

BEFORE THE GOVERNING BOARD OF THE
PLEASANT VALLEY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

Teachers of the Pleasant Valley Unified
School District,

Respondents.

OAH No. 2010030611

PROPOSED DECISION

Ralph B. Dash, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on April 7, 2010, at Camarillo, California.

Sharon J. Ormond, Attorney at Law, represented Pleasant Valley Unified School District (District).

Tareq Hishmeh and Robert M. Ostrove, Attorneys at Law, represented the 39 Respondents named in Exhibit A attached hereto and made a part hereof.

Oral and documentary evidence having been received and the matter submitted, the Administrative Law Judge makes the following Finding of Facts.

1. Luis C. Villegas, Ed. D., Superintendent of the District, acting in his official capacity, caused all pleadings, notices and other papers to be filed and served upon Respondents pursuant to the provisions of Education Code Sections 44949 and 44955. All pre-hearing jurisdictional requirements have been met with respect to the District and the Respondents named in Exhibit A have been met.¹

¹ Marie French Risk is not named in Exhibit A. She was duly served with the pleadings in this matter but failed to file a Request for Hearing/Notice of Defense. She appeared at the hearing and requested to be made a Respondent in these proceedings. The District objected to her request, correctly noting that her failure to file a Notice of Defense deprived her of a right to a hearing as provided in Education Code section 44949, subdivision (b). Ms. French Risk testified, but offered no evidence from which it could be determined that she should be relieved from her default under the provisions of Code of Civil Procedure section 473, subdivision (b). Accordingly, although she was permitted to remain at the hearing under representation of Respondents' counsel, it is found that Ms. French Risk shall not be included as a named Respondent in these proceedings.

2. On March 4, 2010, the District's Governing Board adopted a Resolution to reduce and discontinue the services of 47.5 full time equivalent (FTE) certificated positions for the 2010/2011 school year as follows:

Reduce 6 th – 8 th Grade Counseling Services	3.00	F.T.E.
Reduce Psychologist Services	1.00	F.T.E.
Reduce Nurse Services	.50	F.T.E.
Reduce Special Education Mild to Moderate Teaching Services	2.00	F.T.E.
Reduce K – 3 rd Grade Teaching Services	30.00	F.T.E.
Reduce 6 th Grade Teaching Services	6.00	F.T.E.
Reduce 7 th – 8 th Grade English Teaching Services	1.00	F.T.E.
Reduce 7 th – 8 th Grade Social Science Teaching Services	2.00	F.T.E.
Reduce 7 th – 8 th Grade Digital Imaging Elective Teaching Services	1.00	F.T.E.
Reduce 6 th – 8 th Grade Physical Education Teaching Services	1.00	F.T.E.
TOTAL CERTIFICATED POSITIONS	47.50	F.T.E.

3. These services 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 arbitrary or capricious, but constituted a proper exercise of discretion.

4. The reduction or discontinuation of these particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

5. The Board properly considered all known attrition, resignations, retirements, deaths and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees as of March 15, 2010. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627 at 636 (1983).²

6. The District created a seniority list (Exhibit 10) naming all probationary and permanent teachers in order of each one’s first date of paid service. Respondents are certificated District employees. Except in one instance, no certificated employee junior to any Respondent was retained to perform any services which any Respondent was certificated and competent to render. That exception is with respect to Respondent Rhonda Espinoza, a tenured teacher whose seniority date is February 7, 2005. Ms. Espinoza holds a CLEAR-

² All layoffs were for particular kinds of service, and not “average daily attendance” which might require positively assured attrition to be considered through May 15, 2010.

Multiple Subject credential with a supplemental certification in English. After all bumping, skipping and tie-breaking criteria were applied, Ms. Espinoza was listed as being laid off 0.4 FTE, retaining 0.6 FTE (Exhibit 11 at page 20). Peter Jamieson, a tenured teacher who holds a CLEAR single subject-Social Science credential, with a supplemental certification in Computer Concepts and Applications, has a seniority date of August 24, 2006, was retained in full time employment. In addition to teaching technology, Mr. Jamieson teaches Yearbook, a 0.2 FTE subject. The District retained Mr. Jamieson over Ms. Espinoza to teach Yearbook because of his computer skills. Because the yearbook is assembled with the use of computer technology, the District determined Mr. Jamieson possessed superior skills than Ms. Espinoza for purpose of teaching this elective subject.

7. California Code of Regulations, title 5, section 80005, sets forth the subjects, within a single subject credential, which the credential holder may teach. Under this regulation, Yearbook may be taught by the holder of either an Art or English credential only. Mr. Jamieson possesses neither. Education Code section 44258.7, subdivision (c), provides:

(c) A teacher employed on a full-time basis who teaches kindergarten or any of grades 1 to 12, inclusive, and who has special skills and preparation outside of his or her credential authorization may, with his or her consent, be assigned to teach an elective course in the area of the special skills or preparation, provided that the assignment is first approved by a committee on assignments. For purposes of this subdivision an "elective course" is a course other than English, mathematics, science, or social studies. The membership of the committee on assignments shall include an equal number of teachers, selected by teachers, and school administrators, selected by school administrators.

The District produced no evidence that it had complied with the above code section when it made the determination to skip Ms. Espinoza in favor of retaining Mr. Jamieson.

8. Education Code section 44955 concerns a reduction in the number of a school district's employees. Job security is not inherent in seniority. In section 44955, however, the Legislature chose to provide teachers with limited job security according to their seniority. Students and society, in general, benefit from the Legislature's choice. If school districts were permitted simply to choose which teachers not to rehire, one could expect some teacher to be much more cautious in deciding what to discuss and what ideas to express. In *Board of Education v. Round Valley Teachers Association* (1996) 13 Cal.4th 269, 278, the Supreme Court quoted with approval from *Turner v. Board of Trustees* (1976) 16 Cal.3d 818. The *Turner* court noted various interests that are affected by rules regarding the hiring and retention of teachers. The Court said, "Our school system is established not to provide jobs for teachers but rather to educate the young." (*Turner, supra*, 16 Cal.3d at p. 825.) Students and society benefit from teachers' willingness to promote critical discussions of important – and sometimes unpopular – topics. It is primarily for the benefit of students that the seniority rights provided in Code section 44955 must be protected.

9. A teacher's seniority rights are limited, generally, by what he or she is certificated and competent to teach and by the courses a district has chosen to offer. Subject to these limitations, a teacher, generally, has a right to be terminated according to his or her seniority.

10. Of course, seniority cannot be used to determine the order of termination of teachers who have the same date of hire because they all have the same seniority. In Code section 44955, the Legislature also dealt with the order of termination of teachers with the same date of hire. If there are teachers with the same date of hire and a district is going to terminate some but not all of them, the district must determine the order of termination.

11. The Legislature treated the two matters very differently. With regard to the limitations on job security among teachers with different dates of hire, the Legislature provided very specific standards that a school district must respect. With regard to the circumstance in which there is no seniority, however, the Legislature gave school districts a free hand to establish the order of termination according to any criteria the governing board chose so long as the criteria are based on needs of the district and students.

12. The Legislature also has provided a few justifications for terminating a senior teacher while retaining a junior teacher.³ A school district may not create additional justifications for doing that. Creating additional justifications for terminating a senior teacher while retaining a junior teacher would deprive the senior teacher of his or her seniority rights.

13. The Legislature has provided two limitations on a *permanent* teacher's right to be retained over a probationary or junior teacher. First, the teacher must be *certificated* to render the service the probationary or junior teacher is rendering. Second, the teacher must be *competent* to render the service.⁴ A subsequent provision that limits the rights of both permanent and probationary employees speaks in terms of the services their "qualifications" entitle them to render.⁵

14. A teacher either is or is not *certificated* to render a service. A school district may not require a higher certification than the law requires. Creating a super-certification requirement for a senior teacher who is certificated to render a service would deprive the teacher of his or her seniority rights.

15. The question of whether a teacher is *competent* to render a service has to do with his or her specific training and experience as they relate to the duties of a position. In determining whether a teacher is competent to render a service, a district exercises discretion.

³ Code § 44955, subd. (d).

⁴ *Id.* at § 44955, subd. (b).

⁵ *Id.* at § 44955, subd. (c).

But a district may not, based on some policy that is not focused on competency, determine that a senior teacher is not competent. To permit a district to do that would deprive the teacher of his or her seniority rights.

16. When there are teachers among whom there is no seniority, a district has a rather free hand in ranking them for termination so long as the criteria are based on needs of the district and students. As among teachers with different employment dates, however, the Legislature has specified the needs that must be the focus of decisions that impact their seniority rights. The Legislature has specified (1) the need to have a teacher who is certificated to render a service, (2) the need to have a teacher who is competent to render a service, and (3) the need to have a teacher who has the special training and experience necessary to teach a course for which a district demonstrates a specific need.

ANALYSIS OF CODE SECTION 44955

17. Section 44955, subdivision (b), concerns the seniority rights of permanent employees. That subdivision prohibits a school district from terminating a permanent employee while retaining a probationary employee to render a service the permanent employee is certificated and competent to render. That subdivision also prohibits a school district from terminating a permanent employee while retaining any other employee with less seniority to render a service the permanent employee is certificated and competent to render.

18. The first paragraph of section 44955, subdivision (c), concerns the seniority rights of both permanent and probationary employees. That paragraph provides that employees shall be terminated in the inverse order in which they were employed. This adds nothing to the seniority rights provided to permanent employees by subdivision (b), but it does establish seniority rights for probationary employees.

19. The second paragraph of section 44955, subdivision (c), applies to “employees.” Thus, it applies to both permanent and probationary employees. That subdivision requires a district to retain senior employees to render services their “qualifications entitle them to render.” There is no definition of “qualifications.” It is reasonable to interpret that term as referring back to the language requiring permanent employees to be “certificated and competent.” With that interpretation, the limitation on the seniority rights of probationary employees is the same as the limitation on the seniority rights of permanent employees. They must be certificated and competent to render the service.

20. The third paragraph of section 44955, subdivision (b), deals with teachers hired on the same date, that is, teachers who have the same seniority. A governing board must develop “specific criteria” to be used in determining the order of termination of teachers with the same date of hire, and the criteria must be based on “needs of the district and the students.” Such criteria are commonly referred to as tie-breaking criteria.

21. The second paragraph of section 44955, subdivision (c), does not add to teachers' seniority rights. It does, however, make it clear that governing boards must make assignments in such a way as to protect seniority rights. Employees must be retained to render any service their seniority and qualifications entitle them to render. As noted above, it is reasonable to interpret the term "qualifications" as meaning "certificated and competent." Thus, if a senior teacher whose regular assignment is being eliminated is certificated and competent to teach a junior teacher's courses, the district must reassign the senior teacher to render that service. This is commonly referred to as bumping. The district must then either reassign or terminate the junior employee.⁶

22. In Code section 44955, subdivision (d), the Legislature has established four justifications for a school district's skipping over a junior employee, not terminating him or her, but terminating a more senior employee. That is, the Legislature has established four justifications for deviating from terminating employees according to their seniority. First, a district may skip over a junior teacher and terminate a senior teacher if "the district demonstrates a specific need for personnel to teach a specific course or course of study." Second, a district may skip if "the district demonstrates a specific need for personnel . . . to provide the services authorized by a services credential with a specialization in . . . pupil personnel services." Third, a district may skip if "the district demonstrates a specific need for personnel . . . to provide the services authorized by a services credential with a specialization in . . . health for a school nurse." Fourth, a district may skip to maintain or achieve "compliance with constitutional requirements related to equal protection"

23. A school district may not create justifications for skipping. The only permissible justifications are the four listed in Code section 44955, subdivision (d). Creation of other justifications for skipping would deprive teachers of their seniority rights. The District in this matter failed justify its skipping of Ms. Espinoza, who is certificated to teach Yearbook over Mr. Jamieson, who is not so certificated.

Conclusions of Law

1. Jurisdiction for these proceedings exists pursuant to Education Code Sections 44949 and 44955.

2. The services set forth in Finding 2 are particular kinds of service which may be reduced or discontinued in accordance with applicable statutes and case law. A district may reduce services, within the meaning of Education Code 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

⁶ The second paragraph of section 44955, subdivision (c), speaks of the duty of a school board to make assignments in such a manner that employees will be retained to render any service "their *seniority* . . . [entitles] them to render." (Italics added.) A teacher's entitlement to bump a junior teacher out of his or her assignment derives from the senior teacher's *seniority*. (*Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555.)

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.)

3. Cause exists because of the reduction in particular kinds of services to reduce the District's teaching positions by 47.5 Full Time Equivalents and to give notice to the affected teachers pursuant to Education Code Section 44955. (*Campbell v. Abbot* (1978) 76 Cal.App.3d 796; *Degener v. Governing Board* (1977) 67 Cal.App.3d 689).

4. The District's decision to reduce or discontinue the services is neither arbitrary nor capricious, but rather a proper exercise of the District's discretion.

5. Except as set forth in Findings 6 through 8, no junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

6. Although junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831), the District offered insufficient evidence that it had any justification to skip Ms. Espinoza in favor of Mr. Jamieson.

ORDER

As a result of the reductions of services, the District may give notice to all teachers listed on Exhibit A that their services will not be required for the 2010/1011 school year; provided, however, the District must retain Ms. Espinoza for 0.2 FTE, in addition to the 0.6 FTE for which she has already been retained.

Dated:

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT A

Michele Ackerman
Jamie Albrent
Rebecca Almanza-Vujorich
Lillian Barton
Tiffany Baker
Kayce Betzel
Erica Blumfield
Shaun Blumfield
Barbara Broihier
Tamra Butler-Rice
Andrew Chambers
Jessica Cisneros-Elliott
Keeva Conde
Marissa Dahme
Kristin Durley
Rhonda Espinoza
Paula-Jeanne Feinberg
Renee Guiang
Kent Jacobs
Gloria Kirk
Robyn Kodish
Christina Kyriacou
Lindsey Lehman
David Locken
Kimberly Michaud
Daryl Myers
Tanya Narasaki
Wanda Nealon
Andrea Nevin
Michelle Newbold
Michelle Odle
Mary Postal
Timothy Pryor
Kellie Saylor
Cheri Toyen
Lisa Trueblood
Krista Van Wagner
Sandra Walk