

BEFORE
THE GOVERNING BOARD OF THE
VICTOR VALLEY UNION HIGH SCHOOL DISTRICT
SAN BERNARDINO COUNTY, STATE OF CALIFORNIA

In the Matter of the Proposed Reduction in
Force Proceeding Involving:

OAH No. 2013020588

Certain Certificated Employees of the Victor
Valley Union High School District Who
Have Received Preliminary Layoff Notices
for the 2013-2014 School Year,

Respondents.

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Victorville, California, on April 9, 2013.

Melanie A. Petersen and Kelly A. Owens, Fagen, Friedman & Fulfrost, LLP represented Victor Valley Union High School District.

Carlos Perez, Reich, Adell & Cvitan, represented all respondents. He was assisted by CTA Representatives Dawn Murray and Tara Baldwin.

No respondent represented himself or herself.

The matter was submitted on April 9, 2013.

FACTUAL FINDINGS

The Victor Valley Union High School District

1. The Victor Valley Union High School District (District) is located in the high desert area of San Bernardino County. The District covers a total area of 536 square miles and has a current population of approximately 9,500 students. The District operates and maintains Adelanto High School, Silverado High School, Victor Valley High School, Goodwill High School, Hook Junior High School, University Preparatory School, Cobalt Middle School, and Lakeview Middle School.

The District employs more than 850 persons, about 435 of whom are certificated employees, 415 of whom provide non-administrative instructional services. Employee salaries and benefits comprise about 90 percent of the District's annual expenditures. The District has a projected budget of approximately \$86 million in revenue and \$90 million in expenditures for the 2013-2014 school year, resulting in a \$4 million shortfall. The District has experienced significant financial problems and was on the verge of receivership. Student enrollment is declining at the rate of approximately 250 students per year. The San Bernardino County Board of Education has assigned an administrator to oversee the District's operation as a result of the District's financial condition.

2. The District is governed by an elected five member Board of Trustees. Elvin Moman is the Board's Chief Executive Officer and the Superintendent of Schools. Steven Desist is the Assistant Superintendent of Human Resources.

The Fiscal Crisis

3. Public schools rely on financing from the State of California. A school district cannot determine the level of state funding it will receive from the State of California until the state budget is chaptered, an event that is supposed to occur each year in late June. Before then, a school district's governing board, which has the duty to produce and file a balanced budget with the County Office of Education, must take steps to ensure that financial ends meet if the worst-case financial scenario develops.

California's economic problems have had a crippling impact on the Victor Valley Union High School District, perhaps more so than upon most other public school districts. If the District cannot meet its financial obligations, the San Bernardino County Office of Education has the authority to intervene and take over the District's operations.

The District's Response

4. In response to the anticipated budgetary shortfall for the 2013-2014 school year, District administrators reviewed expenditures, programs, services and staffing. The District embarked upon a program to reduce its budget. The District reduced expenditures for supplies, conferences, and administrative and staff positions. Positive attrition within the ranks of credentialed employees was not fully replenished. And, the District reluctantly concluded that it was necessary to further trim expenditures by reducing or eliminating particular kinds of services being provided by credentialed employees.

5. On December 15, 2012, following a review of the District's budgetary situation and financial projections for the 2013-2014 school year, Assistant Superintendent Desist recommended to the Board of Trustees that preliminary notices be given to a number of certificated employees that their services would not be required in the 2013-2014 school year and the reason for that recommendation.

6. On December 15, 2012, the Board adopted Resolution No. 13-23, which provides:

WHEREAS, the Governing Board of the Victor Valley Union High School District has determined that it shall be necessary to reduce or discontinue the particular kinds of services of the District as itemized in Exhibit A at the close of the current school year; and

WHEREAS, it shall be necessary to terminate at the end of the 2012-13 school year, the employment of certain certificated employees of the District as a result of this reduction or discontinuance in particular kinds of services;

THEREFORE, BE IT RESOLVED that the Superintendent is directed to send appropriate notices to all employees whose services shall be terminated by virtue of this action. Nothing herein shall be deemed to confer any status or rights upon temporary or categorically funded project certificated employees in addition to those specifically granted to them by statute.

Adopted by the Governing Board of the Victor Valley Union High School District this 15th day of December 2012.

 3 AYES 2 NOES 0 ABSENT

7. Exhibit A provides:

EXHIBIT A

Recommended Reduction in 2013-14 Programs/Services
for the Victor Valley Union High School District

The Superintendent recommends that the Governing Board adopt a resolution to reduce the programs and services for 2013-14 as follows:

Item	Services	FTE
1.	Business	1.0
2.	Industrial Arts	1.0
3.	Auto	1.6

4.	Cadet Corps	1.6
5.	Art	2.0
6.	Hope/Opportunity Program	2.0
7.	Special Education	2.0
8.	History	3.0
9.	Independent Studies	3.0
10.	Music	3.0
11.	Physical Education	4.0
12.	English	5.0
13.	Core/Multiple Subject	8.0
14.	Counselor	8.0
TOTAL FULL TIME EQUIVALENT REDUCTION		45.2

The Particular Kinds of Services

8. The services identified in Exhibit A were the kinds of services that could be reduced under the Education Code. While the designation “Independent Studies” is somewhat imprecise because the District does not maintain an Independent Studies Department and does not have an Independent Studies Chairperson in charge of the program, it was established that the designation “Independent Studies” applies to those employees who provide direct instruction to students who attend school whenever necessary as a part of their independent studies program, including the Virtual High School Program. Teachers who are included within the designation “Independent Studies” remain under the direct supervision of the Principal at the school site where instruction is provided. The use of the designations “Independent Studies” and “Hope/Opportunity Program” was neither arbitrary nor capricious and did not result in the termination of service of any credentialed employee on any basis other than seniority and in a manner authorized by the Education Code.

The Board’s enactment of Resolution No. 13-23 was neither arbitrary nor capricious; its enactment was well within the Board’s discretion; no particular kind of service was lowered to a level below that mandated by state or federal law; the enactment of Resolution No. 13-23 related solely to the economic crisis and the Board’s duty to balance the budget and it was, to that extent, in the best interest of the District and the students thereof.

The District’s Seniority List

9. The District maintains a seniority list, a constantly evolving document that is updated as new certificated employees are hired and as other certificated employees retire, resign or otherwise become separated from District service. The District’s seniority list is a spreadsheet that is organized from the District’s most senior certificated employee to the most recently hired certificated employee. The list contains each employee’s seniority number, site, name, hire date, amount of service expressed in Full Time Equivalent (FTE), status (tenured or probationary), current assignment, and credentials.

10. After it became apparent that a reduction in force was necessary, the District requested employees to review the seniority list and make any corrections. If an employee had a question or possessed additional information, the employee's question was answered and the additional information was verified and included in the seniority list. The updated seniority list was used thereafter to determine who should and should not receive a preliminary layoff notice.

Tie-Breaking Criteria

11. To determine the order of termination of employees who rendered paid service to the District on the same date, the Board enacted a resolution on December 15, 2012. That resolution provides:

DETERMINATION OF TIE-BREAKING CRITERIA FOR 2013-2014

Pursuant to provisions of Education Code §44955, the Board of Education is required to determine the District needs should it become necessary to determine the order of termination for employees who first rendered paid service to the District on the same day.

For the 2013-2014 school year only, to meet the requirements of section 44955, the Board of Education determines the needs of the District and the students by establishing the following tie-breaking criteria:

The following rating system shall be applied in determining the order of termination of certificated employees:

- A. Number of teaching and/or special service credentials. **Rating +1 per credential**
- B. Number of supplementary authorizations: **Rating: +1 per supplementary credential**
- C. Earned degrees beyond the BA/BS level. **Rating: +1 per degree**
- D. Meets Highly Qualified requirements for current assignment and credential under No Child Left Behind: **Rating: +1 per credential/assignment**

- E. Cross Cultural language Development (CLAD)
Bilingual Cross Cultural Language Development
(BCLAD). **Rating: +1 per certificate**
- F. Variable Process for Special Settings (VPSS).
**Rating + .25 for each subject area complete/Both
Tier I and Tier II must be completed to + .25**

TIE-BREAKING PROCEDURE

In the event that common day hires have equal qualifications based on the application of the above criteria, the District will then break ties by utilizing a lottery.

PASSED AND ADOPTED this 15th day of December 2012.

 3 AYES 2 NOES 0 ABSENT

The Issuance of Preliminary Layoff Notices/Jurisdictional Documents

12. Using the updated seniority list, Resolution No. 13-23, the tie-breaking criteria, and considering all positive attrition, the District's administrative staff identified those employees who should receive preliminary layoff notices and those who should not. Whenever an employee provided a particular kind of service that was being reduced or eliminated under Resolution No. 12-23 and was identified as being in line to receive a preliminary layoff notice due to a lack of seniority, that employee's seniority and credentials were carefully examined to determine if that employee had the seniority and credentials to "bump" a junior employee and assume the position held by the more junior employee.

The District did not prepare a "bump analysis," so it was necessary to carefully review the seniority list to confirm that an employee who received a preliminary layoff notice could not bump a more junior employee.

13. The District timely served the following respondents, each of whom was a certificated employee, with notice that the Assistant Superintendent had recommended that they not be reemployed in the upcoming 2013-2014 school year: Brock Baziak, Benjamin Bell, Carrie Bershee; Janice Betian; Carlos Campos; Michael Carter; Henry Citarella; Kenneth Cook-Askins; Michael DeBruhl; Liana Dow; Gabriela Fonseca; Katherine Gentilucci; Rudolph Gonzalez; Anya Harvey; Francis Herdlein; Kristina Kamiyama; Caitlen Kemble; Rachael Lepley; Richard Lewis; Vicky McDaniel; Katie McKee; Brandon Mikkelson; Kristie Moitoso; Jaime Monsalve; Kristen Nichols; Kelly Phelan; Brandi Ringnell; Danielle Schertell; Amy Stampe; and Denny Vasquez.

The District timely served each respondent with an Accusation, Statement to Respondent, and blank Notice of Defense forms, accompanied by relevant sections of the Education Code and Government Code.

The District determined that each respondent who was served with an Accusation and related documents was entitled to a hearing, regardless of whether that respondent timely filed a Notice of Defense.

The District timely served all respondents with a Notice of Hearing, setting the hearing in this reduction in force proceeding for April 9, 2013, to commence at 9:00 a.m.

The Administrative Hearing

14. On April 9, 2013, the record in the reduction in force proceeding was opened.

Jurisdictional documents were introduced; it was confirmed that the caption should be amended to delete any reference to an accusation; opening comments were given by the attorney for the District; a written stipulation concerning jurisdictional matters was received; a stipulation regarding the receipt of the District's exhibits was received; sworn testimony was taken; documentary evidence was provided; Assistant Superintendent Desist testified about the budgetary crisis, the impact of that crisis on the District's operations, the layoff process, the seniority list, the bumping of senior employees into positions held by more junior employees, and the District's intent in using the designation "Independent Studies." The District rescinded and withdrew the preliminarily layoff notice served on Liana (Leanne) Dow, Seniority No. 262, to which there was no objection. Following the taking of evidence, closing comments were given; the record was closed; and the matter was submitted.

Stipulation to Amend the Seniority List

15. The parties stipulated to amend the seniority list to change the status of Kenneth Cook-Askins, Seniority No. 358, from Provisional to Prob. 0, and to change the status of Jamie Monsalve, Seniority No. 364, from Provisional to Prob. 0.

Specific Factual Issues

16. Carrie Bershee, Seniority No. 317, a counselor, read from a prepared statement. Ms. Bershee identified current staffing ratios for counselors, what staffing ratios were recommended nationally, and observed that the District's resolution would result in the reduction of 40 percent of the counselors currently on staff. Ms. Bershee outlined the important and valuable services provided by counselors and mentioned how the reduction in staffing would double the work of those counselors who would remain. Ms. Bershee's comments underscored the adverse consequences that always accompany a reduction in force action. Nothing she said supported a finding that counseling was not a particular kind of service, that a reduction in counseling would result in services being provided at a level

below that required by state or federal law, or that the Board's determination to reduce counseling services was arbitrary or capricious.

17. Kelly Phelan, Seniority No. 353, is a tenured teacher who did not dispute her seniority date. Ms. Phelan provides proficiency instruction in Language Arts and Math to 9th through 12th graders to assist them in passing the CAHSEE examination. She holds a clear multiple subject teaching credential with a supplemental authorization in Math. She believed that she had been improperly noticed for a layoff as an "Independent Studies" teacher. She did not consider herself to be an Independent Studies teacher, she did not receive supervision through an Independent Studies program, she taught six classes a day, and she prepared lesson plans.

A preponderance of the evidence established that Ms. Phelan was an Independent Studies teacher within the meaning and intent of Resolution No. 12-23 and that she was bumped from her position by a more senior employee who was credentialed to provide the instructional services she has been providing. Ms. Phelan lacked the seniority and credential to bump a more junior employee.

18. Danielle Schertell, Seniority No. 372, is a tenured teacher who did not dispute her seniority date. Ms. Schertell is a Virtual High School Teacher. She holds a preliminary single subject teaching credentials in English and Social Science and a preliminary multiple subject teaching credential. Ms. Schertell has blended classes. Some of her students attend class on campus just a few days a week while others are always in class. Ms. Schertell did not consider herself to be an Independent Studies teacher or a Hope/Opportunity Program teacher. She knew nothing about those programs, and she was not supervised by anyone who was affiliated with those programs.

A preponderance of the evidence established that Ms. Schertell was an Independent Studies teacher within the meaning and intent of Resolution No. 12-23. Ms. Schertell's position was eliminated under Resolution 12-23 and she had insufficient seniority to bump a more junior employee. She was bumped from her position by a more senior employee who was credentialed to provide the instructional services she was providing.

19. Katherine Gentilucci, Seniority No. 352, is a tenured teacher who did not dispute her seniority date. Ms. Gentilucci teaches an Academic Success program and English III. She holds a preliminary single subject teaching credential in English. Ms. Gentilucci did not consider herself to be an Independent Studies teacher.

Ms. Gentilucci's proposed layoff was not the result of a reduction in the Independent Studies program. Rather, a preponderance of the evidence established that Ms. Gentilucci was subject to layoff because Resolution No. 12-23 called for the reduction of the services of 5.0 FTE English teachers, she was one of the least senior English teachers, and she lacked the seniority and credential to bump a more junior employee.

20. The employees who testified were honest, articulate and passionate about teaching. As with every other respondent, they are not being released from their employment for any reason related to their competence

The Reduction in Force Proceeding

21. The enactment of Resolution No. 13-23 was the result of a budgetary crisis; it was enacted in good faith; the tie-breaking criteria set forth in a separate resolution were reasonable and were applied in an evenhanded manner; enacting the resolutions were in the best interest of the District and its students. The District used seniority and credentials as the basis for “bumping” and retaining services of senior, appropriately credentialed employees to provide services that were being provided by more junior employees. The District complied with all jurisdictional requirements.

LEGAL CONCLUSIONS

Statutory Authority - Reduction in Force Proceedings

1. Education Code section 44949 provides in part:

(a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

[¶] . . . [¶]

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. A request for a hearing shall be in writing and shall be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified in that subdivision, which shall not be less than seven days after the date on which the notice is served upon the employee. If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing . . .

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the

governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

(2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefor within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. 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. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds . . .

(d) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee. . . .

(e) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Section 11524 of the Government Code, the dates prescribed in subdivision (c) which

occur on or after the date of granting the continuance and the date prescribed in subdivision (c) of Section 44955 which occurs after the date of granting the continuance shall be extended for a period of time equal to the continuance.

2. Education Code section 44955 provides in part:

(a) No permanent employee shall be deprived of his or her position for causes other than those specified . . . and no probationary employee shall be deprived of his or her position for cause other than as specified . . .

(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. 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 . . .

As 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 needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and

services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

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.

(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, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

Jurisdiction

3. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied as to all respondents.

The Reduction of Particular Kinds of Services

4. A school board may determine whether a particular kind of service should be reduced or discontinued, and it cannot be concluded that the governing board acted unfairly

or improperly simply because it made a decision it was empowered to make. (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 174.) A school board's decision to reduce or discontinue a particular kind of service need not be tied in with any statistical computation. It is within the discretion of a school board to determine the amount by which it will reduce or discontinue a particular kind of service as long as the school district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.)

5. A preliminary notice that provides designations of categories of services that are to be reduced or eliminated but does not identify the specific positions subject to the notice is sufficient if it specifies the statutory grounds. The failure to identify specific positions subject to reduction or elimination is not fatal. Since the March 15 notice is only the initial step in the termination process, it is not required that it specify the precise number of teachers to be terminated or the specific positions to be eliminated. The specific positions to be eliminated need not be identified. (*San Jose Teachers Assn. v. Allen, supra*, at p. 632.

Seniority, Bumping, Skipping

6. Seniority: Under Education Code section 44845, seniority is determined by the date a certificated employee "first rendered paid service in a probationary position."

7. Education Code section 44846 provides in part: "The governing board shall have power and it shall be its duty to correct any errors discovered from time to time in its records showing the order of employment."

8. The Statutory Scheme: Education Code section 44955, the economic layoff statute, provides in subdivision (b), in part:

Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while . . . any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

Essentially this statutory language provides "bumping" rights for senior certificated and competent employees, and "skipping" authority to retain junior employees who are certificated and competent to render services which more senior employees are not.

9. Bumping: The district has an obligation under Section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. (*Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 136-137.)

10. Skipping: Subdivision (d)(1) of Section 44955 provides an exception to subdivision (b) where a district demonstrates specific need for personnel to teach a specific course of study and that a junior certificated employee has special training and experience necessary to teach that course that the senior certificated employee does not possess. (*Bledsoe v. Biggs Unified School Dist.*, *supra*, at pp. 134-135.) There is nothing in the statute that requires such special needs be evidenced by formal, written policies, course or job descriptions, or program requirements. (*Id.*, at p. 138.)

Cause Exists to Give Notice to Certain Employees

11. As a result of the Governing Board's lawful reduction of particular kinds of service, cause exists under the Education Code to authorize the District to give final notice to those respondents who are identified hereafter that their employment will be terminated at the close of the current school year and that their services will not be needed by the District for the 2013-2014 school year.

Determination

12. The charges set forth in the Accusation were sustained by a preponderance of the evidence. The District's rescission and withdrawal of the preliminary layoff notice served on Liana (Leanne) Dow was ratified. The Board's enactment of the resolutions applicable in this reduction in force proceeding was related to the welfare of the District and its pupils. The District made necessary assignments and reassignments in such a manner that the most senior credentialed employees were retained to render services that their seniority and qualifications entitled them to provide.

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RECOMMENDATION

It is recommended that the Board of Trustees of the Victor Valley Union High School District issue final layoff notices to the following certificated employees: Brock Baziak, Benjamin Bell, Carrie Bershee; Janice Betian; Carlos Campos; Michael Carter; Henry Citarella; Kenneth Cook-Askins; Michael DeBruhl; Gabriela Fonseca; Katherine Gentilucci; Rudolph Gonzalez; Anya Harvey; Francis Herdlein; Kristina Kamiyama; Caitlen Kemble; Rachael Lepley; Richard Lewis; Vicky McDaniel; Katie McKee; Brandon Mikkelson; Kristie Moitoso; Jaime Monsalve; Kristen Nichols; Kelly Phelan; Brandi Ringnell; Danielle Schertell; Amy Stampe; and Denny Vasquez.

Dated: April 18, 2013



JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings