

BEFORE THE
GOVERNING BOARD OF THE
HAMILTON UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Non-Reemployment/
Reduction in Force of:

LESLIE CARLSEN
FRANK CATOMERISIOS
SUSAN McDONOUGH
SUZANNE TEFS,

OAH No. 2010031604

Respondents.

PROPOSED DECISION

This matter was heard before Rebecca M. Westmore, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 29, 2010, in Hamilton City, California.

Matthew Juhl-Darlington, Attorney at Law, appeared on behalf of the Hamilton Unified School District.

Michael N. McCallum, Attorney at Law, appeared on behalf of all respondents. All respondents, except Suzanne Tefs, were present throughout the hearing.

Evidence was received, the record was closed, and the matter was submitted for decision on April 29, 2010.

FACTUAL FINDINGS

1. Ray L. Odom is the Superintendent of Hamilton Unified School District (District). His actions and the actions of the District's Governing Board (Board) were taken in their official capacities.
2. Respondents are permanent certificated employees of the District.
3. On March 8, 2010, the Board adopted Resolution No. 09-111 (Resolution), entitled "A Resolution of the Governing Board of the Hamilton Unified School District to Decrease the Number of Certificated Employees Due to a Reduction in Particular Kinds of

Services.” Pursuant to the Resolution, the Board determined that it was necessary and in the best interest of the District to reduce or eliminate particular kinds of services (PKS) and to decrease a corresponding number of certificated District employees not later than the beginning of the 2010-2011 school year. The Board directed Superintendent Odom to send appropriate notices to all employees whose services will be reduced or eliminated by virtue of the PKS reductions and eliminations. The PKS reductions and eliminations are based solely upon economic reasons, and are not related to the skills, abilities or work performance of the affected teachers.

4. Pursuant to the Resolution, the Board resolved to reduce the following 11.83 full-time equivalent (FTE) positions:

<u>Certificated Positions</u>	<u>FTE</u>
Administrative	0.33
Adult Education	0.50
Agriculture	0.50
Art	0.33
Continuation School	0.50
Counselor	1.50
Elementary School	5.00
English	0.50
Librarian	0.67
Mathematics	0.50
Science	0.50
Social Studies	0.50
Woodshop	0.50
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Total	11.83 FTE

5. On March 15, 2010, in accordance with the Resolution, and pursuant to Education Code sections 44949 and 44955, the District served preliminary layoff notices on 20 certificated employees advising that their services would not be required for the 2010-2011 school year. Seven certificated employees timely filed a Request for Hearing to determine if there is cause for not reemploying them for the ensuing school year.

6. On March 26, 2010, Superintendent Odom made and filed the Accusation against the seven certificated employees who requested a hearing. On March 29, 2010, all seven respondents timely filed a Notice of Defense to the Accusation. On April 6, 2010, the Board issued Notices of Rescission to three respondents and one certificated employee,¹ based

¹ The three respondents who received Notices of Rescission were Erica Gorden, Kelly Henning and Michelle Walker. The certificated employee who did not request a hearing but received a Notice of Rescission was Kelly Langan.

on revised revenue estimates for the 2010-2011 school year, and the matter proceeded against the remaining four respondents.

District's Layoff Procedures

7. The District maintains a HUSD Certificated Seniority List (Seniority List) which contains data obtained from the District's records and its employees, including, but not limited to, employees' names, hire dates, school sites, classifications, NCLB status, teaching positions, FTE's, and credentials.

8. At hearing, Superintendent Odom asserted that the Board accepted and applied the following "tie-breaking" criteria that were developed in 2009 by the Hamilton Union Elementary School District,² to determine the order of termination of certificated employees who first rendered paid service to the District on the same date:

- a. Credential and experience to teach or serve in a particular program or provide a particular service of need by the District (e.g. bilingual, special education, etc.)

Rating: +1 per credential, +1 per year of experience

- b. Years of experience previous to current employment as a full-time credentialed teacher in a probationary/permanent K-12 teaching situation in a public school

Rating: +1 per year

- c. Credentials that permit supplementary authorizations

Rating: +1 per supplementary authorization

- d. Number of teaching and/or specialist service credentials

Rating: +1 per credential

- e. Earned degrees beyond the B.A. or B.S. level (e.g., masters, doctorate)

Rating: +1 per degree

² At hearing, Superintendent Odom testified that Hamilton Union Elementary School merged with Hamilton High School in 2009 to form the Hamilton Unified School District.

f. Multiple language skills relevant to District need (e.g., Spanish)

Rating: +1 for Spanish

g. Preliminary v. Clear/Life Credentials

Rating: +1 per preliminary, +2 per Clear/Life Credential

h. National Board Certification

Rating: +1 per certificate

Discussion

9. **Frank Catomerisios** has a seniority date of October 11, 2004. He holds a Lifetime Multiple Subject Credential. He is currently assigned to teach 0.83 FTE at Ella Barkley Continuation High School, and 0.17 FTE of independent study at Hamilton High School. His services were reduced by the reduction of 0.50 FTE at the Continuation School, pursuant to the Board's Resolution. Mr. Catomerisios contends that because he has a multiple subject credential, he should be allowed to "bump" a more junior elementary school teacher for 0.50 FTE.

10. At hearing, Superintendent Odom asserted that Mr. Catomerisios "has always taught alternative school," and "has not taught in the elementary school setting." According to Superintendent Odom, although Mr. Catomerisios' credential allows him to teach in an elementary school setting, if the 0.50 FTE reduction is rescinded, "it would not be reasonable to reassign him to the elementary school setting" because "it's very disruptive" to assign half-time status to an elementary, self-contained classroom. Superintendent Odom believes that Mr. Catomerisios "is not qualified to bump into an elementary school position." He admitted that the Board did not adopt competency criteria in its Resolution.

11. Mr. Catomerisios has been teaching at Ella Barkley Continuation High School for six years. He provides individual instruction on all subjects, except science and physical education, to approximately 20 students. Mr. Catomerisios asserted that "I taught in elementary school in a part-time position," and have "substitute taught numerous elementary school jobs." He was hired as a long-term substitute for a combination 5th/6th grade class for four months. Mr. Catomerisios argued that he is credentialed, competent and willing to teach in an elementary school position, and should be permitted to bump into 0.50 FTE of more

junior employees, Erica Gorden³ or Kelly Henning,⁴ who are being retained by the District to teach at Hamilton Elementary School in the 2010-2011 school year.

12. Economic layoffs are generally to be carried out on the basis of seniority. A teacher with more seniority typically has greater rights to retain employment than a junior teacher. A senior teacher whose position is discontinued has the right to a position held by a junior teacher if the senior teacher is properly credentialed. That displacement of a junior teacher is known as “bumping.” In general, the District has an affirmative obligation to reassign senior teachers who are losing their positions into positions held by junior teachers if the senior teacher has both the credentials and competence to occupy such positions. The seniority rule is not absolute, and a junior teacher with a needed credential or skills may be retained even if a more senior teacher is terminated. Such “skipping” is recognized by statute (Education Code section 44955, subdivision (d)(1)) and appellate law (*Santa Clara Federation of Teachers, Local 2393 v. Governing Board of the Santa Clara Unified School District* (1981) 116 Cal.App.3d 831). In order to depart from a seniority-based economic layoff, Education Code section 44955, subdivision (d)(1), requires the District to “demonstrate a specific need for personnel to teach a specific course or course of study... and that the certificated employee [to be skipped] has special training and experience necessary to teach that course or course of study...which others with more seniority do not possess.”

13. It is undisputed that Mr. Catomerisios is credentialed to teach elementary school. He holds the same Multiple Subject Credential held by each of the junior teachers who have been retained by the District to teach in an elementary school position in the 2010-2011 school year. With regard to his competency to teach elementary school, the Resolution does not establish “competency” criteria or explicitly state that in order to be retained to teach in an elementary school position, certificated employees must have taught in an elementary school position within a specified number of years. Even though Superintendent Odom testified that Mr. Catomerisios is not competent, his testimony alone is insufficient to establish that Mr. Catomerisios is not competent to teach an elementary school position. Moreover, Mr. Catomerisios testified that he has taught elementary school positions in part-time substitute and long-term substitute positions. In addition, the District failed to establish that the junior employees who are being retained have special training and experience to teach elementary school that Mr. Catomerisios does not possess. (Ed. Code, § 44955, subd . (d)(1).) Therefore, the District failed to establish that Mr. Catomerisios is not competent to teach in an elementary school position.

14. Even though the District failed to establish that Mr. Catomerisios is not competent to teach in an elementary school position, the District contends that it would be unreasonable and disruptive to reassign Mr. Catomerisios to half-time status at Hamilton

³ Erica Gorden has a seniority date of August 19, 2005. She holds a Multiple Subject Credential, Supplemental Authorization in Mathematics, and CLAD Certificate. She is currently assigned to teach 1.00 FTE Kindergarten at Hamilton Elementary School.

⁴ Kelly Henning has a seniority date of August 18, 2006. She holds a Multiple Subject Credential. She is currently assigned to teach 1.00 FTE 4th grade at Hamilton Elementary School.

Elementary School. While Mr. Catomerisios is certificated and competent to teach in an elementary school position, the District is not required to permit Mr. Catomerisios, or any other part-time employee, to “bump” a full-time teacher out of part of his or her position. It is “within the scope of a school district’s discretion ... to define a position as full time if the district concludes that the assignment cannot be as well performed on a part-time basis.... So long as the determination is reasonable and made in good faith, neither section 44955 nor any other provision of the Education Code precludes a school district from defining a position, or ‘service,’ as full time.” (Hildebrandt v. St. Helena Unified School District (2009) 172 Cal.App.4th 334, 343-344.) Therefore, Mr. Catomerisios’ contention that he be permitted to “bump” into a .50 FTE elementary school teaching position is rejected.

15. Respondents Leslie Carlsen, Susan McDonough and Suzanne Tefs first rendered service to the District on August 12, 2008, and are affected by the reduction in particular kinds of services. Initial application of the “tie-breaking” criteria by the District resulted in Susan McDonough being the “most senior” and Suzanne Tefs being the “most junior” of the three respondents. According to Superintendent Odom, none of the affected respondents objected to the “tie-breaking” criteria, or the order of seniority that was established as a result of the initial application of the “tie-breaking” criteria.

16. At hearing, the parties agreed to reapply the “tie-breaking” criteria to establish the accuracy of the order of seniority initially established by the District:

17. **Leslie Carlsen** has a seniority date of August 12, 2008. She holds a Clear Multiple Subject Credential, Supplemental Authorization in Music, and Cross-cultural, Language and Academic Development (CLAD) Certificate. She is currently assigned to teach 8th grade at Hamilton Elementary School.

18. **Susan McDonough** has a seniority date of August 12, 2008. She holds a Lifetime Multiple Subject Credential, Supplemental Authorizations in English and Social Science: Anthropology, and CLAD Certificate. She is currently assigned to teach 5th/6th grade at Hamilton Elementary School.

19. **Suzanne Tefs** has a seniority date of August 12, 2008. She holds a Clear Multiple Subject Credential, Supplemental Authorization in English and Social Science, and CLAD Certificate. She is currently assigned to teach 7th/8th grade at Hamilton Elementary School.

20. After reapplying the “tie-breaking” criteria, it was determined that Ms. Carlsen had 15 points and was entitled to seniority over Ms. McDonough, who had 14 points.⁵ However, at the request of Ms. McDonough, both respondents submitted copies of their credentials for further review.

⁵ At hearing, respondents’ counsel represented that Ms. Tefs was not contesting the order of seniority. Therefore, the “tie-breaking” criteria were not applied to Ms. Tefs.

21. A review of the credentials of Ms. Carlsen and Ms. McDonough revealed that the “tie-breaking” criteria were appropriately applied at hearing, and all of the applicable points were appropriately awarded. Therefore, in the event the District has an opportunity to rehire certificated teachers prior to the 2010-2011 school year, Ms. Carlsen is entitled to seniority over Ms. McDonough, and Ms. McDonough is entitled to seniority over Ms. Tefs.

22. It is within the discretion of the Board to employ “tie-breaking” criteria. Respondents did not establish that the Board violated its discretion, or engaged in arbitrary or capricious action when it accepted the “tie-breaking” criteria developed in 2009 by the Hamilton Union Elementary School District. Application of the tie-breaking criteria resulted in determining the order of termination solely on the basis of the needs of the District and the students thereof.

LEGAL CONCLUSIONS

1. The District employees who received notices that their services would be reduced or would not be required in the 2010-2011 school year are not being laid off for reasons related to their ability or performance.

2. Jurisdiction in this matter exists pursuant to Education Code sections 44949 and 44955. The District has the burden of proving by a preponderance of the evidence that the proposed reduction or elimination of particular kinds of services and the preliminary notice of layoff served on respondents are factually and legally appropriate. The District has met its burden. The anticipation of receiving less money from the state for the next school year is an appropriate basis for a reduction in services under section 44955. As stated in *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 638-639, the reduction of particular kinds of services on the basis of financial considerations is authorized under that section, and, “in fact, when adverse financial circumstances dictate a reduction in certificated staff, section 44955 is the only statutory authority available to school districts to effectuate that reduction.” The District must be solvent to provide educational services and cost savings are necessary to resolve its financial crisis. The Board’s decision to reduce particular kinds of services was a proper exercise of its discretion. In addition, all notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945 were met. The notices sent to respondents indicate the statutory basis for the reduction of services and adequately describe the particular kinds of services to be reduced, and, therefore, were sufficiently detailed to provide them due process. (*Ibid.*, at p. 627; see also, *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831; *Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838; and *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

3. 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.) As set forth in Factual Finding 4, the services identified in the Resolution are particular kinds of services that may be reduced or discontinued under Education Code 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 Education Code sections 44949 and 44955.

4. Education Code section 44955, subdivision (b), provides in pertinent part:

Whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, ...or whenever the amendment of state law requires the modification of curriculum, 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.

5. Pursuant to Education Code section 44955, subdivision (b), cause exists to give notice to respondents Leslie Carlsen, Frank Catomerisios, Susan McDonough and Suzanne Tefs that their services will be reduced or will not be required for the 2010-2011 school year because of the reduction or elimination of particular kinds of services.

RECOMMENDATION

Final notices may be given to Leslie Carlsen, Frank Catomerisios, Susan McDonough and Suzanne Tefs that their services will be reduced or will not be required for the 2010-2011 school year.

DATED: May 5, 2010

REBECCA M. WESTMORE
Administrative Law Judge
Office of Administrative Hearings