

BEFORE THE
BOARD OF TRUSTEES OF THE
DRY CREEK JOINT ELEMENTARY SCHOOL DISTRICT

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE DRY CREEK JOINT
ELEMENTARY SCHOOL DISTRICT,

OAH No. 2010021036

Respondents.

PROPOSED DECISION

This matter was heard before Ann Elizabeth Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, in Roseville, California, on April 28, 2010.

Robert E. Thurbon, Attorney at Law, represented the Dry Creek Joint Elementary School District (District).

Michael N. McCallum, Attorney at Law, represented respondents, who are listed on Attachment A and incorporated herein by reference.

Evidence was received, the record was closed, and the matter was submitted for decision on April 28, 2010.

FACTUAL FINDINGS

1. Mark Geyer is the Superintendent of the Dry Creek High School District (District). His actions, and those of the District's governing body, the Board of Trustees (Board), were taken solely in their official capacities.
2. The District currently expects a significant budget shortfall for the 2010-2011 school year.

3. On February 25, 2010, the Board adopted Resolution No.2010-01 (Resolution), reducing or discontinuing particular kinds of services (PKS), affecting 36.2 Full Time Equivalent of certificated positions (FTE).

4. The Resolution was based on the Superintendent's February 25, 2010, written recommendation that it was necessary to reduce or discontinue particular kinds of services no later than the beginning of the 2010-2011 school year.

5. The Resolution states that it is necessary to reduce the PKS of the District not later than the beginning of the 2010-2011 school year. The Resolution identified the PKS reduction as follows:

■ Administrators-Reduce work year of all positions by three (3) days

■ Assistant Principal-Elementary 1.0 FTE

■ Assistant Principal-Middle School 1.0 FTE

■ School Counselor 2.0 FTE

■ Teacher- Special Education 2.0 FTE

■ Teacher- Reading Resource/
English Language Learner 7.0 FTE

■ Teacher-4/5 Science .2 FTE

■ Teacher- Elementary 19.0 FTE

■ Teacher-Middle School: 4.0 FTE

Reduce total middle school teaching services due to class size increases by reducing the equivalent of four (4) full-time employees in middle school service areas including but not limited to one or more of the following services: Language Arts, Social Sciences, Math, Science, Exploratory and Physical Education

6. As a result of the above PKS reductions and discontinuances, the Board determined that it was necessary to decrease a corresponding number of certificated positions, 36.2 FTE, in the District at the close of the 2009-2010 school year, in accordance with Education Code section 44955.¹

¹ All statutory references are to the California Code of Education unless otherwise stated.

7. The Resolution further stated that:

It may also be necessary to retain certificated employees who possess special certifications, service credentials, training or experience, which other certificated employees with more seniority do not possess to teach a specific course or course of study, or provide services authorized by the special credential and these needs may include but are not limited to

1. Special Education: special day class teachers, resource specialists, speech therapists, psychologists, adaptive P.E. teachers;
2. Speech and language pathologists;
3. Health Educators (Nurses);
4. Physical education and music teachers;
5. Counselors.

8. On March 2, 2010, the Superintendent timely served a letter (Preliminary Notice) on at least 59 certificated employees, including the 37 respondents. The Preliminary Notice advised that the Superintendent had recommended to the Board that the recipient be given preliminary written notice that his/her services would not be required for the 2010-2011 school year, due to reductions in PKS. The Preliminary Notice identified the PKS to be reduced and notified the recipient that "... the District intends to retain, regardless of seniority (i.e. "skip" in the layoff process) certificated employees who possess credentials and qualifications needed for Special Education, Special Day Class Teachers, Resource Specialists, Speech Therapists, Psychologist, Adaptive P.E. Teachers, Speech and Language Pathologists, Health Educators (Nurse), Physical Education, Music Teacher, Counselors, and Cross-Cultural Language and Academic Development (CLAD) or equivalent, to meet the needs of its diverse and scattered student population."

9. Respondents timely filed a Request for Hearing to determine whether there was cause for not reemploying them for the 2010-2011 school year.

