

BEFORE THE
GOVERNING BOARD OF THE
SAN GABRIEL UNIFIED SCHOOL DISTRICT

In the Matter of the Reduction in Force of
Certificated Staff of the San Gabriel Unified
School District (31.84 Full Time Equivalent
Positions),

OAH No. 2011030573

Respondents.

PROPOSED DECISION

David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on April 21, 2011, at the San Gabriel Unified School District office in San Gabriel, California.

Warren S. Kinsler, attorney at law, of Atkinson, Andelson, Loya, Ruud & Romo, represented the San Gabriel Unified School District (District). Richa Amar, attorney at law, of Rothner, Segall & Greenstone, represented Respondents Justin Doring, Stephen Feng, Patricia Gallegos, Alison Hussar, Megan Michaelis, Kent Monteleone, Keri Seeger, Christina Shi and William Wong. Respondent J. Michael Hammett was present and represented himself.

Stipulations were placed on the record, oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on April 21, 2011.

FACTUAL FINDINGS

1. Complainant Susan C. Parks filed the Accusations while acting in her official capacity as the Superintendent of the District.
2. Respondents are certificated employees of the District. The District serves approximately 5,400 students at eight schools including elementary, middle and high schools and a continuation school.
3. On February 22, 2011, the Governing Board (Board) of the District adopted a resolution (Resolution No. 15) to reduce and discontinue particular kinds of services provided by the District no later than the beginning of the 2011-2012 school year. A total of 31.84 full time equivalent positions (FTEs) were affected, in the particular services set forth in the resolution. (Exhibit 1.

4. The Board further determined that the reduction in services necessitated a decrease in the number of certificated employees at the close of the 2010-2011 school year by a corresponding number of FTE positions, and directed Ms. Parks to notify the appropriate employees to implement the Board's determination. The main reason for the reduction was proposed budget shortfalls due to the State budget.

5. On or before March 15, 2011, the District gave notice (preliminary layoff notice) to each certificated staff member identified as related to the services to be reduced or eliminated of the potential elimination of his/her position for the 2011-2012 school year. Some certificated staff members who received the preliminary layoff notices requested a hearing, and are referred to as Respondents. Respondents are probationary or permanent certificated employees of the District. On March 24 or 25, 2011, the District served an Accusation on each Respondent.

6. In some instances, the District also served temporary certificated employees "as a precaution." As alleged in paragraph VI of the Accusation (Exhibit 8), the District has or will nonreelect and release such employees separately from the layoff proceeding, but also served a preliminary notice to allow such employees to request a hearing and assert their position. This allegation relates to employees who are no longer involved in these proceedings.

7. In some instances, the District also served other probationary or permanent certificated employees "as a precaution." These may be characterized as "over-notices," as the District alleges in paragraph VIII of the Accusation (Exhibit 8), that the seniority of these employees is such that they should not be laid off. However, if events occur to alter the proposed order of layoffs, it may affect their positions and their reemployment will be implicated. This allegation relates to nine employees; the following remain as Respondents at this time: Justin Doring, Stephen Feng, Patricia Gallegos and William Wong. As set forth below, at the hearing the District rescinded the Accusation against all of these Respondents except William Wong.

8. Respondents timely filed Notices of Defense to determine if there was cause for not reemploying them for the 2011-2012 school year.

9. The services set forth in Resolution No. 15 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. The Board's decision to reduce or discontinue the identified particular kinds of services was neither arbitrary nor capricious, and constituted a proper exercise of discretion.

10. The reduction or discontinuation of particular kinds of services was related solely to the welfare of the District and its pupils. It was not related to the capabilities and dedication of the individuals whose services are proposed to be reduced or eliminated.

11. The Board considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

12. The resolution also included criteria to break the ties in seniority of employees who shared the same date of first paid service to the District (tie-breaking criteria). A point system was established for various credentials, certificates, experience, training and coursework. Among teachers who shared a date of first paid service, the greater the number of points attained by a teacher, the higher the seniority.

13. The District maintains a seniority list which contains employees' seniority dates, current assignments, permanency description and credential and certificate information. (Exhibit 12.)

14. The District used the seniority list to develop a proposed layoff list of the least senior employees currently assigned in the services being reduced. The District then determined whether the least senior employees held credentials in another area and were entitled to displace, or "bump," other employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority.

15. At the hearing, the District rescinded the Accusation against the following Respondents: Daphne Chase, Justin Doring, Karen Estrada, Amy Feng, Stephen Feng, Patricia Gallegos, Jenny Mizokami and Heather Wolpert.

16. Pursuant to a settlement agreement (Exhibit 17), the following Respondents rescinded their requests for hearing and notices of defense: Christina Baker, Eric Burruss, Gabriel Cabrera, Daphne Chase, Trisha Chun, Jenna Dizon, Karen Estrada, Amy Feng, Michael Gray, Tiffany Guzman, Socorro Hernandez, Maria Jarak, Sarah Jones, Julie Lanier, Joan Lapidatanagool, Jenny Mizokami, Jennifer Trapp, Diane Tse, Courtney Vanis, Jennifer Vargas and Heather Wolpert.

17. The following Respondents testified: Megan Michaelis, Keri Seeger, Christina Shi, William Wong, Kent Monteleone and J. Michael Hammett. Among the contentions raised are that the District should not have reduced or eliminated certain services; that some possess specific training and experience that is valuable to the District and may be more significant than the qualifications possessed by other teachers; that the tie-breaking criteria should have been different; that by eliminating "overload" periods (extra periods taught by some teachers), some of the FTE reductions have been met; bumping should allow a teacher to be retained; an incorrect seniority was assigned; and the District improperly considered the categorical funding of certain positions. Except as set forth in more detail below, these contentions were not supported by sufficient evidence or the law and, therefore, are rejected.

18. One of the tie-breaking criteria is listed as “AVID,” which stands for Advancement Via Individual Determination. This is a two-day program, most recently provided by the Los Angeles County Office of Education, for which a certificate of completion is supplied. Anna Molinar, the District Assistant Superintendent for Human Resources, interpreted this tie-break criterion as requiring the completion certificate. Ms. Michaelis has received training in AVID subjects from other teachers in the District, but has not taken or completed the two-day program or received a certificate. Ms. Molinar properly considered her as not having the completion certificate and therefore not entitled to added points for tie-breaking.

19. Ms. Michaelis’ other training and experience, although valuable to the District and her students, does not entitle her to be retained over more senior teachers who are certificated and competent to fill her position under section 44955, subdivision (b). (See Legal Conclusion 1.)

20. Similarly, Keri Seeger’s training and experience, although valuable to the District and her students, does not entitle her to be retained over more senior teachers who are certificated and competent to fill her position under section 44955, subdivision (b). (See Legal Conclusion 1.)

21. The potential issue of rehire rights of Ms. Michaelis and Ms. Seeger are not within the jurisdiction of the ALJ to address in this matter.

22. Ms. Seeger and Ms. Hussar’s positions were eliminated to satisfy a 2.0 FTE reduction in English. Respondents contend that the District improperly accounted for the position of Julie Lanier and that, as a result, reductions in English were over-noticed by 0.4 FTE and Ms. Seeger, as the most senior English teacher, should be retained to the extent of 0.4 FTE. Ms. Lanier is identified as a temporary teacher who has been nonreelected but who also received a precautionary layoff notice (see Factual Finding 6). For the present school year, Ms. Lanier served as a temporary teacher in two positions, each with categorical funding. In the first part-time position, Ms. Lanier is “backfilling”; that is, another teacher left for a position with categorical funding and Ms. Lanier is filling in. In the second part-time position, Ms. Lanier is paid with categorical funds to teach English Language Learner (ELL) high school students. Ms. Molinar credibly testified that the availability of categorical funding next year is uncertain. Ms. Lanier was properly considered a temporary employee. She received a notice of nonreelection. Neither of the two part-time positions she held should have affected the 2.0 FTE reductions in English.

23. Christina Shi questioned the manner in which the District determined the particular kinds of services slated for reduction as well as the different points assigned to the tie-breaking criteria. These decisions are well within the District’s discretion and are not within the jurisdiction of the ALJ to address in this matter. (See Legal Conclusion 6.) Ms. Shi shares the same seniority date with William Wong. Her contention that she was entitled to more points based on her number of units was insufficient, as the District properly converted her quarter units to semester units. Mr. Wong was entitled to more tie-breaking

points and the tie-breaking criteria were properly applied to both of them. Although Mr. Wong was identified as satisfying the 1.0 FTE reduction in math, he is able to bump Ms. Shi. Therefore, although Mr. Wong was considered as receiving a precautionary notice due to tie-breaking issues, those issues are resolved and the Accusation as to Mr. Wong will be dismissed.

24. William Wong and other Respondents asserted that by eliminating overload assignments the District had effectively satisfied the goal of the resolution to eliminate certain math FTEs. For example, five overload classes in math are the equivalent of the teaching load for one full time math teacher. The District established that overload assignments are not regular teaching assignments, are completely discretionary and the District does not intend to authorize them for next school year. The District properly considered the overload periods as not affecting the FTEs identified for reduction. The Respondents' contention was not supported by sufficient evidence or the law and, therefore, is rejected.

25. Kent Monteleone's position as a health instructor is being eliminated. He raised two contentions: first, that his position was improperly identified for elimination; and second that he is credentialed and competent to bump another less-senior employee who is being retained by the District.

Mr. Monteleone submitted evidence that he had been served with Notices of Unsatisfactory Acts by the District, that the District sought to terminate him for cause, and that a settlement of that matter required the District to reinstate him as an employee. (See Exhibits F and 21.) He also submitted evidence that his health course includes the mandatory subject of HIV education. He contends that the District, having been unsuccessful in terminating him for cause, now seeks to lay him off by eliminating his FTE position in health in this layoff proceeding, and that this is an improper motive or reason for layoff. The District established that the health course taught by Mr. Monteleone is a one-semester course and that the teaching position for the second semester course taught in conjunction with it (a freshman social science course) is also subject to layoff. There is no requirement that the mandatory HIV education be provided by a teacher with a credential in health, such as Mr. Monteleone. The District plan for next year is for the mandatory HIV education to be provided by physical education teachers. It was not established that the District had an improper motive in identifying the health position for elimination.

26. With respect to bumping, Mr. Monteleone identified one teacher, junior to him in seniority, being retained by the District and who is in a position that Mr. Monteleone could assume. More specifically, Mr. Monteleone has a seniority date of September 1, 1999, and a seniority number of 100. At number 169 is Bo Botts, seniority date August 30, 2004. Mr. Botts is presently assigned to Del Mar High School, the District's continuation program, assigned to teach co-educational physical education and electives. There is no particular credential required for his position. When Ms. Molinar was asked whether Mr. Monteleone could bump Mr. Botts, she testified that the focus of the implementation of bumping (found in Exhibit 14) related to the proposed reduction of 0.50 FTEs at the continuation school and

effecting employees Jennifer Trapp and Gabriel Cabrera, and that “we missed” any attempt to analyze whether Mr. Monteleone could bump any other more junior employee.

27. The resolution contains three criteria that apply to determine if a senior teacher is credentialed and competent to render the entire service currently being performed by a junior teacher. (See Resolution No. 15, Exhibit 1.) As applied to Mr. Monteleone, he is considered competent because: (1) he possesses a clear credential in health, and Ms. Molinar testified that no particular credential is needed for the position held by Mr. Botts; (2) as there is no Highly Qualified status under the No Child Left Behind Act for the subject matters taught by Mr. Botts, this criterion does not apply; and (3) as there is no English Learner authorization needed for Mr. Botts’ assignment, this criterion does not apply.

Based on this evidence and these circumstances, Mr. Monteleone established that the District was retaining someone more junior to him in a position for which he is credentialed and competent. Therefore, the Accusation against Mr. Monteleone must be dismissed.

28. J. Michael Hammett was originally hired by the District to begin as a teacher on August 23, 1996. There was no evidence whether this was in a temporary position or otherwise or what type of credential or teaching authorization he held at that time. Mr. Hammett later took a leave of absence, and then resigned effective June 30, 2006. He claims to have had 10 years of seniority at that time. He returned and was reemployed by the District on August 24, 2009. He was returned to his status as a permanent teacher, and the District based his seniority on the date of reemployment. Mr. Hammett received a layoff notice because of the elimination of his FTE position in social science. Mr. Hammett contends that he has twelve years of seniority (he includes his time while on leave of absence but not between his resignation and rehire).

Section 44931 requires that if a permanent employee resigns and is reemployed within 39 months of the date of his resignation, the employee must be restored to all of the “rights, benefits, and burdens of a permanent employee, except as otherwise provided in this code.” Section 44848 requires that the date of employment of a certificated employee who resigns and returns to employment be deemed to be the date on which the employee first rendered paid service after reemployment. In *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 641, the court interpreted sections 44931 and 44848 such that the rehired teacher regains his “individual rights, burdens and benefits, but not as to seniority rights which affect other employees.” This is not discretionary with the District, as claimed by Mr. Hammett. Nor is *San Jose* incorrect. While the District may have made minor errors (e.g., incorrect dates on correspondence), it handled Mr. Hammett’s seniority correctly under the circumstances. Mr. Hammett’s claim that section 44848 does not apply because it only affects resignations “for cause” is rejected as contrary to the plain language of the statute. In accordance with the requirements of sections 44848 and 44931, Mr. Hammett resigned and later returned and was restored to permanent status, but with a new seniority date upon his return to employment with the District. The District assigned the correct seniority date to Mr. Hammett.

29. Other than as set forth above (Factual Findings 26 and 27 re Mr. Botts), no certificated employee junior to any Respondent was retained to perform any services which any Respondent was certificated and competent to render.

30. Respondents raised several contentions at the hearing, some of which are discussed herein. Except as specifically set forth herein, these contentions were not supported by sufficient evidence or the law and, therefore, are rejected.

LEGAL CONCLUSIONS

1. Education Code¹ section 44949, subdivision (a), states in pertinent part:

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

Section 44949, subdivision (c)(3), states in pertinent part:

“The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. . . . Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors.”

2. Section 44955 provides, in pertinent part:

“(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

“(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, . . . and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or

¹ All citations are to the Education Code.

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. . . .

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

“The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. . . .

“(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

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

3. Sections 44949 and 44955 establish jurisdiction for this proceeding. The notice and jurisdictional requirements set forth in sections 44949 and 44945 were met. (Factual Findings 1 through 8.)

4. A school district may reduce services within the meaning of section 44955, subdivision (b), “either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may ‘reduce services’ by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.” (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

5. The District must be solvent to provide educational services, and cost savings are necessary to resolve projected District budget reductions, to insure that its schools provide, and students receive, required instruction in an effective and efficient manner. Such financial circumstances can dictate a reduction in certificated staff, and “section 44955 is the only statutory authority available to school districts to effectuate that reduction.” (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 639.) The Board’s decision to reduce services in light of its budget does address the welfare of students, and was a proper exercise

of the Board's discretion. Respondents did not establish that the proposed reductions in services would violate any statutory or regulatory requirement governing the District.

6. Boards of education hold significant discretion in determining the need to reduce or discontinue particular kinds of services, which is not open to second-guessing in this proceeding. (*Rutherford v. Board of Trustees, supra*, 64 Cal.App.3d 167.) Such policy-making decisions are not subject to arguments as to the wisdom of their enactment, their necessity, or the motivations for the decisions. (*California Teachers Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1529.) Such decisions and action must be reasonable under the circumstances, with the understanding that "such a standard may permit a difference of opinion." (*Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.)

Numerous cases stand for the proposition that the process of implementing layoffs is a very flexible one and that school districts retain great flexibility in carrying out the process. (See, for example, *Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796.)

7. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949.

8. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.)

9. For the reason set forth in Factual Findings 7, 15, 25, 26 and 27, the Accusation should be dismissed against Respondents Daphne Chase, Justin Doring, Karen Estrada, Amy Feng, Stephen Feng, Patricia Gallegos, Kent Monteleone, Jenny Mizokami, Heather Wolpert, and William Wong.

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10. No certificated employee junior to any Respondent was retained to perform any services which any Respondent was certificated and competent to render, except as set forth in Factual Findings 26 and 27.

11. Except as provided in Legal Conclusion 9, cause exists within the meaning of section 44955 for reducing or terminating Respondents' employment for the 2011-2012 school year as set forth in Factual Findings 1 through 30.

ORDERS

WHEREFORE, THE FOLLOWING ORDERS are hereby made:

1. The Accusations served on Respondents Daphne Chase, Justin Doring, Karen Estrada, Amy Feng, Stephen Feng, Patricia Gallegos, Kent Monteleone, Jenny Mizokami, Heather Wolpert and William Wong are dismissed.

2. The Accusations served on all other Respondents are sustained. Notice may be given to those Respondents before May 15, 2011, that their services will be reduced or terminated for the 2011-2012 school year.

Dated: April 25, 2011.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings