.

3. The Notice of Release incorrectly listed the authority for respondent's release as Education Code section 45591, rather than section 44951. The Superintendent testified that this was a typographical error and that the correct section number was 44951. Under Education Code section 44949, subdivision (c)(3), "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." A typographical error incorrectly noting the code section under which respondent was released did not prejudice his substantive rights or affect the Board's actions. Therefore, this error was of no consequence.

Reduction in Force Actions

4. On March 4, 2010, the Board adopted Resolution No. 834-10 (Resolution 834) upon recommendation of the Superintendent that it was necessary to reduce or discontinue particular kinds of services no later than the beginning of the 2010-2011 school year. The Board determined that it was necessary to reduce or discontinue particular kinds of services and a corresponding number of FTE positions, as follows:

<u>Services</u>	<u>Number of FTE Position</u>
I. <u>Classroom Teaching Services:</u>	
A. Grade K-3 Elementary Teachers	3.00 FTE
B. Middle School Science Teacher (vacancy)	.857 FTE

C. High School RSP Special Education Teacher (vacancy)	.50 FTE
D. High School English Teacher (librarian vacancy)	1.00 FTE
E. K-12 Independent Study Teacher	.33 FTE
II. <u>Classroom Support Services:</u>	
A. Counselor (vacancy if retirements)	.75 FTE
III. <u>Administrative Services:</u>	
A. Elementary Principal	.50 FTE
B. Middle School Assistant Principal	<u>1.00 FTE</u>
TOTAL:	7.937 FTE Positions

5. The services identified in Resolution 834 are the particular kinds of services that may be reduced or discontinued within the meaning of Education Code section 44955. The Board considered all positively assured attrition, including deaths, resignations, retirements and other permanent vacancies for 2010-2011, which had occurred by March 4, 2010, in determining the services to be reduced or eliminated. The Board's decision to reduce or discontinue services was a proper exercise of its discretion and was related to the welfare of the schools and the pupils of the District.

6. In Resolution 834, the Board also set forth "competency criteria" designed to assist the District in determining whether affected employees could displace or bump junior employees. The Resolution stated that,

"competency" for the purposes of Education Code sections 44955, 44956 and 44957 shall be met based upon: (1) current possession of a preliminary or clear credential and "highly qualified" status under the No Child Left Behind Act for each subject matter in secondary teaching assignments and/or grade level in a self-contained class to which the employee will be assigned at the beginning of the 2010-11 school year; and (2) the employee must have taught at least one subject within the department of the proposed secondary assignment, or taught in a self-contained classroom for a proposed elementary assignment, or taught the specific course of AVID, Student Government, Leadership or Intervention classes for assignment to one of those courses, for at least one full year within the District in the past five (5) school years (*e.g.*, 2005-2006 or later) while classified as a probationary or permanent employee. If the proposed assignment is in alternative education, the employee must be highly qualified under NCLB in each academic subject currently assigned to the

position and have taught in alternative education within the District for at least one full year within the past five (5) school years (*e.g.*, 2005-2006 or later) while classified as a probationary or permanent employee.

7. Laura M. Smith is the Administrative Assistant to the Superintendent. She works closely with the Superintendent to provide human resources information to the Board because there is no human resources officer in the District. Ms. Smith testified that she was “heavily involved” in the planning for layoffs this school year. In determining the competency criteria, key factors for the Board were: 1) to maintain a strong academic program at the secondary and elementary levels; 2) to have staff who have taught at the secondary or elementary level to which they are assigned; 3) to have staff assigned to courses that they want to teach; and 4) to assign staff to courses in which they have had recent teaching experience.

8. Ms. Smith testified about the reasons for the Board’s decision to include specific courses in the competency criteria. The “AVID [Advancement Via Individual Determination], Student Government, Leadership or Intervention courses” were included because the Board wished to retain teachers who had a “strong interest” in these courses. The Board required prior teaching experience in alternative education because the students in such settings have not been successful at a “regular” high school. They often have different needs and require “different teaching strategies.”

9. By letter dated March 11, 2010, the Superintendent recommended to the Board that three certificated employees be given written notice of layoff for the 2010-2011 school year, pursuant to Resolution 834. Respondent was not listed as one of those employees. In addition, respondent’s administrative position as high school principal was not listed among the particular kinds of services to be reduced or discontinued.²

10. On March 11, 2010, the Superintendent gave respondent a written “Certificated Layoff Notice” along with a copy of Resolution 834 and copies of Education Code sections 44949 and 44955. She explained that the District had determined that respondent had “no bumping rights as part of the layoff process,” and, for this reason, he was being given a layoff notice as a teacher.

² Although it appears that the Superintendent erred in failing to notify the Board of respondent’s proposed layoff, as required under Education Code section 44949, subdivision (a), in fact, respondent was not entitled to a section 44949 notice. The Board’s action in releasing respondent from his administrative position did not require subsequent action to lay him off under Education Code sections 44949 and 44955. The steps that the District took to include respondent in the layoff process were apparently precautionary, affording him the opportunity to assert his bumping rights, if any. Nevertheless, any error in notice to the Board under section 44949, subdivision (a), was non-substantive and did not deprive respondent of a fair hearing.

11. On March 18, 2010, respondent submitted a timely written request for a layoff hearing to determine if there was cause for not reemploying him for the 2010-11 school year. On March 22, 2010, the Superintendent made and filed the Accusation in her official capacity. Respondent timely filed a Notice of Defense on March 27, 2010.

12. All of the pre-hearing jurisdictional requirements have been met.

Respondent's Status and Seniority in the District

13. Respondent has been an employee of the District for 14 years. He has served as an administrator that entire time and has never been a classroom teacher in the District.

14. After two years working as an administrator, respondent gained permanent status as a teacher or certificated employee, even though he had never taught in the District. Under Education Code section 44956.5,³ as a site administrator, the maximum seniority respondent can claim for bumping purposes is three years. In accordance with this statute, the District set respondent's seniority date as July 1, 2007. Respondent did not contest this date.

15. Respondent holds a clear multiple subject credential, a Bilingual, Crosscultural, Language and Academic Development (BCLAD) Certificate, a clear single subject Spanish credential, and a clear administrative services credential.

16. Respondent has general bumping rights to displace a less senior teacher currently assigned to a teaching position for which respondent is both credentialed and "competent" under the District's criteria in Resolution 834. There was no evidence that respondent's services as a permanent employee were being terminated while any probationary or other employee with less seniority was retained to render a service which respondent is certificated and competent to render.

The District's Position

17. The District determined that respondent had no bumping rights in the layoff process due to a combination of lack of seniority and lack of Board-established "competence" to teach specific areas. Respondent could not bump into either a self-contained elementary assignment or a secondary Spanish assignment because there were no teachers in these assignments who were less senior than he. In the case of the elementary

³ Education Code section 44956.5 provides, "For a certificated employee initially employed in an administrative position on or after July 1, 1983, who transfers to a teaching position, the period of employment in the administrative position shall not be included in determining seniority for purposes of Sections 44955 and 44956, except for school site administrators who shall earn up to a maximum of three years seniority while serving as site administrators."

Dual Immersion program, even though three teachers being skipped⁴ were less senior than respondent, the District determined that he still could not bump due to the Board's competency criteria. Respondent was also not "competent" to bump into an assignment to teach either alternative education or the specific courses listed in Resolution 834.

Respondent's Defenses

18. Respondent's primary defense was that his release from the administrative position was not handled correctly under the procedural requirements of the public meeting law, known as the Ralph M. Brown Act (Brown Act), contained in Government Code sections 54950-54963. Respondent contended that the failure of the Board to report its roll call vote while in closed session on March 4, 2010, was a violation of Government Code section 54957.1, subdivision (a)(5). Respondent argued that, because the March 4 meeting resulted in his administrative release, it led to his eventual layoff, and was, therefore, relevant.

The District argued that there is no jurisdiction in a teacher layoff proceeding for consideration of possible Brown Act violations.

19. In *Santa Clara Federation of Teachers v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 846, the court found a violation of the Brown Act, but held that, "the validity of the action taken by the Board is not affected by the violation of the Brown Act. [citation omitted.] Moreover, the fact that the Board's decision was made during a meeting which violated the Brown Act did not in and of itself deny respondent[s] a fair hearing." In this case, the possible Brown Act violation was a minor procedural defect. It had no effect on the Board's substantive decision or on respondent's subsequent hearing rights. Therefore, respondent's Brown Act defense is not availing.

20. Respondent also challenged the competency criteria adopted by the Board, stating that the development of the "exclusion criteria" [competency] was not done "in the spirit of the Ed. Code." He believes the criteria were adopted to specifically exclude an administrator from having rights to a teaching position, and considers the logic that an administrator cannot teach to be "suspect." Respondent also believes that the criteria were directed specifically at him and claimed that Board members had so informed him. He pointed out that his BCLAD certificate would qualify him to teach in the Dual Immersion program, but for the competency requirement, and believes that this is evidence that the Board's criteria were directed at him. Respondent contended in closing argument that his 14 years of experience as an administrator is relevant and should qualify as one year of classroom teaching in order to satisfy the competency requirement in Resolution 834.

⁴ In Resolution 834, the Board authorized the Superintendent to deviate from terminating in order of seniority ("skipping") for teachers currently assigned to the elementary Dual Immersion program "based upon their unique training, qualifications and skills related to the required responsibilities for the course/job." Respondent did not challenge this skipping provision in the resolution.

21. The District argued that the competency criteria were reasonable in focusing on the need for teachers with recent teaching experience, i.e. one year teaching a particular subject within the past five years. The District also pointed out that there was no evidence that the criteria were specifically directed at respondent, and that respondent's testimony to the contrary was mere "speculation." The District contended that respondent's experience as an administrator is not the same as classroom experience no matter what the classroom subject.

22. The evidence indicates that the competency criteria adopted by the Board in Resolution 834 were designed to strengthen the District's academic program by retaining teachers with more recent classroom experience in the subject they would be assigned to teach. Teaching standards and curriculum change regularly. Teachers must constantly keep abreast of new developments and must attend continuing education programs. It was reasonable and appropriate for the Board to adopt competency criteria that addressed these matters.

There was no evidence that the criteria were adopted in order to specifically exclude respondent or other administrators. Administrative experience, no matter how extensive, is not the same as classroom teaching experience. The two are not interchangeable. The evidence indicates that the Superintendent and Board acted in a manner consistent with the welfare of the schools and pupils in the District in adopting the competency criteria in Resolution 834.

23. Any defenses or issues not specifically raised in this proceeding are deemed waived. Any other assertions put forth by respondent at the hearing and not addressed above are found to be without merit and are rejected.

LEGAL CONCLUSIONS

1. There is jurisdiction to proceed in this matter under Education Code sections 44949 and 44955. All notices and other requirements of those sections have been provided as required. Any defects were non-substantive and not prejudicial, as set forth in Factual Findings 1, 3, and 9 (footnote).

2. The notices sent to respondent indicated the statutory basis for the reduction of services and were sufficiently detailed to provide him due process. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board*, *supra*, 116 Cal.App.3d 831.) The description of services to be reduced, both in Resolution 834 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.)

3. The services identified in Resolution 834 are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The

Superintendent's decision to reduce or discontinue the identified services was neither arbitrary nor capricious and was a proper exercise of discretion. Cause exists to reduce the number of certificated employees of the District due to the reduction or discontinuation of particular kinds of services. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

4. 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.)

5. Education Code section 44955, subdivision (b), provides, "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."

6. Education Code section 44955, subdivision (c), provides in pertinent part, "... and services of such employees shall be terminated in the inverse order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845."

7. Because of the reduction or discontinuation of particular kinds of services pursuant to Education Code section 44955, cause exists to give notice to respondent that his services will not be required for the 2010-2011 school year, as set forth in Factual Findings 13 through 23. No certificated employees with seniority dates junior to respondent are being retained to render a service which respondent is certificated and competent to render.

8. As set forth in Factual Findings 6 through 8, and 20 through 22, the competency criteria adopted by the Board were reasonable and were the result of a reasonable exercise of discretion by the Board upon recommendation of the Superintendent.

9. As set forth in Factual Findings 1, and 18 through 19, respondent's defense based on an alleged Brown Act violation was unavailing. Any possible violation was a minor procedural defect, and had no impact on the Board's substantive decision or on respondent's subsequent hearing rights.

RECOMMENDATION

Notice may be given to respondent George Griffin that his services will not be required for the 2010-2011 school year because of the reduction or discontinuation of particular kinds of services in the District.

Dated: April 27, 2010

JOANN I. ESHELMAN
Administrative Law Judge
Office of Administrative Hearings