

BEFORE THE
GOVERNING BOARD OF THE
LENNOX SCHOOL DISTRICT

In the Matter of the Reduction in Force of
Certificated Staff of the Lennox School
District (55.07 Full Time Equivalent
Positions),

OAH No. 2011031033

Respondents.

PROPOSED DECISION

David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on April 28, 2011, at the Lennox School District office in Lennox, California.

Salvador O. Holguin, attorney at law, of Atkinson, Andelson, Loya, Ruud & Romo represented the Lennox School District (District). Lillian Kae, attorney at law, of Trygstad, Schwab & Trygstad represented all Respondents, set forth in Attachment A on page 12. Respondents indicated with “*” were present at the hearing.

Oral and documentary evidence was received, and argument was heard. The record remained open for receipt of briefs and for a telephonic status conference. The District’s brief was received May 4, 2011, and marked for identification as Exhibit 23. Respondents’ brief was received May 4, 2011, and marked for identification as Exhibit C.

In a telephonic status conference on May 5, 2011, the District moved for a continuance of 15 days to lodge the transcript from the hearing and to submit a final brief. Respondents do not object to the motion. The motion was granted. The matter was continued for 15 days from May 5, 2011. The District lodged the transcript, which is marked for identification as Exhibit 24. The District’s Reply Brief was received May 10, 2011, and marked for identification as Exhibit 25. Under Education Code section 44949, subdivision (e), due to the continuance of 15 days, all dates prescribed in Education Code section 44949, subdivision (c), and section 44955, subdivision (c), are extended by 15 days.

FACTUAL FINDINGS

1. Complainant Dr. Frederick Navarro filed the Accusation while acting in his official capacity as the Superintendent of the District.

2. Respondents are certificated employees of the District. The District serves approximately 7000 students in grades from preschool through grade 12 at seven schools and a preschool program.

3. On March 8, 2011, the Governing Board (Board) of the District adopted Resolution No. 10-23 to reduce and discontinue the following particular kinds of services provided by the District no later than the beginning of the 2011-2012 school year:

| <u>Service</u> | <u>Full Time Equivalent (FTE) Positions</u> |
|---|---|
| Reduce Elementary Counselor Services | 0.20 |
| Reduce K-5 Instructional Services | 20.0 |
| Discontinue Middle School Academic Counselor Services | 1.0 |
| Reduce Middle School Physical Education Instructional Services | 2.0 |
| Reduce Middle School Social Studies Instructional Services | 1.0 |
| Discontinue High School Athletic Director Services | 0.34 |
| Discontinue BTSA Coordinator Services | 1.0 |
| Discontinue Director of School Readiness Services | 1.0 |
| Discontinue Education Technology Coach Services | 1.0 |
| Discontinue EL Committee Liaison Services | 1.0 |
| Discontinue Family Services Counselor Services | 0.53 |
| Discontinue Literacy Coach Services | 2.0 |
| Discontinue Math/Student Assessment Resource Teacher Services | 1.0 |
| Discontinue Pre-School Literacy/Parent Coordinator Services | 1.0 |
| Discontinue School Readiness Center Early Childhood Counselor Services | 1.0 |
| Discontinue School Readiness Literacy Coach/Parent Coordinator Services | 2.0 |
| Discontinue Special Education Program Specialist Services | 1.0 |
| Discontinue Special Education School Readiness Instructional Services | 1.0 |
| Discontinue Speech Supervisor Services | 1.0 |
| Discontinue Staff Development Specialist (SDS) Services | 15.0 |
| Discontinue Weingart ELD Intervention Specialist Services | 1.0 |
| TOTAL CERTIFICATED POSITIONS: | 55.07 |

4. Resolution 10-23 also included a provision that the District would retain certificated employees, regardless of seniority, “who have authorization to teach English Learner (“EL”) students, as determined by the California Commission on Teacher Credentialing, and the special training and experience that comes therewith.” (Exhibit 1.) This is commonly referred to as “skipping.” Other than information in the seniority list (Exhibit 15) and the layoff implementation chart (Exhibit 19), there was no evidence identifying the specific teachers which the District proposed to skip or of their special training and experience. Nor was there any evidence or argument from Respondents that the skipping process was improperly performed.

5. 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 Dr. Navarro to notify the appropriate employees to implement the Board’s determination. Dr. Navarro delegated this task to Cesar Morales, Ed.D., Assistant Superintendent of Human Resources. The main reason for the reduction was expected budget shortfalls due to the State budget.

6. 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, 2011, the District served an Accusation on each Respondent. (Although the District also served “precautionary” layoff notices on temporary employees assigned to categorical programs who had also been notified that they were nonreelected for the 2011-2012 school year, no teachers receiving the precautionary notices requested a hearing.)

7. Prior to the hearing, the District learned that funding was available for a position previously identified to be discontinued (Weingart ELD Intervention Funding Specialist), and the Board passed Resolution No. 10-29 to decrease the number of FTE positions for layoff by 1.0 FTE. As a result, the District rescinded the preliminary layoff notice to, and Accusation against, Respondent Rosalinda Barajas. The District also determined that a more junior employee had been retained for a particular position for which a senior employee was competent and credentialed to perform. As a result, the District rescinded the preliminary layoff notice to, and Accusation against, Respondent Jessica Gomez. The District also determined that, due to attrition after March 15, 2011, fewer layoffs are necessary. As a result, the District rescinded the preliminary layoff notice to Thelma Gonzales (who did not request a hearing), and rescinded the preliminary layoff notice to, and Accusation against, Respondent Joshua Aleman.

8. Respondents timely filed Notices of Defense to determine if there was cause for not reemploying them for the 2011-2012 school year. In addition, a Joint Notice of Defense was filed for Respondents (Exhibit 11).

9. The services set forth in Factual Finding 3 are particular kinds of services (PKS) which may be reduced or discontinued within the meaning of Education Code section 44955. The Board's decision to reduce or discontinue the identified PKS was neither arbitrary nor capricious, and constituted a proper exercise of discretion.

10. The reduction or discontinuation of PKS 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 preliminary layoff notices to be delivered to its employees.

12. The Board also passed a resolution (Resolution No. 10-22) determining the order of seniority for employees who shared the same date of first paid service to the District (tie-breaking criteria). These criteria, to be applied in descending order, include, among other things, consideration of credential status, authorization to teach English Language Learners, breadth of credential, certifications, subject matter of credential, number of years of service, degrees and semester credits. There was no specific evidence or argument from Respondents that the tie-breaking process was improperly performed.¹

13. The District maintains a seniority list which contains employees' seniority dates, current assignments, permanency description and credential and certificate information. (Exhibit 15.)

14. At the hearing, counsel stipulated to make the following changes to the seniority list:

- a. Tenured employee Elizabeth Franco, seniority #273 on Exhibit 15: seniority date was changed from August 11, 2003, to January 6, 2003. Tie-breaking criteria were used to place her prior to Norma Garcia-Paredes, seniority #267, relative to other employees with that same date.
- b. Tenured employee Erica Delgado, seniority #291 on Exhibit 15: seniority date was changed from August 3, 2005, to August 1, 2003. Tie-breaking criteria were used to place her after Paula Angulo-Poe, seniority #271, relative to other employees with that same date.
- c. Probationary employee Ann Ngo, seniority #342 on Exhibit 15: added a Single Subject credential in Social Studies, and CLAD certification.

¹ Although Respondents' Brief (Exhibit A) states it will address, among other things, the contention that the tie breaker formula was unfair, there is no other mention of the subject in the Brief.

d. Probationary employee Jesus Rius, seniority #330 on Exhibit 15: seniority date was changed from August 13, 2009, to August 20, 2008. Mr. Rius becomes a tenured employee. Tie-breaking criteria were used to place him after Cindy Alberty, seniority #322, relative to other employees with that same date.

e. Tenured employee Yvonne Rodriguez, seniority #302 on Exhibit 15: She holds a Clear, not Preliminary, multi-subject credential and a CLAD certificate. Her seniority date will remain as August 11, 2006. However, the District will examine its records to determine whether Ms. Rodriguez's service as a long-term substitute, from August 11, 2005, to February 2006, combined with her service as a temporary teacher from then until the conclusion of that school year, amount to more than 75 percent of the school days and should result in an adjustment of her seniority date to August 11, 2005. The District is entitled to rely upon the information it had as of the time the Board passed the resolution, and the ALJ will rely upon this stipulation. Ms. Rodriguez may submit additional information when it is obtained, and the District may consider it before determining if her seniority date will be adjusted and if she will be issued a final notice.

f. Tenured employee Jaime Reichbach, seniority #263, seniority date August 12, 2002, on salary step 10, has greater seniority than tenured employee Oliver Lo, seniority #264, seniority date August 12, 2002, on salary step 8.

g. Tenured employee Flor Calderon, seniority #272, seniority date August 11, 2003, on salary step 9, has greater seniority than tenured employee Monica Flores, seniority #274, seniority date August 11, 2003, on salary step 5.

15. 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 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.

16. No certificated employee junior to any Respondent was retained to perform any services which any Respondent was certificated and competent to render.

17. Respondents raised several contentions in their Joint Notice of Defense (Exhibit 11), in their Brief (Exhibit A), or at the hearing, some of which are discussed herein. These contentions include improper reduction in teaching in general; improper skipping by the District; failure to permit employees to bump into another position; and failure to assign correct seniority dates. Except as specifically set forth herein, these contentions were not supported by sufficient evidence or the law and, therefore, are rejected.

18. With regard to attrition, Assistant Superintendent Morales testified that, prior to March 15, 2011, the District was aware of the retirement of Deborah Waynesmith (seniority #34), and accounted for that retirement on the Layoff Implementation Chart. (Exhibit 19, page 4, row 4.) Respondents contend that the District improperly accounted for other, later attrition in determining which teachers might be retained and which were to receive preliminary layoff notices.

19. After March 15, the District became aware of further attrition, and Dr. Morales reconfigured the Layoff Implementation Chart accordingly. More specifically, with the post-March 15 resignation of Stephanie Policare, the District was able to rescind the preliminary layoff notice sent to Thelma Gonzalez. (Exhibit 19, page 5, row 4; see Factual Finding 7.) With the post-March 15 retirement of Cynthia Durieux, the District was able to rescind the preliminary layoff notice sent to Joshua Aleman. This latter reconfiguration of the Layoff Implementation Chart is challenged by Respondents, and requires further explanation.

20. Prior to learning of Ms. Durieux's retirement, Dr. Morales determined that Alexander Reinbold (seniority #212) could bump Josh Aleman (seniority #321). Ms. Reinbold serves in a Staff Development Specialist (SDS) position being discontinued under the resolution. Due to her greater seniority and her credential, Ms. Reinbold would have been able to bump into Mr. Aleman's position teaching 9th grade Algebra I. Therefore, the District served a preliminary layoff notice on Mr. Aleman. However, after factoring in the retirement of Ms. Durieux, Dr. Morales reconfigured the Layoff Implementation Chart and determined that Ms. Reinbold, due to her seniority and credentials, would be able to bump into Ms. Durieux's position teaching 2nd grade. (Exhibit 19, page 4, row 5.) Under this reconfiguration, Mr. Aleman was no longer bumped by Ms. Reinbold. Rather, Mr. Aleman would now be bumped by Kathy Cordova (seniority #284) (Exhibit 19, page 8, row 2), but he would then, in turn, bump into the position of Ann Ngo (seniority #341) teaching high school Geometry Lab/Algebra Lab. (Exhibit 19, page 9, row 3.) As with the other bumps throughout the Layoff Implementation Chart, Dr. Morales considered the affected employees' seniority and if they were certificated and competent to render the service involved. As testified by Dr. Morales, this reconfiguration does not affect the preliminary layoff notice given to Angelica Trujillo, the Respondent with the greatest seniority (see more in Factual Findings 21 and 22).

21. Respondents contend that, rather than undertaking the reconfiguration noted in Factual Findings 19 and 20, the District should have factored in Ms. Durieux's retirement by rescinding the preliminary layoff notice sent to Angelica Trujillo (seniority #258) (Exhibit 19, page 6, row 1.) This contention is based on the facts that Ms. Trujillo is the Respondent with the most seniority; her position in K-5 Instructional Service is being reduced under the Resolution; and her seniority and credentials would allow her to bump into the teaching position of Ms. Durieux.

22. However, the District, relying upon the Layoff Implementation Chart, contends that Ms. Trujillo should be laid off. (Exhibit 19, page 6, row 1.) In this manner, the District contends that even though it had no legal obligation to consider post-March 15 attrition, it

has done so in a manner that assures Respondents and other teachers of their seniority and bumping rights. Specifically, Ms. Reinbold (seniority #212), whose position is being eliminated, is retained by the District, and Ms. Trujillo (seniority #258), with less seniority, is subject to layoff. The District also contends that Respondents' analysis is an improper attempt to take laid-off employees' rights for later reappointment (see, for example, sections 44956 and 44957) and require the District to accommodate those rights before and during the layoff, as opposed to after the layoff and in conjunction with reappointment.

23. The ALJ has reviewed the case law relating to attrition and order of termination, including *Degener v. Governing Bd. of Wiseburn School Dist.* (1977) 67 Cal.App.3d 689; *Lewin v. Board of Trustees of Pasadena Unified School Dist.* (1976) 62 Cal.App.3d 977; and *San Jose Teachers Assn v. Allen* (1983) 144 Cal.App.3d 627. Generally, the case law establishes that, where layoffs flow from reduction or elimination of particular kinds of services, attrition must be considered to the extent it is known before the preliminary layoff notices are served but does not have to be considered between that time and the hearing. Other cases such as *Santa Clara Federation of Teachers v. Governing Bd.* (1981) 116 Cal.App.3d 831, relating more specifically to layoffs due to decline in average daily attendance, have also been reviewed, but are of less help, as the obligation to consider attrition is different than when layoffs are based on reduction of particular kinds of services such as with this District. Although these cases all confirm the effects of attrition on the layoff process, none answers the specific question at issue to address the manner in which the attrition is to be handled.

24. Reductions in teaching staff must proceed according to seniority principles. "The statute specifically protects tenure rights and seniority. Layoffs must begin with the most recently hired. Furthermore, tenured employees who are competent and properly credentialed must be reassigned to replace junior employees . . ." (*Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, 563, quoting from *Vassallo v. Lowrey* (1986) 178 Cal.App.3d 1210, 1214.) (Although the statute discussed in *Duax* related to community college employees, it contained the same relevant language as found in Education Code section 44955.²) Under the applicable statutes, seniority is the principle controlling the order of layoffs and reemployment. (*Cousins v. Weaverville Elementary School Dist.* (1994) 24 Cal.App.4th 1846.) The purpose of the authority, under section 44955, subdivision (b), to permit a more senior teacher to bump into a position of a more junior teacher is to give preference to a qualified employee based upon their relative seniority. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 342-343.)

25. The District acted within its discretion in reconfiguring the Layoff Implementation Chart as it did. The ability of teachers to bump into a position held by another teacher with less seniority is a right established in section 44955 as part of the very same statute that sets forth the process to be followed by a school district in implementing layoffs. Although not required to consider post-March 15 attrition, the District did so in the

² All citations are to the Education Code.

same manner as if it was made aware of that attrition before March 15. Respondents' contention looks at the situation of Ms. Trujillo in somewhat of a vacuum, limiting the scope of analysis to her and Ms. Durieux. The District's actions, however, were broader, examining, in order: the effects of the bump by Ms. Reinbold (who has more seniority than Ms. Trujillo) into Ms. Durieux's position; the lack of a position for Ms. Trujillo to bump into; Ms. Cordova's bump of Mr. Aleman; and Mr. Aleman's bump of Ms. Ngo. This process properly considered Ms. Trujillo's bumping rights; however, by the time the District analyzed Ms. Trujillo's bumping rights, Ms. Durieux's position had already been taken by someone more senior to Ms. Trujillo and there was no other position into which she could bump. The evidence established that the process utilized by the District was not arbitrary or capricious and was related to the welfare of the District's schools and the pupils thereof.

LEGAL CONCLUSIONS

1. 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 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) . . . services 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, *supra*, 144 Cal.App.3d at p. 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 Bd.*, *supra*, 116 Cal.App.3d at p. 845.)

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. (E.g., *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.) A school district may give junior teachers retention priority over senior teachers to teach a specific course, or "skip" the junior over the more senior, if the junior teachers possess special training and experience which their more senior counterparts lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers v. Governing Bd.*, *supra*, 116 Cal.App.3d 831.)

9. Stipulations were reached in instances where the seniority list was incorrect, and the District agreed to reconfigure the seniority list, as set forth in Factual Finding 14. Except as set forth in Factual Finding 7, where the Accusation will be dismissed to three Respondents, as of the time of the hearing this did not have an effect on the order of layoff. It may affect possible rehiring rights, which are not subject to the jurisdiction of this hearing and are covered in other statutory provisions such as sections 44956 and 44957.

10. None of the errors in the seniority list, which are corrected by stipulation, are prejudicial to Respondents in the context of this proceeding. Therefore, they are deemed “nonsubstantive procedural errors” under section 44949, subdivision (c), and are not cause for dismissing the charges.

11. No certificated employee junior to any Respondent was retained to perform any services which any Respondent was certificated and competent to render.

12. 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 25.

ORDERS

WHEREFORE, THE FOLLOWING ORDERS are hereby made:

1. The Accusations served on Respondents Joshua Aleman, Rosalinda Barajas and Jessica Gomez are dismissed.

2. The Accusations served on all other Respondents are sustained. Notice may be given to those Respondents within the time period required by statute that their services will be reduced or terminated for the 2011-2012 school year.

DATED: May 10, 2011.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT A (“*” indicates present at the hearing.)

List of Respondents

| | | | |
|--------------------------|---|------------------------|---|
| 1. Barroso, Claudia | * | 9. McCutchan, Quinn | * |
| 2. Calderon, Flor | * | 10. Michael, Rodney | * |
| 3. Delgado, Erica | * | 11. Montano, Anell | * |
| 4. Flores, Monica | | 12. Ngo, Ann | * |
| 5. Franco, Elizabeth | * | 13. Rius, Jesus | * |
| 6. Garcia-Paredes, Norma | * | 14. Rodriguez, Yvonne | * |
| 7. Lo, Oliver | * | 15. Trujillo, Angelica | * |
| 8. Martin, Susana | * | 16. Zaragoza, Gabriela | * |