10. On April 6, 2010, the Deputy Superintendent executed an Accusation, and caused it to be served on respondents. Respondents timely filed Notices of Defense.²

² The parties entered into a written stipulation (Exhibit 1) that layoff notices were timely served on respondents, requests for hearing were timely served on the District, accusations and notices of hearing were timely served on respondents and notices of defense were timely served on the District.

Implementation of Lay-Off Process

11. The Board adopted a seniority list on February 25, 2010. The seniority list contains the following information: name of the employee; school and position assignment for the 2009-2010 school year; seniority date and credentials. Prior to the Board's adoption of the seniority list, the list was circulated among all worksites and employees were given an opportunity to request changes. The list was updated and corrected where appropriate.

12. District employees used the seniority list to identify the least senior certificated employees occupying the positions affected by the PKS reduction. In respect to the 4.0 FTE middle school reduction, District employees selected the four least senior employees teaching at middle schools. They are Linda Smith, Nicole Brackett, Kristie Edmondson and Kara Cunningham. There were no certificated employees teaching in the middle schools, junior to these four, who were skipped, except Heather McMurray, who is discussed in Finding 27.

13. District employees then turned to the seniority list to identify the certificated employees who were teaching in the elementary schools. They applied the Board's "skipping criteria" by skipping any employee teaching special education, speech pathology and physical education. They also skipped for "science" Mark Brown (seniority date July 26, 2006) and Natalie Paiva (seniority date August 5, 2005). They skipped Joshua OGeen for reasons that are unclear; he is a teacher in middle school and has a multiple subject with CLAD.

14. District employees then identified the least senior teacher teaching 4/5 FTE in science. The teacher was issued a Preliminary Notice, which was ultimately rescinded.

15. District employees then identified certificated employees occupying the 7.0 FTE Teacher- Reading Resource/English Language Learner PKS. These affected employees were able to bump junior classroom teachers. At hearing, the District Director of Personnel Services, Colleen Slattery, acknowledged that there are two junior reading resource teachers being retained to teach reading resources, Kelly Hall (seniority date July 25, 2002) and Kellie Welty (seniority date July 10, 2000), while more senior reading resource teachers were bumping into classroom positions. Ms. Slattery acknowledged that she did not know why senior resource teachers did not bump into these junior reading resource positions rather than into classroom positions.

16. District employees identified the persons occupying the 2.0 FTE special education positions eliminated in the Resolution, who received notice as well as one school counselor and a counselor on a temporary contract.

17. In respect to the 1.0 FTE reduction in middle school principal and the 1.0 FTE reduction in elementary school principal, District employees determined that there was a vacancy in an elementary school principal position, which eliminated 1.0 FTE elementary principal services. But to satisfy the 1.0 FTE reduction in middle school principals, two assistant middle school principals each bumped .5 FTE into an elementary principal position, held by interim assistant elementary school principal Julie Hermann. Ms. Hermann holds a multiple subject credential and was able to bump junior respondent Nicole Bussell from classroom teaching.

Respondents' Challenges to Layoff Proceeding

Over-Noticing

18. The District acknowledges that it served a Preliminary Notice on 25 elementary teachers, six more than the PKS authorization for a 19.0 FTE reduction in elementary teachers. The District over-noticed out of legitimate concerns that middle school teachers and administrators subject to lay off may be able to bump into the elementary positions. The District stipulates that six of these notices will be rescinded, but has not yet identified the affected teachers, because it needs additional time to make that determination. The District wants an opportunity to look at next year's schedule and determine which respondents should be retained to teach courses offered in 2010-2011, and wants time to perhaps apply skipping and bumping criteria to the respondents. Respondents maintain that the six preliminary notice rescissions should be of the most senior respondents who are multiple subject holders teaching middle and elementary school: Roberta Blynn; Brandi Payne; Karen Long; Melanie Maclean; Francisca Diaz and Karmjeet Fishburn.

19. Sections 44949 and 44955 provide procedural due process protections for certificated employees who have received a Preliminary Notice of termination of services. One of these protections is the right to a full evidentiary hearing in which the employee may challenge the District's decision to terminate his or her services, and the procedures the District employed in selecting the employee for termination. Here, the respondents identified in Finding 18 are the six most senior respondents who hold multiple subject credentials and, if their services are to be terminated, they are entitled to present evidence challenging their terminations. They are effectively prevented from challenging their terminations at this hearing, because, even at the conclusion of the hearing, they do not know whether they are targeted for layoff and what defenses they may have. It would be a clear violation of these respondents' due process rights to require them to wait for an indeterminate amount of time, until May 15 at the latest, to learn if they will be terminated. At that time, they would have no avenue in which to challenge termination. Accordingly, the Preliminary Notices issued to respondents Roberta Blynn, Brandi Payne, Karen Long, Melanie Maclean, Francisca Diaz and Karmjeet Fishburn must be rescinded.

Application of “Skipping”

20. There was no Board authorization to skip from layoff persons with science or math credentials or persons teaching science or math. Yet certificated employees holding science credentials were skipped and math credentials were considered in the layoff process, although it is unclear from the evidence what significance was ascribed to the math credential. The Education Code does not require a governing body to adopt a resolution identifying services it intends to skip in the layoff process. However, here, the Board did adopt “skipping criteria,” but the skipping criteria were so broad that the District personnel implementing the criteria clearly felt confident designating various subjects and various credentials to be exempt from lay off. Hence the paradox: The Board resolved to reduce certain PKS (school counselors, special education teachers, science teachers, reading resource teachers and physical education teachers under the (4.0 FTE Middle School PKS)), which District personnel believed they were authorized to skip from lay off (special education, counseling, middle school teaching in math and science, resource teachers and counselors and science and physical education.)

21. Section 44955, subdivision (d)(1), places the burden upon the District to demonstrate a specific need for personnel to teach a specific course or course of study and to demonstrate that the certificated employee skipped has special training and experience necessary to teach that course or course of study, which others with more seniority do not possess. A blanket resolution authorizing the Board, or its designee, to skip unlimited and broad categories of employees cannot substitute for the District’s affirmative obligation to demonstrate the factors set out in section 44955, subdivision (d)(1). There was no evidence produced at hearing to support either that there was a specific need for specific personnel to teach a specific course or course of study, or that an inquiry was made as to whether senior persons possess the same skills as the skipped junior person.³ Instead, all “skipping criteria” employed was done for the purpose of retaining teachers who held certain credentials, so that they would be available to teach unspecified classes in the future. Thus, the District’s application of skipping criteria was invalid.

³ Moreover, the Board Resolution did not specifically find that it was necessary to skip junior persons in this proceeding. The Resolution merely stated that “It *may* also be necessary to retain certificated employees who possess special certifications, service credentials, training or experience, which other certificated employees with more seniority do not possess to teach a specific course or course of study, or provide services authorized by the special credential and these needs may include but are not limited to...” (italics added)

22. Accordingly, the District may not use its skipping criteria to retain a junior employee. However, the District also used the term “skip” to pass over junior employees who were teaching outside of the areas affected by the PKS reductions.⁴ For instance, in respect to the layoff of 4.0 FTE middle school teachers, District personnel mistakenly considered it a “skip” when they identified teachers who were teaching outside of the middle school PKS reductions. And, District employees considered speech therapy teachers and special education teachers a “skip” as well as psychologists and pre K-instructions. The PKS reduction of 4.0 FTE Teacher-Middle School plainly is intended to apply to middle school teaching services, not these specialized services.⁵

23. Although section 44955, subdivision (d)(1), and its authorization for skipping appears to have been misunderstood, the certificated employees affected by the 4.0 FTE middle school teaching reduction were adversely affected by only one instance of “skipping.” District employees “skipped” Valerie Verboncouer Green (seniority date 8/8/08), a middle school music teacher, when making the decision which middle school teachers were subject to lay off. As the Board’s skipping criteria are invalid and there was no evidence that this skip met the requirements section 44955, subdivision (d)(1), this was an improper skip. Valerie Verboncouer Green is junior to Linda Smith, Nicole Brackett, Kristie Edmondson and Kara Cunningham. Accordingly, the employee with the highest seniority, Kristie Edmondson (7/26/06), would have been retained had Valerie Verboncouer Green not been improperly skipped. Ms. Edmondson’s Preliminary Notice must be rescinded.

24. Linda Smith, Nicole Brackett and Kara Cunningham are the most junior middle school teachers and are subject to layoff.

25. The District’s erroneous concept of “skipping” was also applied to determine who was affected by the elimination of 19.0 FTE elementary teaching positions. Teachers teaching in special education were erroneously “skipped” according to “skipping criteria.” However, as noted above, these special-education positions were not subject to layoff. (The Resolution identified only two special-education positions for layoff.) The elementary reductions clearly pertain to regular elementary school positions. Thus this erroneous “skipping” of the special education teachers did not adversely affect the seniority of the elementary school teachers.

⁴ These errors are understandable given the confusion generated by the Resolution, the Board adopted skipping criteria and the skipping information included in the Preliminary Notice.

⁵ The Resolution states as an explanation for its 4.0 FTE Teacher-Middle School reduction that its purpose is to “reduce total middle school teaching services due to class size increases by reducing the equivalent of four (4) full-time employees in middle school service areas including but not limited to one or more of the following services: Language Arts, Social Sciences, Math, Science, Exploratory and Physical Education.”

26. There were multiple elementary school teachers who were served with a Preliminary Notice of layoff while junior elementary school teachers subject to layoff were improperly skipped. Laura Benjamin was skipped because she had a P.E credential, but then was bumped by a senior teacher. Mark Brown was skipped due to his science credentials. Joshua OGeen was skipped for an unknown reason. As the Board's skipping criteria are invalid and there was no evidence that these skips met the requirements section 44955, subdivision (d)(1), these were improper skips. The appropriate remedy is to rescind the Preliminary Notices of the three most senior of respondent multiple subject holders serving in middle or elementary positions after rescission of notices to Kristie Edmondson, Roberta Blynn, Brandi Payne, Karen Long, Melanie Maclean, Francisca Diaz and Karmjeet Fishburn, pursuant to Findings 18, 19 and 23. The Administrative Law Judge is not in a position to make the determination which three respondents are the most senior and the District must do so without application of "skipping criteria."

Release of Temporaries and Categoricals

27. Ms. Slatterly testified that in preparation for the layoffs, several teachers were non-reelected or placed back on a rehire list. Heather McMurray, Colleen Sullivan and Kelli Wilner are temporary teachers who are replacing teachers on leave in the 2009-2010 school year. It appears that rather than considering these temporary positions as within the pool of elementary and middle school positions subject to layoff, District employees looked at the seniority date of the teachers the temporaries were replacing and determined that the teachers on leave were senior to any of the affected employees. Accordingly, the three temporary positions were not eliminated as part of a PKS reduction. For example, the eighth grade position taught by Heather McMurray, a temporary teacher, was not eliminated as part of the 4.0 FTE reduction of middle school teaching. Ms. Slatterly also acknowledged that the position occupied by Janell Campbell (seniority date July 6, 1999), a reading resource teacher on a leave of absence, was not considered a vacant PKS position subject to layoff.

28. Respondents argue these temporary positions should have been eliminated, and the District responds that the positions are retained for employees with seniority to those subject to lay off, and that the employees on leave are either compelled to return next year or have the opportunity to convert to part-time work. Respondents did not support their argument with authority and accordingly this argument was rejected.

29. Respondents argue that there are 3.32 FTE in categorical positions that are occupied by temporary personnel and that these should be eliminated as part of the PKS reduction. Respondent argues that the *Bakersfield* opinion mandates that categorical and temporary employees be classified as probationary employees, and urges that these employees be designated as probationary employees with seniority

junior to respondents, and then terminated as junior employees. This argument is not persuasive.

Principal Vacancy Should Count Toward Teaching FTE Reductions

30. As set forth in Finding 17, the District eliminated a vacant 1.0 FTE elementary school principal position, satisfying the 1.0 FTE reduction in elementary school principals. Two assistant middle school principals bumped .5 FTE into an elementary principal position, which in turn bumped interim assistant elementary school principal Julie Hermann into the classroom. She bumped respondent Nicole Bussell. Respondents argue that the Hermann bump into the classroom should not have occurred. It is unclear why Respondents maintain this position. But it appears there might have been some confusion about whether the 1.0 FTE principal vacancy was in the elementary or middle school principal ranks. If it was in the middle school ranks, then no middle school principal would have to vacate a position and bump into the elementary school principal slot held by Hermann, thereby causing Hermann to bump Bussell. However, even if the vacancy was in the middle school ranks, the elementary principal ranks would still be reduced 1 FTE pursuant to the Resolution, and the evidence was that Hermann was least senior in these ranks and would be entitled to bump into the classroom position held by Bussell.

Tuesday Mahlberg

31. Tuesday Mahlberg has a seniority date of July 1, 2006. She is a seventh grade teacher and was bumped out of her position by a senior reading resource teacher. She maintains that senior resource teachers were improperly selected for layoff, rather than junior ones. She contends that the senior resource teachers have the seniority to bump junior classroom teachers, while the junior resource teachers do not have the seniority to bump many classroom teachers.

32. As set forth in Finding 15, Ms. Slattery acknowledged that there are two junior reading resource teachers being retained to teach reading resources, Kelly Hall (seniority date July 25, 2002) and Kellie Welty (seniority date July 10, 2000), while more senior reading resource teachers were bumping into classroom positions. However, Ms. Mahlberg is junior to these junior resource teachers and would have been bumped by them, rather than the senior resource teachers, had the lay off been implemented as she contends.

Other Defenses

33. Any other assertions raised by respondents at hearing which are not addressed above are found to be without merit.

LEGAL CONCLUSIONS

1. As set forth the Findings, all notice and jurisdictional requirements set forth in sections 44944 and 44945 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.)

2. The Governing Board may reduce, discontinue or eliminate a particular kind of service and then provide the needed services to the students in another manner. (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571; *California Teachers Association v. Board of Trustees of Goleta Union School Dist.* (1982) 132 Cal.App.3d 32.) A school board may reduce services within the meaning of the statute either by determining that a certain type of service shall not be performed at all or by reducing the number of district employees who perform such services. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.)

3. The services identified in PKS Resolution No. 2010-01 are particular kinds of services that may be reduced or discontinued under sections 44949 and 44955. 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 schools and pupils within the meaning of section 44949.


4. Section 44955, subdivision (b), provides that 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 any permanent employee is certificated and competent to render. As set forth in Findings 18 through 26, employees with less seniority than ten respondents are being retained to render services which these respondents are certificated and competent to render. The senior employees are: Kristie Edmondson; Roberta Blynn; Brandi Payne; Karen Long; Melanie Maclean; Francisca Diaz; Karmjeet Fishburn and the three next most senior of respondent multiple subject holders serving in middle or elementary positions.

5. With the exception of the matters set forth in Legal Conclusion 4, and Findings 18 through 26, the District has established that no employees junior to respondents are being retained to perform the services which respondents are competent and certificated to render.

RECOMMENDATIONS

1. The District shall rescind the Preliminary Notices issued to Kristie Edmondson; Roberta Blynn; Brandi Payne; Karen Long; Melanie Maclean; Francisca Diaz; Karmjeet Fishburn and the three next most senior of respondent multiple subject holders serving in middle or elementary school positions.
2. The District may give notice to the remaining respondents in the inverse order of seniority that it will not require their services for the 2010-2011 school year.

DATED: May 7, 2010


ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings