

BEFORE THE
BOARD OF TRUSTEES OF THE
STONY CREEK JOINT UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Non-Reemployment of
Certificated Employees:

OAH No. 2010011055

JANINE BEARD, ALISA JOHNSEN and
KATHLEEN PORTO-JONES,

Respondents.

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings on March 25, 2010, in Elk Creek, California.

Kim Kingsley Bogard and Elizabeth A. Tanner, Attorneys at Law, appeared on behalf of the Stony Creek Joint Unified School District.

Leslie V. Freeman, Attorney at Law, appeared on behalf of respondents Janine Beard, Alisa Johnsen and Kathleen Porto-Jones, who were all present.

Submission of the case was deferred pending filing of legal argument. Briefs from the District and respondent were received by April 13, 2010, and marked respectively as Exhibits 18 and P for identification. The case was submitted for decision on April 13, 2010.

FACTUAL FINDINGS

1. John T. McIntosh is the Superintendent of the Stony Creek Joint Unified School District (District). He made and filed the Accusation in his official capacity.

2. Respondents Janine Beard, Alisa Johnsen and Kathleen Porto-Jones are permanent certificated employee of the District. On February 12, 2010, the District served on respondents a written notice that it had been recommended that notice be given to them pursuant to Education Code sections 44949 and 44955 that their services would not be required for the 2010-2011 school year. The written notice set forth the reasons for the recommendation and noted that the District's Board of Trustees had passed a Resolution (No. 09-10-6) reducing the certificated staff by 4.5 full-time equivalent (FTE) positions.

Respondents timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year.

3. The Superintendent made and filed Accusations against respondents. The Accusations with required accompanying documents and blank Notices of Defense were timely served on respondents on February 24, 2010. On February 24, 2010, respondents timely filed Notices of Defense to the Accusation. All pre-hearing jurisdictional requirements were satisfied.

4. On February 11, 2010, at a regular meeting, the District's Board of Trustees was given notice of the Superintendent's recommendation that certificated employees holding 4.5 FTE positions be given notice that their services would be reduced or not required for the next school year, and stating the reasons for that recommendation.

5. On February 11, 2010, the District's Board of Trustees determined that it was necessary to decrease programs and services and thus it was necessary to reduce teaching and other certificated services affecting employment of 4.5 FTE positions. The District's Board of Trustees adopted Resolution No. 09-10-6 providing for the reduction or elimination of the following particular kinds of services (PKS):

	<u>Services</u>	<u>Grade Level</u>	<u>FTE</u>
a.	Elementary Reading	K-6	1.0
b.	Elementary CDS	K-6	1.0
c.	Secondary CDS	7-12	1.0
d.	Agriculture	7-12	1.0
e.	Counseling	K-12	0.5

Total Full-Time Equivalent Reduction 4.5

In determining the extent by which to reduce or discontinue particular kinds of services, the District's Board of Trustees considered all positively assured attrition up to and including the date of the resolution. The total number of positions to be reduced or discontinued under this resolution is 4.5 FTE certificated positions. The Board has determined that the services of a corresponding number of certificated employees shall be terminated at the close of the current 2009-2010 school year.

Application of Tie-Break Criteria

6. On February 11, 2010, The District's Board of Trustees passed a second resolution (No. 09-10-5) which established criteria to break seniority date ties. It specified that the criteria were determined "on the basis of needs of the district and the students thereof." In determining relative seniority of certificated employees who first rendered paid probationary service on the same day, the following criteria were to apply, in the order listed:

- a. Length of Service in the District, Excluding Substitute Service
- b. Length of Certificated Service Outside District, Excluding Substitute Service
- c. Clear Credentials
- d. CLAD Certification or Equivalent
- e. Breadth of Credentials
- f. Amount of Post-Graduate Study

7. The District maintains a Certificated Seniority List which contains employees' seniority dates (first date of paid service), credentials/certificates, authorizations and assignments. The District used the seniority list to develop a proposed layoff list of the least senior employees assigned in the various services being reduced.

8. Holly McLaughlin is a principal and half-time teacher with the District. She testified as to application of the tie-break criteria. Four District certificated employees have a seniority date of August 15, 2007. These include Victoria Cutler, Erin Powell, and respondents Janine Beard and Kathleen Porto-Jones. After application of the tie-break criteria, Victoria Cutler and Erin Powell were determined to be most senior, followed by Jeanine Beard and Kathleen Porto-Jones. Ms. Cutler and Ms. Powell were served with precautionary layoff notices. All four employees have the same length of service within the District. Ms. Cutler had four years of certificated service outside the District, followed by Erin Powell with three years of certificated service outside the District. Ms. McLaughlin determined that respondents Beard and Porto-Jones had no certificated experience outside the District. Neither holds a clear credential. Ms. Beard has a CLAD certification credential so she was determined to be senior to Ms. Porto-Jones.

Ms. Porto-Jones contends that she has a CLAD, and is No Child Left Behind (NCLB) compliant in science as a result of her 2007 science degree from California State University at Chico. The District noted that even if Ms. Porto-Jones possesses a CLAD, respondent Beard would still be more senior to her under the tie-break resolution. This is because Ms. Beard holds a multiple subject credential and this has greater breadth than Ms. Porto-Jones' Designated Subjects Career Technical Education Teaching Credential.

The District did not abuse its discretion in the creation or application of the tie-break criteria. The District's application of the tie-break criteria in this case was reasonable and proper. There was no indication that such application was arbitrary or capricious.

Assignment and Reassignment of Certificated Employees

9. Sherry Reed has a District seniority date of September 1, 1976. She is employed as a full time reading specialist at the elementary school, one of the services being reduced by PKS Resolution No. 09-10-6. Ms. Reed holds a Standard Elementary credential, with a Supplemental Authorization in Social Science. The District determined to reassign her to an elementary classroom.

Respondents contend that the District should have instead assigned Sherry Reed to Jeffrey Flynn's Social Science position for the 2010-2011 school year because she holds a Supplemental Authorization in Social Science. By so doing, Jeffrey Flynn and not respondent Beard would be subject to layoff. Jeffrey Flynn is a probationary teacher. His District seniority date is September 13, 2008. He received a precautionary layoff notice. Mr. Flynn holds a Single Subject Credential in Social Science, and he is scheduled to teach three Social Science courses not designated by grade level next year. Respondents also note that Ms. Reed is certificated and competent to provide the half-time continuation teaching service provided by Ms. McLaughlin, also a probationary employee. Ms. McLaughlin's District seniority date is November 10, 2008.

The District explained that Ms. Reed has been an elementary school teacher in the District for over 30 years. Over that period she has never taught self-contained social science at the secondary level. The District correctly noted that it has broad discretion to assign and reassign employees as it deems appropriate. It has discretion as to whether additional assignments and reassignments should be made to save other junior teachers named as respondents. And while the District has an affirmative obligation to reassign senior teachers who are losing their positions, it does not have the same obligation to reassign senior teachers who are not losing their position in an effort to save junior teachers. "Inverse bumping rights" are not contemplated in the process by which Districts exercise discretion as to which assignments and reassignments are made. (*Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 568.)

10. The District did not abuse its discretion when it determined not to reassign Ms. Reed to teach Jeffrey Flynn's Social Science position, or to teach Ms. McLaughlin's position, for the 2010-2011, notwithstanding the fact that both are probationary employees, junior to respondent Beard.

Alisa Johnsen

11. Ms. Johnsen has a District seniority date of August 26, 1996. She holds a multiple subject credential, with single subject credentials in Pupil Personnel Services and Agriculture. She is employed by the District in a counselor position (.5 FTE), grades K-12, the position eliminated in the District's PKS resolution. Although respondents contend that half-time counseling has not been reduced or eliminated, and that some counseling services will continue to be provided to the students of the District, this is not evidence that the service is not being reduced or eliminated, or that it will be provided by existing District employees who are not credentialed or competent to provide them. The District is not required to identify by name the person or persons who will render the counseling service. It is enough at this time that the District has included a .5 FTE counselor position among the particular kinds of services it intends to reduce or eliminate.

Ms. Johnsen contends that she is certificated and competent to bump into a half-time teaching services position for grades 7-12 at a continuation school where Holly McLaughlin

taught this year. Respondents note that a valid teaching credential issued by the State Board or the Commission on Teacher Credentialing is deemed qualifying for assignment as a teacher in a continuation school, provided that the teacher consents to the assignment, that continuation classes provide suitable instruction for the various individuals for whose benefit they are established, and that continuation classes are designed to meet the educational needs of each pupil including, but not limited to, independent study, regional occupation programs, work study, career counseling, and job placement services, as a supplement to classroom instruction. (See Ed. Code, §§ 48430, 48435.) Ms. Johnsen believes her counseling and teaching experience, and her agricultural training and experience establish her competence to provide the varied and individualized attention that the students attending the continuation school require.

12. The District notes that Ms. McLaughlin is assigned to a blended Administrative/Social Science assignment. Ms. McLaughlin holds single subject credentials for both Social Science and English, with a supplemental authorization in Administrative Services. She splits her time equally between teaching and principal duties. The District contends that it is not required to split Ms. McLaughlin's position to accommodate Ms. Johnsen.

The District has never employed Ms. Johnsen for greater than .5 FTE. No employee less senior to Ms. Johnsen is being retained to render service in a position for which she is credentialed and competent that is .5 FTE or less. The District notes that a school district is not required to split an assignment when "bumping" pursuant to Education Code section 44955. Citing *Hildebrandt v. St Helena* (2009) 172 Cal.App.4th 334, the District points to the limitations on the bumping and reemployment rights of half-time teachers. In *Hildebrandt*, the First Appellate District ruled that a school district is not required to split a full-time position to allow half-time employee reinstatement rights.

Respondents believe this case can be distinguished from *Hildebrandt* because the District would be allowing a half-time counselor to bump into an existing half-time teaching position. This case is somewhat complicated by Ms. McLaughlin being tentatively assigned to less than half-time teaching responsibilities next year. The District's tentative high school master schedule for next year has Ms. McLaughlin teaching only two periods (Junior High History and Yearbook 9-11) and serving as principal/administrator for five periods. Respondents believe Ms. McLaughlin increased her own administrative responsibilities from half-time to .7 FTE, and assigned herself one period teaching junior high history and one period overseeing high school yearbook. Respondents suggest that this, as well as other elements of the tentative schedule, "defies logic and can only be seen as obfuscation." Respondents further suggest that the fact that Ms. McLaughlin was not subject to layoff was due to her intimate involvement as the principal in making the choices and recommendations to the Board for approval. Respondents believe Ms. McLaughlin's involvement demonstrates that the layoff decisions were arbitrary and capricious.

13. The above matters have been considered. The District could have split Ms. McLaughlin's existing position had it so chosen. However, it was not an abuse of discretion

for the District to characterize Ms. McLaughlin's position as a full time blended Administrative/Social Science assignment, and then chose not to decouple the principal (.5 FTE) from the teaching (.5 FTE) duties. In *King v. Berkeley Unified School District* (1979) 89 Cal.App.3d 1016, the court found that a district is not compelled to offer separate half-time positions in order to accommodate those previously laid off. The school district had created a new position that involved 50 percent teaching and 50 percent counseling. The court found no abuse of discretion in the district's decision to retain a less senior employee who had credentials for 100 percent of the duties. Here, the District has determined to retain Ms. McLaughlin, a less senior employee, to perform 100 percent of the duties. Respondents believe there is evidence in this case suggesting bad faith and self-serving motives for redefining of positions. In *King*, the court noted that "[v]irtually no evidence was presented to show that respondent showed bad faith in so defining the available position." Regardless, the record and evidence presented in this case did not demonstrate that Ms. McLaughlin or the District engaged in bad faith in the manner in which Ms. McLaughlin's position was defined or redefined.

Janine Beard

14. Ms. Beard possesses a multiple subject teaching credential. This credential authorizes her to teach grades K-12 in a self contained classroom. Only two employees less senior to Ms. Beard are being retained for the 2010-2011 school year. Mr. Flynn is teaching Social Science. Ms. McLaughlin is assigned to a blended Administrative/Social Science assignment. Ms. Beard possesses neither a Single Subject Social Science nor an Administrative credential. She is not authorized to perform the assignments of either Mr. Flynn or Ms. McLaughlin.

Kathleen Porto-Jones

15. Ms. Porto-Jones possesses a designated subjects credential authorizing her to teach Agriculture and Natural Resources in grades 12 and below, and classes organized primarily for adults in career technical instruction. She taught Agriculture and Natural Resources in grades 7-12 at the Elk Creek Junior and Senior High Schools. During the three years she taught, Ms. Porto-Jones held a certificate of clearance and a preliminary designated subjects career technical education teaching credential. The District believes Ms. Porto-Jones is in the same position as Ms. Beard, with regard to whether she is credentialed and competent to perform the assignments of either Mr. Flynn or Ms. McLaughlin. The District is correct. Ms. Porto-Jones possesses neither a Single Subject Social Science nor Administrative credential.

16. Ms. Porto-Jones wishes to be assigned into a vacant agriculture position on the District's Tentative High School Master Schedule. It is a .70 FTE agriculture position that she believes she is certificated and competent to teach.

The District noted that the Agriculture vacant position includes an Agriculture Animal Science and/or Agriculture Biology class, and an Animal and Plant Physiology class.

Students must complete at least one biological science class in order to graduate. Ms. McLaughlin testified that the agriculture biological science classes are the only biological science classes offered, and thus the only way for students to meet the science graduation requirement. Because the agriculture biological science classes are not an “alternative” means of meeting science graduation requirements, they are a “core” science class as defined by NCLB.¹ Accordingly, career technical education teachers such as Ms. Porto-Jones are required to meet NCLB teacher requirements if they are teaching core academic courses. A teacher is not “highly qualified” or competent to teach a core subject area at the secondary level unless she has demonstrated competence in the subject area. There are two ways of demonstrating subject matter competence in a core subject area: 1) possession of a credential in the subject area; or 2) successful completion of a required amount of course work in the subject area. (Cal. Code Regs., tit. 5, § 6111.) Ms. Porto-Jones does not possess a single subject science credential so she must have completed the required course work in order to be competent.

17. Ms. Porto-Jones testified that she is NCLB compliant in Science as a result of her 2007 Bachelor of Science Degree from California State University at Chico. She noted that her college transcripts demonstrate that she had completed 54 units of coursework which counted toward NCLB compliance in Science.

A teacher must have completed coursework equivalent to an undergraduate major in the core subject area (32 non-remedial units earned with a grade of C or higher) to be NCLB compliant. (Cal. Code Regs., tit. 5, § 6111.) The District believes that Ms. Porto-Jones confused classes which counted toward her Agriculture Bachelor’s Degree with courses which count toward NCLB compliance. The CTC Subject Matter Authorization Guidebook provides that coursework from a department other than that of the subject matter authorization being sought is not counted toward NCLB compliance unless a letter is provided from the chair of the subject area department stating that the course is equivalent to one offered by the department. The District reviewed Ms. Porto-Jones’ transcripts. Only 14 units were from classes taken through the science departments. Of those 14 units, Ms. Porto-Jones received a grade of C or better in 10 units. The District noted that even if Ms. Porto-Jones is credited with all the “science” units she claims, she only completed 29 units with a grade of C or better. Ms. Porto-Jones provided no documentation/letters that the classes she took in her major were equivalent to courses offered by the science departments.

The above matters having been considered, Ms. Porto-Jones did not demonstrate that she is NCLB compliant to teach the core subject area (Science) to which she wishes to be assigned.

18. The District concedes that Ms. Porto-Jones was mis-assigned to agriculture biological science classes during the 2009-2010 school year. However, past mis-assignments

¹ “Core subjects” are defined as: “English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, art, history and geography.” (United States Code, title XX, section 7801(11).)

do not entitle her to continued mis-assignment, as such would entitle an unqualified teacher to be mis-assigned in perpetuity.

Other Matters

19. Respondents contend that the Agriculture curriculum provided in 2009-2010 by Ms. Porto-Jones is not really being eliminated, noting that the Tentative High School Master Schedule lists a vacant .7 FTE position teaching four Agriculture courses. Ms. Porto-Jones noted that she can also teach two science courses in a different vacant 1.0 FTE position with an agriculture slant. The District has used her over the past three years to offer the sole science curriculum in the District. The matters set forth in Findings 16 through 18 govern, and provide the District's rationale for not assigning Ms. Porto-Jones to these positions. The District's explanation was not unreasonable.

Finally, Ms. Porto-Jones strongly hinted that a school board member's personal complaint against her explains why the Agriculture program taught by her was targeted for elimination in the PKS resolution. Along with suggestions that Ms. McLaughlin's involvement and decisions were self serving, respondents believe that the decisions made by the District were "arbitrary, capricious and preposterous." No such finding is made in this case.

20. No other permanent or probationary certificated employee with less seniority is being retained to render a service which respondents and other noticed teachers, or any of them, are certificated and competent to render. As between employees who first rendered paid service to the District on the same date, the order of termination was based solely on the needs of the District and the students thereof. The District was required to apply tie-break criteria as part of the layoff process. Such application was reasonable and proper.

The reduction or discontinuation of the particular kinds of services set forth in Resolution No. 09-10-6 are related to the welfare of the schools and the students thereof within the meaning of Education Code sections 44949 and 44955. The decision to reduce or discontinue these services is neither arbitrary nor capricious, but rather a proper exercise of discretion of the District.

LEGAL CONCLUSIONS

1. The District employees receiving notices that their services would not be required next year have rendered valuable services to the District.

2. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide them due process. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) The description of

services to be reduced, both in the Board Resolution 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 Board Resolution No. 09-10-6 are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The District Board of Trustee's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

4. Cause exists to reduce the number of certificated employees of the Stony Creek Joint Unified School District due to the reduction and discontinuation of particular kinds of services. Cause for reduction or discontinuation of services relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

5. The District has discretion in making assignments and reassignments, and was not required to make the reassignment of Sherry Reed into other positions as proposed by respondents. (See Factual Findings 9 and 10.)

As set forth in the Factual Findings, the District applied seniority rules with some consistency, and allowed bumping based upon the more senior employee holding a credential or authorization to teach the assignment of the less senior teacher. The District properly disallowed respondents from bumping into positions they were not otherwise certificated and competent to perform. The District otherwise articulated the rationale for its bumping, assignments and reassignments, along with tie-break criteria, when the process so required.

RECOMMENDATION

Notice shall be given to respondents occupying up to 4.5 FTE that their services will not be required for the 2010-2011 school year because of the reduction or discontinuation of particular kinds of services.

DATED: April 19, 2010

JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings