

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

In the Matter of the Layoff of:

SUSAN TRAPASSO,

Respondent.

OAH Case No.: L2007030964

PROPOSED DECISION

Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 26, 2007, in Bakersfield, California.

Peter C. Carton, Attorney at Law, represented Curtis Dubost, Ph.D., Superintendent (Superintendent) of the Taft Union High School District (District).

Ernest Tuttle, Attorney at Law, represented Susan Trapasso (respondent).

District has decided to reduce certain educational services and has given respondent and other teachers notice of its intent not to reemploy them for the 2007-2008 school year. Respondent requested a hearing for a determination of whether cause exists for not reemploying her for the 2007-2008 school year.

Oral and documentary evidence was presented at the hearing. The record was left open for the submission of written closing briefs. On May 1, 2007, both parties filed their briefs, which documents have been marked for identification as Exhibits 12 (District's) and B (Respondent's). The matter was submitted for decision on May 1, 2007.

FACTUAL FINDINGS

1. Superintendent Dubost filed the Accusation in his official capacity.
2. Respondent is a certificated employee of the District.

3. Superintendent Dubost recommended to the Board of Trustees of the District (Governing Board) the reduction of services set forth in factual finding number 4.

4. On March 14, 2007, the Governing Board approved the Superintendent's recommendation and adopted Resolution Number 13, reducing the following services for the 2007-2008 school year:

| <u>Service</u> | <u>Reduction</u> |
|------------------------|------------------|
| Piano Class | 2 Sessions |
| Drama/Stagecraft Class | 2 Sessions |
| Dance Class | 1 Session |

The five-session reduction is equal to a .83 Full-Time-Equivalent (FTE) reduction, as one FTE equals 6 class periods of instruction and one preparation period.

5. On March 15, 2007, the Superintendent notified the Governing Board and provided written notice, via certified mail sent to the last known address, to respondent and two other certificated employees of the District, that their services will not be required on a full-time basis for the 2007-2008 school year due to the reduction of particular kinds of services. District seeks to reduce respondent's assignment to .7 FTE, or four class sessions and a preparation period.

6. On March 19, 2007, respondent requested a hearing to determine if there is cause for not reemploying her in a full-time capacity for the 2007-2008 school year.

7. The District filed the Accusation on April 9, 2007, and on the same date respondent filed a timely Notice of Defense.

8. All prehearing jurisdictional requirements have been met.

9. The services set forth in factual finding number 4 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.¹

10. The Governing Board's decision to reduce the services set forth in factual finding number 4 is not arbitrary or capricious but is rather a proper exercise of the District's discretion.

¹ All further references are to the Education Code.

11. The reduction of services set forth in factual finding number 4 is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

12. On March 14, 2007, the Governing Board also adopted Resolution Number 14, setting forth its tie-breaking criteria for employees with the same seniority date. In pertinent part, the Resolutions provides: "THIS BOARD RESOLVES that the order of termination as between employees who first rendered paid service to the District on the same date shall be based solely on the needs of the District and the students thereof. The specific criteria used in determining this need shall be as follows, but not necessarily listed in order of importance: [¶] Credentialing [¶] Experience [¶] Extracurricular Activities [¶] Training [¶] Special Education Needs [¶] Competence [¶] Evaluations. . . ."

13. The Superintendent applied the tie-breaking criteria to select respondent for partial layoff, choosing to retain Mark Howard (Howard), who has the same seniority date as respondent. Howard holds a single subject (Music) credential and teaches band, piano, and other instrumental classes when offered. Superintendent Dubost did not employ any objective criteria or point system to rank the two teachers. At the hearing, the Superintendent explained that he did not consider the criteria of competence, evaluations, or special education needs. Credentials were the same. Training did not seem to play a role either, as both individuals met the criteria, albeit in different ways.

Superintendent Dubost considered experience and extra curricular activities in breaking the tie between the two teachers. He rated Howard higher in the experience criterion because Howard had been hired to fulfill a full-time assignment and had taught instrumental music full-time since his hiring. He viewed respondent as having been hired to fill a part-time music teaching position. Howard received the nod with respect to extracurricular activities because the band he leads is needed for football games and parades.

14. Respondent's seniority date is August 13, 2003. She is a permanent employee and holds a clear single subject (Music) credential. She teaches choir, piano, and music appreciation. She holds a master's degree and has been a teacher for eleven years, seven in California. Respondent participates in several extracurricular activities, including class advisor and choir advisor. The choir assignment involves after-school practices, fundraisers, and performances before live audiences. Although she has not always worked full time as a music teacher, respondent was hired, and has always worked, as a full-time employee.

15. The District has one continuation high school. Several teachers, namely, Ryan Heber (Science), Scott Bennett (Special Education), Bennett Johnson (History), Alan Popejoy (English), Donald Hansen (several core areas), and Julie Skowron (English), who are junior to respondent, teach part-time at the continuation school. These teachers teach in subject matter areas specifically authorized by their respective credentials. Superintendent Dubost explained

that the District assigns employees to teach classes in the continuation school in the same manner as it does in the regular schools. The District assigns its teachers to areas authorized by their individual teaching credential, as it believes such assignments are required for compliance with the federal No Child Left Behind of 2001 (NCLB), Title 22, United States Code section 6301 et seq.

16. Respondent testified that she is competent to teach the continuation school classes in English and entry-level or beginning Science. However, she acknowledged that she is not "highly qualified" to teach such assignment pursuant to NCLB.

17. Respondent is competent to teach the athletic tutorial classes now taught by Steven Sprage (Sprague) and Brandelyn Trejo (Trejo), both of whom are junior to her. The former, the football coach, was hired August 13, 2004, and holds a physical education credential. The latter was hired August 12, 2005, and holds a physical education credential. Sprague is a permanent employee and Trejo is a probationary employee. The tutorial classes provide educational support to athletes in need of remedial assistance. Respondent has taught other classes at the District designed to provide remedial tutoring to students and no specific subject matter credential is required to teach the class. Superintendent Dubost stated that the District prefers to assign the athletes' coaches to teach the tutorial, as they have the athletes' attention and are able to relate the instructional material to athletic pursuits. However, this preference has not been formally adopted or published by the Governing Board. Although the District has offered one tutorial class per period, or seven per day, Superintendent Dubost did not know if the tutorials would be authorized for the 2007-2008 school year.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 8.

2. The services listed in factual finding number 4 are determined to be particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 4 and 9.

3. Cause exists under sections 44949 and 44955 for the District to reduce the particular kinds of services set forth in factual finding number 4, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 11.

4. Section 44955 directs that certificated permanent and probationary employees are to be laid off by seniority, consistent with their qualifications and status. Thus, subdivision (c) provides, in pertinent part: "[t]he governing board shall make assignments and reassignments in such manner that employees shall be retained to render any service which their

seniority and qualifications entitle them to render." The statute, in subsection (b), gives preference to permanent employees: "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."

5. Section 44955, subdivision (b), provides that "[a]s between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of the needs of the district and the students thereof. . . ." The tie-breaking criteria adopted by the Governing Board as Resolution number 14 is based on the needs of the District and its students and, therefore, may be used to decide which teacher, respondent or Howard, is to be laid off. However, the criteria developed by the Governing Board was not properly applied in this instance.

The evidence presented at the hearing indicates that both teachers remain tied after application of the pertinent criteria. Three of the criteria, competence, evaluations, and special education needs, were not utilized to differentiate between the candidates, and no evidence was presented at the hearing to enable the Administrative Law Judge to apply the criteria. Moreover, relative competence would be difficult to assess given the different musical emphasis of the two individuals. Special education considerations did not seem to apply. As Superintendent Dubost concluded, both teachers possessed the same credentials and underwent similar training in their respective areas of emphasis. In applying the decisive criteria, experience and extracurricular activities, the Superintendent did not use any objective measurement and instead made a value judgment not in Resolution Number 14, namely, that instrumental activities were of greater value to the District than choral ones. On the other hand, respondent did not present sufficient evidence at the hearing from which to conclude that she has greater experience or more extracurricular activities than Howard.

Accordingly, the District did not establish that respondent should lose the tie-breaker to Howard. Both individuals should be treated the same. Since both individuals were directly impacted by the reduction of two piano classes, they should each retain one class session. Respondent's teaching load should be increased accordingly.

6. Respondent also asserts that she is certificated and competent to teach two other assignments: continuation English or entry-level Science and athletic tutorial. Section 44865 provides that "A valid teaching credential issued by the . . . Commission for Teacher Preparation and Licensing . . . shall be deemed qualifying for an assignment as a teacher in the following assignments, provided that the assignment of a teacher to a position for which qualifications are prescribed by this section shall be made only with the consent of the teacher: [¶] . . . [¶] (e) Continuation schools. . . ." By virtue of her certification and consent, respondent is "certificated" to teach at the continuation school.

However, she is not competent to teach at the continuation school. The District has, in effect, adopted a competency standard for this assignment, namely, that teachers must hold a single subject certification to teach the class in question, which credentialing is deemed NCLB-compliant.

In *Forker v. Board of Trustees* (1994) 160 Cal.App.3d 13, 19, the Court defined "competent," in the context of a reemployment proceeding under section 44956, in terms of the teachers' skills and qualifications, as "relating to special qualifications for a vacant position, rather than relating to the on-the-job performance of the laid-off permanent employee." In doing so, the Court noted that courts in reduction in force cases, namely *Brough v. Governing Board* (1981) 118 Cal.App.3d 702, 714-15 and *Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, 654-55, had interpreted the term in a similar manner.

In *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 565, the court permitted a governing board to define competency if such definition considered "[t]he skills and qualifications of the teacher threatened with layoff." (See also *Martin v. Kentfield School District* (1983) 35 Cal.3d 294, 299-300 (1983); *Forker*, supra, 160 Cal. App.3d 13.) The board had established a standard of competency that required one year of full-time teaching in the subject area within the last ten years. The Court found that such a standard "clearly related to skills and qualifications to teach" and was, therefore, a reasonable one. (*Duax*, supra, 196 Cal.App.3d 555, 567.) The Court also concluded that the standard did not define competency too narrowly.

The District's competency rule relates to the skills and qualifications of its certificated employees and is reasonable. Respondent does not possess a credential or other authorization in English or Science and, therefore, is not competent to teach in the continuation school.

7. Respondent has established that she is certificated and competent to teach the athletic tutorial class, as set forth in factual finding numbers 14 and 17. Her credential allows teaching remedial subjects and she has in fact taught such subjects in the past. The desire to have the coaches provide the remedial assistance, while understandable, is not a credentialing requirement. Nor has the District established specific need or competence criteria to preclude respondent from qualifying to teach the athletic tutorial classes. She also has more seniority than the two individuals assigned to provide the instruction. Respondent may, therefore, bump the more junior employees if the athletic tutorial class is offered during the 2007-2008 school year.

8. Cause does not exist to terminate the services of respondent for the 2007-2008 school year due to the reduction of particular kinds of services, by reason of factual finding numbers 12, 13, 14, and 17 and legal conclusion numbers 4, 5, and 7.

ORDER

1. The Accusation is dismissed.
2. The District may not terminate respondent Susan Trapasso's services for the 2007-2008 school year due to the reduction of particular kinds of services.

DATED: _____

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings