

BEFORE THE
GOVERNING BOARD OF THE
YUBA COMMUNITY COLLEGE DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

JAMIE BATTERSHELL, CHARLES DOBBS,
LYNETTE GARCIA, LI-CHIUAN HSIEH,
FRANCES JULIAN, ELIZABETH LARA-
MEDRANO, COLLEEN MONAHAN,
GEORGANNA O'KEEFE-SCHWERING,
DAVID PEREZ, FATIMA RUIZ, ESTELITA
SPEARS, and VERONICA TORRES,

OAH No. 2010030036

Respondents.

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, in Marysville, California, on April 22 and 23, 2010.

Scott K. Holbrook, Attorney at Law, represented the Yuba Community College District (District).

Brant J. Bordsen and Nicole D. Delerio, Attorneys at Law, represented respondents Lynette Garcia, Li-Chiuan Hsieh, Frances Julian, Colleen Monahan, Fatima Ruiz, Estelita Spears, and Veronica Torres.

Robert P. Biegler, Attorney at Law, represented respondent Charles Dobbs.

Lisa Jensen, President of the Yuba College Faculty Association (YCFA), represented respondents Jamie Battershell, Elizabeth Lara-Medrano, Georganna O'Keefe-Schwering, and David Perez.

Evidence was received, the record was closed, and the matter was submitted for decision on April 23, 2010.

FACTUAL FINDINGS

1. On March 3, 2010, the District's Governing Board (Board) adopted Closed Session Resolution No. 10-09, releasing certain identified temporary, categorically-funded District employees, including respondents Jamie Battershell, Elizabeth Lara-Medrano, Georganna O'Keefe-Schwering, and David Perez. These respondents were served with precautionary layoff notices. At the hearing, the District rescinded the precautionary layoff notices served on these respondents.

2. On March 3, 2010, the Board adopted Closed Session Resolution No. 10-11, releasing respondent Charles Dobbs from his employment as an Academic Administrator. Mr. Dobbs was served with a precautionary layoff notice. At the hearing, the District rescinded the precautionary layoff notice served on Mr. Dobbs.

3. On March 11, 2010, the Board adopted Resolution No. 10-15, entitled "Resolution Reducing or Discontinuing Particular Kinds of Academic Services" (PKS Resolution). Pursuant to the PKS Resolution, the Board determined that it was necessary and in the best interests of the District to reduce or eliminate certain identified particular kinds of services (sometimes referred to herein as PKS), and to decrease a corresponding number of District academic employees no later than the beginning of the 2010-2011 academic year. The PKS Resolution directed the Chancellor or her designee to give Notice of Recommendation Not to Reemploy to academic employees in accordance with Education Code sections 87740 and 87743.¹ The PKS reductions and eliminations are based solely upon financial reasons, and are not related to the skills, abilities or work performance of the affected faculty members.

4. The PKS Resolution identified the following particular kinds of services for reduction or elimination:

A. Woodland Community College

1.	Counseling	1.00 FTE ²
2.	Earth Science/Physical Science	1.00 FTE

B. Yuba Community College

1.	Drafting/Engineering	.60 FTE
2.	Nursing	2.00 FTE
3.	Political Science	<u>1.00 FTE</u>

Total: 5.60 FTE

¹ All statutory references are to the Education Code unless otherwise indicated.

² "FTE" stands for full-time equivalent.

5. On March 12, 2010, Al Alt, Vice Chancellor, Administrative Services, caused Notices of Recommendation Not to Reemploy (preliminary layoff notices) to be sent to the academic employees identified for layoff. The preliminary layoff notices informed the academic employees of their right to request a hearing, and enclosed copies of the PKS Resolution, sections 87740 and 87743, and a blank request for hearing form. In response to the preliminary layoff notices, the District received requests for hearing from respondents Lynette Garcia, Li-Chiuan Hsieh, Frances Julian, Colleen Monahan, Fatima Ruiz, Estelita Spears, and Veronica Torres. On March 26, 2010, the District served the Accusation, Statement to Respondent, form Notice of Defense, Notice of Hearing, and Request for Discovery on these respondents. The District received Notices of Defense from these respondents.

6. Respondents Garcia, Hsieh, Julian, Monahan, Ruiz, Spears, and Torres are academic employees of the District. The District timely served all notices required by sections 87740 and 87743. Respondents Garcia, Hsieh, Julian, Monahan, Ruiz, Spears, and Torres timely served their Notices of Defense.

7. At the hearing, the District rescinded the preliminary layoff notices served on respondents Monahan, Ruiz, and Spears.

8. The remaining respondents³ raised the following arguments against the District's proposed layoff: (1) the District's actions were "arbitrary, capricious and in bad faith, and fail to constitute a valid opinion required by" section 87743 because the District "did not give thought to the institution or the good of the students, but simply selected the faculty with the least seniority and ability to bump other faculty members"; (2) by its reductions of Political Science (relating to respondent Hsieh) and Drafting (relating to respondent Torres), the District is attempting to eliminate a program without following established guidelines; (3) respondent Julian meets the minimum qualifications to teach Ecology and there is load available for her to teach; and (4) the District did not obtain the approval of the Board of Vocational Nursing and Psychiatric Technicians (Vocational Nursing Board) before reducing Nursing services (relating to respondent Garcia), thereby jeopardizing the accreditation of the District's Nursing program. These arguments are addressed below.

The District's Consideration of Seniority and Bumping Rights

9. Respondents recognized and did not dispute that, due to serious financial and budgetary conditions, the District has a legitimate fiscal motivation for eliminating particular kinds of services and reducing academic staff. Respondents, however, challenged the manner by which the District chose the particular kinds of services and academic staff to be reduced. As set forth below, respondents' arguments are not persuasive.

³ The term "respondents" as used in the remainder of this proposed decision applies only to the four respondents whose preliminary layoff notices were not rescinded at the hearing - respondents Garcia, Hsieh, Julian, and Torres.

10. Nicki Harrington is the Chancellor of the District. As set forth above, Mr. Alt is the District's Vice Chancellor, Administrative Services. He is also the District's Chief Financial Officer and Director of Personnel. The District consists of two fully accredited colleges (Woodland Community College and Yuba Community College) and several outreach facilities.

11. In planning for this reduction in force, Mr. Alt met with the Executive Team, consisting of the Chancellor, the Vice Chancellors, the Presidents and Vice Presidents of the colleges, and the Executive Dean. According to Mr. Alt, in deciding which particular kinds of services to recommend to the Board for reduction, the Executive Team considered a variety of factors, including whether students could obtain the courses by a different fashion, the nature of the degree, the courses required for degree completion, productivity (i.e., student contact hours), the full-time equivalent of students (FTES), and general education requirements. According to Mr. Alt, during the Executive Team meetings, there was no discussion about selecting the particular kinds of services to be reduced based upon the seniority or bumping rights of any faculty.

12. Respondents disputed Mr. Alt's testimony. Respondents asserted that Angela Fairchilds, Woodland Community College President; Al Konuwa, Woodland Community College Vice President; and Kevin Trutna, Yuba Community College Vice President of Academic and Student Services, told respondents and others that the particular kinds of services chosen for reduction were selected based upon the seniority and bumping rights of the faculty teaching them. The only information produced by respondents to support their assertion was either admitted as hearsay under Government Code section 11513, subdivision (d),⁴ or stated in an offer of proof. Respondents did not establish that these alleged statements were made by or on behalf of the Board, were heard by the Board, or were acknowledged or accepted as true by the Board. As a result, these alleged statements cannot be given any credit.

13. Moreover, the evidence presented at hearing contradicted the assertion made by respondents that the Board chose the services to be reduced by selecting the faculty with the least seniority and ability to bump. The District's bumping chart shows that two faculty employees (Jennifer McCabe and Estelita Spears) whose services were identified for reduction possessed seniority and bumping rights, which permitted them to bump two respondents (Frances Julian and Fatima Ruiz).

14. More importantly, the DVD's of the Board's working session and meeting on March 3, 2010 (Exhibit CC), contradict respondents' assertion that the Board acted in an arbitrary or capricious manner or abused its discretion when it selected the particular kinds of

⁴ Government Code section 11513, subdivision (d), provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

services to be reduced. Respondents argued that the Board just “rubberstamped” the service reductions recommended by the Chancellor. To the contrary, the DVD’s show that the Board spent many hours on March 3, 2010, reviewing the proposed service reductions. The Board requested and received significant input, and undertook a comprehensive review of the proposed reductions before issuing the PKS Resolution on March 11, 2010. The Board permitted a full airing of all issues relating to the proposed reductions, including the arguments raised by respondents in this case. The DVD’s establish that the Board exercised its discretion in a thorough and deliberate fashion. There is no indication on the DVD’s that the Board engaged in arbitrary or capricious action or abused the discretion that the law vests in the Board to make the difficult choices made in this case.

15. But even if respondents’ assertion - that the Board considered seniority and bumping rights when determining which particular kinds of services to reduce - were accepted as true solely for the sake of argument, such consideration would not establish that the Board acted arbitrarily or capriciously, or abused its discretion. Section 87743, in relevant part provides:

... 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** either of these conditions to decrease the number of tenured employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the employees of the district, tenured as well as probationary, at the close of the school year. However, the services of no tenured employee may be terminated under this section while any probationary employee, or any other employee with less seniority, is retained to render a service in a faculty service area in which the records of the district maintained pursuant to Section 87743.4 reflect that the tenured employee possesses the minimum qualifications prescribed by the board of governors and is competent to serve under district competency criteria. (Bolding added.)

In closing argument, respondents conceded that they could find no court decisions that have held that a governing board cannot consider seniority and bumping rights when determining which particular kinds of services to reduce. Respondents argued however, that section 87743, by including the term “by reason of,” requires that governing boards must first select the particular kinds of services to eliminate and then determine the corresponding percentage of individuals to be reduced. According to respondents, the Board applied section 87743 “in reverse”: It first decided which individuals to reduce based upon their seniority and bumping rights, and then selected the particular kinds of services to eliminate. According to respondents, this “reverse” way of applying section 87743 constitutes an abuse of discretion. Respondents’ argument is not persuasive.

Section 87743 permits governing boards to exercise their discretion in selecting particular kinds of services for reduction. The section does not dictate the factors that a governing board may take into consideration in making this selection. It does not include any language that prohibits governing boards from considering seniority and bumping rights when selecting the particular kinds of services to be reduced.

Moreover, respondents did not establish that the District targeted respondents for layoff for any illegal or discriminatory reasons. There was no evidence that the District chose respondents because of their race, ethnicity or gender; or to retaliate against them for exercising their union or complaint rights; or to get rid of them for disciplinary reasons. The evidence established that, in accordance with the law, the only factors that the District considered in selecting respondents for layoff were their seniority and bumping rights.

16. Respondents also alleged that the Board's selection of the particular kinds of services to be reduced and the faculty to be laid off was not made in the best interests of the District's colleges or the students. Jennifer McCabe, a tenured professor currently employed at Woodland Community College in the Earth Science/Physical Science Division, submitted her analysis of criteria (productivity, FTES, degree completion and general education requirements), which Mr. Alt testified the Executive Team considered in recommending services for reduction. Sheila Cooney Scroggins, a tenured professor in the Nursing division and the Chair of the Nursing Curriculum Committee, submitted her analysis of the effect that the Nursing reductions would have on the Nursing division. Respondent Hsieh testified to the effect that she believes that the elimination of Political Science will have on the District and the student body.

17. Respondents argued that, based on Dr. McCabe's analysis, there was no way that Earth Science would have been eliminated if the factors delineated by Mr. Alt were considered. But the Board, in reducing particular kinds of services, was not limited either to considering only the factors that Mr. Alt delineated or to applying those factors only in the way Dr. McCabe described. As set forth above (Finding 15), the law gives the Board discretion in deciding which factors to consider in selecting services for reduction, and in determining how those factors should be weighed and balanced. As long as the Board does not abuse its discretion or exercise it in an arbitrary or capricious fashion, its service reductions cannot be overturned.

18. Dr. McCabe and Dr. Scroggins were strong advocates seeking to protect their divisions from the Board-approved reductions. Respondent Hsieh was advocating to save her job. Their analyses took into consideration only information about their particular divisions. They did not review information about any other divisions. Although respondents and their witnesses may believe that their recommendations would better serve the District and its students, the law vests in the Board the legal authority and discretion to determine which services to cut. It is the Board that is tasked with making difficult choices among many competing divisions and interests. The evidence did not establish that the Board acted arbitrarily or capriciously, or abused its discretion in choosing particular kinds of services for reduction. Respondents presented no evidence and raised no arguments to warrant overturning the Board's service reduction decisions.

Discontinuance of Programs

19. By reducing Drafting and Political Science, the District is eliminating all the courses currently being taught in these program areas. Respondents argued that, by eliminating these courses, the District is discontinuing the Drafting and Political Science programs. Respondents submitted two District policies governing program discontinuance – BP 4021 and AP 4021. Respondents asserted that, if the District wished to discontinue these programs, it had to follow the procedures set forth in BP 4021 and AP 4021. According to respondents, because the District did not follow the procedures set forth in these policies to discontinue these programs, it cannot eliminate the Drafting and Political Science courses identified for reduction in the PKS Resolution, or lay off respondent Torres, who teaches Drafting, or respondent Hsieh, who teaches Political Science. As set forth below, respondents' arguments are without merit.

20. Mr. Alt explained that, although the District has approximately 2,000 course offerings, there are only about 1,300 courses offered at any given time. According to Mr. Alt, a program has an approved curriculum. To discontinue a program, the District must follow the provisions of BP 4021 and AP 4021 to eliminate the program's curriculum from the system. When a program is discontinued, the courses within it cannot be taught again unless the program is reestablished through the applicable procedures.

21. Mr. Alt testified that, by reducing Drafting and Political Science, the District is only eliminating these courses from the District's course offerings; it is not eliminating the Drafting and Political Science programs. Because the District is not eliminating the Drafting and Political Science programs, if it receives sufficient funding in the future, it can offer these courses again without reestablishing the programs.

22. Mr. Alt's testimony was persuasive. It was supported by the testimony of Ms. Jensen. Ms. Jensen expressed her concerns that, based upon her past observations, when the District has stopped offering all courses in a program area, that program area has ceased to exist. Ms. Jensen conceded, however, that when a program is not discontinued pursuant to the District's policies, the District may offer courses in that program area in the future.

23. During closing argument, respondents argued that, in order to keep a program alive, the District has to offer at least one course in that program; and if the District eliminates all course offerings in a program, the District discontinues the program. There was no evidence to support this argument. To the contrary, BP 4021 and AP 4021 set forth significant procedures that must be followed before a program may be discontinued. The District did not follow these procedures so that it could retain the Drafting and Political Science programs for utilization in the future, if and when the District's budget allows. Because the arguments that respondents made about program discontinuance were without merit, respondents Torres and Hsieh did not establish that their preliminary layoff notices should be rescinded.

Respondent Julian's Minimum Qualifications

24. Respondent Julian's hire date is August 14, 2006. She currently teaches Earth Science. Dr. Julian has a master's degree and Ph.D. in Geology. At the hearing, she argued that she has the qualifications to teach Ecology and should be allowed to bump into that subject area.

25. According to Dr. Julian, in order to teach Ecology, she must have either a master's degree in Ecology or Environmental Science or the equivalent. Dr. Julian argued that she has the equivalent of a master's degree in Environmental Science and therefore meets the minimum qualifications to teach Ecology.

26. Dr. Julian testified that she had completed her portion of the District's process to establish that she meets the minimum qualifications to teach Ecology, but had not yet received a response to her request.

27. Mr. Alt testified that the District has determined that Dr. Julian has not yet completed the minimum qualifications to teach Ecology. In addition, the District has determined that there are currently no Ecology positions that Dr. Julian has the seniority to bump into. According to Mr. Alt, all the faculty who are currently teaching Ecology are more senior than Dr. Julian.

28. Mr. Alt's testimony was persuasive. Because Dr. Julian did not establish that she meets the minimum qualifications to teach Ecology and because there are currently no Ecology positions being taught by more junior faculty whom she could bump, Dr. Julian did not establish that she has any rights to bump into an Ecology position. Consequently, Dr. Julian did not establish that her preliminary layoff notice should be rescinded.

Reduction of Nursing Courses

29. Respondent Garcia is an Associate Professor of Nursing. Her hire date is January 18, 2007. She is currently scheduled to teach two courses for students studying to become licensed vocational nurses (LVN's).

30. At the hearing, Ms. Garcia testified that the District has decided not to offer the LVN program, but has agreed to continue to teach the current students who still have one year of classes before they can sit for the licensing examination. She conceded that there are faculty in the Nursing division who are more senior and who have the credentials and qualifications to teach the classes that the current students need to finish their degrees and sit for the licensing examination.

31. Ms. Garcia asserted that the District cannot reduce her LVN classes without obtaining the prior approval of the Vocational Nursing Board, because doing so would violate the Vocational Nursing Board's regulations and jeopardize the District's LVN program accreditation. Ms. Garcia testified that, before making any changes to the LVN

curriculum, the District must comply with California Code of Regulations, title 16, section 2533, subdivision (f), which provides:

All curricular changes that significantly alter the program philosophy, conceptual framework, content, objectives, or other written documentation as required in Section 2526, shall be approved by the Board prior to implementation. Proposed curricular changes must be submitted to the Board in final form by the fifteenth day of the second month preceding the month of the Board meeting at which the changes will be considered. Revisions should include:

- (1) Explanation of changes;
- (2) Rationale for proposed revision;
- (3) Description of revised curriculum materials; and
- (4) Changes to behavioral objectives, if applicable.

32. Ms. Garcia testified that, if the LVN courses she is scheduled to teach are reduced, there will be a change in the LVN program's curriculum. She testified further that, if her position is reduced, the District will not have enough teachers to adequately teach the curriculum, the classes will not be available for students to take, students will not be able to graduate in a timely fashion, and the Vocational Nursing Board may not let the students sit for the licensing examination. In addition, Ms. Garcia asserted that the Vocational Nursing Board may not agree to extending the program from a two-year program to a longer program.

33. Whether the District's reduction may violate the Vocational Nursing Board's regulations is a matter beyond the jurisdiction of this proceeding. Whether and to what extent the District may have to take any action to comply with California Code of Regulations, title 16, section 2533, subdivision (f), before it can accomplish the Nursing reductions the Board has approved is a matter best addressed to the Vocational Nursing Board.

34. Dr. Scroggins' analysis shows that the District's cuts in Nursing will reduce the total nursing faculty to seven full-time instructors. Ms. Garcia's testimony confirmed that at least some of these instructors have the credentials and qualifications to teach the LVN courses that current students may need to finish their degrees and sit for the licensing examination. The testimony of Ms. Garcia and Dr. Scroggins did not establish that the Board has engaged in arbitrary or capricious action, or abused its discretion by reducing Nursing services. Consequently, Ms. Garcia did not establish that her preliminary layoff notice should be rescinded.

35. Respondents also argued that the particular kinds of services chosen by the Board cannot be eliminated because there is a load of classes available for each respondent to

teach and more than sufficient students who want to take these classes. These factors are not relevant. The unfortunate consequences of an economic reduction in force are that classes that students may want to take may be eliminated, and that competent faculty may be laid off.

36. There was no evidence that the District proposes to eliminate any services that are mandated by state or federal laws or regulations.

37. Any other assertions put forth by respondents at the hearing and not addressed above are found to be without merit and are rejected.

38. No junior employees are being retained to render services that more senior respondents are qualified and competent to perform.

39. The District's reductions and discontinuances of particular kinds of services relate solely to the welfare of the District's colleges and students.

LEGAL CONCLUSIONS

1. The District complied with all notice and jurisdictional requirements set forth in sections 87740 and 87743.

2. The services identified in the PKS Resolution are particular kinds of services that may be reduced or discontinued under section 87743. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuance of services relates solely to the welfare of the District's colleges and its students within the meaning of section 87740.

3. As set forth in Findings 1 and 2, at the hearing, the District rescinded the precautionary layoff notices served upon respondents Jamie Battershell, Elizabeth Lara-Medrano, Georganna O'Keefe-Schwering, David Perez, and Kevin Dobbs.

4. As set forth in Finding 7, at the hearing, the District rescinded the preliminary layoff notices served on respondents Colleen Monahan, Fatima Ruiz, and Estelita Spears.

5. Cause exists to reduce academic faculty of the District due to the reduction or discontinuance of particular kinds of services. The District properly identified the academic faculty to be laid off as directed by the Board.

6. No junior academic faculty is being retained to perform services that a more senior respondent is qualified and competent to render.

7. Other than for the respondents identified in Legal Conclusions 3 and 4, cause exists to give notice to respondents that their services will be reduced or will not be required for the 2010-2011 academic year because of the reduction or discontinuance of particular kinds of services.

RECOMMENDATION

1. Pursuant to Legal Conclusion 3, the District shall rescind the precautionary layoff notices served upon Jamie Battershell, Elizabeth Lara-Medrano, Georganna O'Keefe-Schwering, David Perez, and Kevin Dobbs.

2. Pursuant to Legal Conclusion 4, the District shall rescind the preliminary layoff notices served on respondents Colleen Monahan, Fatima Ruiz, and Estelita Spears

3. Except as provided in Recommendations 1 and 2, notice may be given to respondents that their services will be reduced or will not be required for the 2010-2011 academic year. Notice shall be given in inverse order of seniority.

DATED: May 3, 2010

KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings