

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

In The Matter of the Accusations against:

OAH No. N2004040090

James Rizzuto, Cruz Gutierrez,
Tony Reis, Valerie Erb, Scott Gates, Vince
Sormano, and Deborah Waller

Respondents.

PROPOSED DECISION

Ann Elizabeth Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 22, 2004, in Biggs, California.

David E. Robinett, Attorney at Law, represented the Biggs Unified School District.

Leslie Beth Curtis, Attorney at Law, of Langekamp & Curtis filed a Notice of Defense on behalf of all of the respondents.¹ At hearing, Ms. Curtis, stated that she represented respondents Deborah Waller, Vince Sormano, James Rizzuto and Tony Reis to the extent that their interests did not conflict. These respondents represented themselves to the extent that their interests conflicted.

Although Notices of Defense were filed by and on behalf of respondents Cruz Gutierrez, Valerie Erb, and Scott Gates, these respondents did not appear through Ms. Curtis, nor did anyone appear on their behalf.

¹ Kendi Botts, John Hopper, and Rob Gregor did not file a Request for Hearing after being served with layoff notices. Thus, they were not served with Accusations. Nevertheless, the Law Office of Langekamp & Curtis filed a Notice of Defense on behalf of these three employees. These three employees did not appear at hearing and Attorney Leslie Beth Curtis advised that she did not represent them. Because of their failures to file Requests for Hearing, these three employees are not respondents in this action.

The District agreed to rescind the layoff notices issued to Patty Jones and Suzanne Francis at a pre hearing conference. Thus, these two employees are no longer respondents in this action.

The matter proceeded in respect to the Lay Off Notices issued to the following employees; James Rizzuto, Cruz Gutierrez, Tony Reis, Valerie Erb, Scott Gates, Vince Sormano, and Deborah Waller, as these employees had filed Requests For Hearing, been issued Accusations, and had filed (either individually or through Langekamp & Curtis) a Notice of Defense to the Accusation.

The record remained open until April 30, 2004, to allow parties to submit briefs. Said briefs were timely filed. The matter was submitted and the record closed on April 30, 2004.

FACTUAL FINDINGS

1. The Biggs Unified School District ("District") operates two elementary schools, one middle school, one high school, and two Community Day Schools. The District serves approximately 750 students.

2. Steven Lee Funk, Ed.D is the Superintendent of the District. His actions, and the actions of the Board, were taken in their official capacities.

3. Before March 15, 2004, the District personally served on each respondent a written notice that it had been recommended that notice be given to respondents pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year. Each written notice set forth the reasons for the recommendation and noted that the Board had passed Resolutions reducing the certificated staff by 6.49 full-time equivalent ("FTE") positions.

Respondents timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year.

4. The Superintendent made and filed Accusations against each of the employees who requested a hearing. The Accusations with required accompanying documents and blank Notices of Defense were timely served on those employees.

5. Respondents timely filed Notices of Defense.

6. Respondents in this proceeding are permanent certificated employees of the District.

7. On March 10, 2004, at a regular meeting of the District's Board of Trustees (the Governing Board), the Governing Board of the District was given notice of the Superintendent's recommendations that certificated and other employees holding 6.49 FTE positions be given notice that their services would not be required for the next school year and stating the reasons for that recommendation.

8. On March 10, 2004, the Board adopted Resolution No. 2003/04 #9, providing for the reduction or elimination of the following particular kinds of services:

- A. The services of three elementary classroom teachers.
- B. The services of one middle school teacher.
- C. The services of two agricultural teachers.
- D. The services of one .29 FTE Community Day School teacher.
- E. The services of one .20 FTE District-wide teacher.

9. The District is experiencing financial difficulties. The Governing Board determined that it needs to reduce its 2004-2005 operating budget by approximately \$240,000 in order to remain solvent. Thus, the Governing Board resolved to reduce teaching services, affecting employment of 6.49 FTE teaching positions. The Board's resolution to eliminate and reduce teaching services was made in order to balance its budget for the welfare of students.

10. The District maintains a Certificated Seniority List which contains employees' seniority dates (first date of paid service), status as tenured, probationary or temporary, and credentials and authorizations. Status, credential and authorization data are obtained from the District's records.

11. Dr. Funk and other District employees were responsible for implementation of the technical aspects of the layoff. The District failed to circulate or post the seniority list in anticipation of issuing layoff notices.² However, no respondent raised the argument that she or he was prejudiced by the District's failure to circulate the list.

12. The District used the seniority list to develop a proposed layoff list of the least senior employees currently assigned in the various services being reduced. The District then determined whether the least senior employees held credentials in another area and were entitled to "bump" other employees. In determining who would be laid off for each kind of affected service, 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. The District then checked the credentials of affected individuals and whether they could "bump" other employees. The District then looked at employee competence for certain positions as opposed to other positions.

13. The Governing Board did not establish tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. The Governing Board considered proposed tie breaking criteria, but did not adopt any tie breaking criteria.

² Dr. Funk testified that the Certificated Seniority List ("list") was not circulated because it contained confidential information. He is in error. The information contained on the list is not confidential personnel information. Employees have a statutory right to be informed of their respective placements on the list and to review the information contained on the list in order to challenge any perceived inaccuracies.

14. 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. As of the date of the hearing, the Board had determined that the position held by Karen Bischoff as a part time elementary school teacher may become available for the 2004-2005 school year.

MAY THE DISTRICT RETAIN COMMUNITY DAY SCHOOL TEACHERS SCOTT GATES and VINCE SORMANO WHILE LAYING OFF SENIOR TEACHERS?

15. Scott Gates is currently assigned to teach Community Day School and he is assigned as Lead Teacher for Alternative Education. The District seeks to retain ("skip") Mr. Gates, and noticed him only in the event he could be "bumped" by a more senior employee. Mr. Gates' first day of service is 5/1/2002. He holds a Clear Multiple Subject and CLAD credentials. More senior respondents; Valerie Erb and Tony Reis, maintain that they can "bump" Mr. Gate.

Vince Sormano is currently assigned as a secondary Community Day School teacher. Mr. Sormano's first day of service is 8/22/2002. Mr. Sormano, however, is serving under an Emergency Long Term Multiple Subject Permit and under an Internship Single Subject Social Science. As an emergency credential holder, Mr. Sormano ordinarily may be displaced or "bumped" by permanent or probationary employees regardless of seniority date.

The District wishes to retain Mr. Gates and Mr. Sormano. The District maintains that it has a specific need to retain these teachers to teach Community Day School. The District maintains that no employee, except Mr. Gates and Mr. Sormano, is qualified and competent to teach Community Day School ("CDS").

CDS classrooms are self contained with a class size of from five to eight students in grades 5 through 12. The CDS was established four years ago in order to provide classroom instruction to students with chronic and pronounced attitude and behavioral problems. The vast majority of CDS students are on probation as a result of a court order issued in a juvenile criminal matter.

Dr. Funk testified persuasively that the CDS teacher is a unique position. He testified that CDS teachers in this District require a special set of skills and knowledge which is not usually provided in the credentialing process. Teachers require a background in psychology or sociology. They require experience and training working with students with extreme behavioral problems. The CDS teacher also requires training and experience working with persons with behavioral problems which stem from disabilities.

The evidence was persuasive that Mr. Gates has extensive background and training in specialized areas vital to teaching CDS. Mr. Gates has ten years of experience teaching, eight years of which involved working with disabled populations. His Bachelor's degree is in Applied Psychology. He has had extensive training in mediation, aggression management

managing assaultive behaviors, after school programs in test taking skills, abuse recognition and numerous other areas of training related to working with difficult student populations. Mr. Gates is also the District trainer for management of assaultive behaviors. He provides training to those who train others in assault management techniques.

There is no respondent who possesses the unique qualifications and competency Mr. Gates possesses. The District demonstrated a specific need for retaining Mr. Gates in the lead CDS position.

The evidence was persuasive that Mr. Sormano has extensive background and training in specialized areas vital to teaching CDS. Mr. Gates has worked as a long term substitute teacher and has completed all of the coursework necessary to receive his teaching credential. His Bachelors degree is in History with a Social Science option. He has sufficient academic credits to achieve an Associates degree in sociology. He has extensive specialized training in management of assaultive behavior, drug abuse recognition and working with hard to handle students. He has experience working with special needs children. He has training in serving special education students and utilizing behavioral modification techniques.

Tony Reis and Deborah Waller maintain that they should bump into the position Mr. Sormano now occupies. Mr. Reis possesses a Clear Designated Vocational Agricultural Mechanics (K-12) credential. He has had some experience disciplining ROP students and managing groups of students on and off campus. He has no psychological or sociological training. The evidence was persuasive that he does not possess the skills and qualifications necessary to teach CDS.

Deborah Waller has Clear Multiple Subject credential with a supplemental credential in Social Sciences. She also holds a CLAD certificate. She has completed all of the coursework necessary to obtain a Master's degree. Although she has one year of experience working with adults with disabilities through a Mental Health Department, she does not, however, possess the extensive training and experience necessary for working with the troubled and aggressive student population of CDS classes.

There is no respondent who possesses the unique qualifications and competency Mr. Sormano possesses. The District demonstrated a specific need for retaining Mr. Sormano in the secondary CDS position.

MAY THE DISTRICT RETAIN QUEST/DISCIPLINARIAN TEACHER ROB GREGOR WHILE LAYING OFF MORE SENIOR EMPLOYEES?

16. The District wishes to skip Rob Gregor from layoffs. The District maintains that it has a specific need to retain Mr. Gregor to fill the Quest/Disciplinarian position. The District maintains that no respondent with more seniority than Mr. Gregor is qualified to teach Quest and to serve as the School Disciplinarian.

Mr. Gregor holds a Preliminary Single Subject Credential. Three respondents are senior to Mr. Gregor. In order of seniority these are Tony Reis, Valerie Erb and James Rizzuto. Ms. Waller is tied with Mr. Gregor for seniority.

Dr. Funk testified that the Quest/Disciplinarian ("Quest") program focuses on developing the social skills, communication skills and decision making skills of young adolescents. The students engage in a set of activities and scenarios designed to generate discussion. The emphasis is on socialization, communication and decision making skills. The program is mandatory for every student in grades 7 and 8. Every student takes one section of Quest programming. The teacher must be credentialed and must take a short period of Quest training.

The teacher who provides Quest instruction also serves as the School Disciplinarian. The Disciplinarian is assigned to carry out discipline, to monitor attendance, and to make referrals to social and legal authorities.

Dr. Funk did not meet the District's burden of showing that this position was of such a specialized nature that it was necessary to retain a junior employee. Nor did the District show that two of the employees senior to Mr. Gregor were not competent and certificated to fill this position. The evidence was that Ms. Erb, who holds a Clear English Subject credential, and Mr. Rizzuto, who holds a Clear Multiple Subject and CLAD credentials, are each competent and certificated to bump into the Quest/Disciplinarian position now held by Mr. Gregor.

Mr. Reis is not certificated and competent to teach Quest. Mr. Reis holds a Designated Subjects Vocational Education Teaching Credentials. This credential only permits him to teach a course that is designated as a technical, trade or vocational course. (Education Code section 44256) Mr. Reis does not have an academic degree, nor has he had experience in teaching the programming offered in Quest.

The Quest/Disciplinarian position is a .79 FTE position. Ms. Erb is senior to Mr. Rizzuto. However, she was noticed at .29 and .20 FTE layoff. She cannot bump into .49 of the Quest position, as the District is not required to split positions into fractions in order to facilitate bumping. Mr. Rizzuto was noticed at 1FTE layoff and may bump into the Quest/Disciplinarian position for .79 FTE.

MUST THE DISTRICT RETAIN THE IN SCHOOL SUSPENSION PROGRAM AND STAFF IT WITH A CERTIFICATED TEACHER?

17. The District currently has an In School Suspension Program ("ISSP"). The program allows students to remain on campus while serving suspensions. ISSP has up to seven students three days a week. And on Wednesdays, ISSP has approximately thirty students.

This program is currently staffed by a substitute credentialed teacher. The substitute teacher has worked approximately four full days a week for the entire school year. She reviews the list of the next day's suspended pupils, emails the pupils' teachers to make sure they provide assignments to the suspended pupil for the day's work, collects assignments from teachers who do not comply with her email request, isolates suspended pupils from the rest of the student population and supervises pupils as they do their assignments. She helps pupils with their schoolwork when they ask for help. Students ask for help approximately three times a week. She also maintains appropriate records for the program.

When a substitute teacher is needed in a classroom and no other substitute teachers are available, the substitute assigned to ISSP cancels suspension for the day and substitutes in the classroom. This happens infrequently.

Dr. Funk testified that the District intends to eliminate the services of the substitute credentialed teacher for the 2004-2005 school year. In place of the credentialed substitute teacher, the District is considering various options for changing the ISSP so that it is more cost effective. One consideration is employing a classified employee to supervise suspended students. Another is having principals or other administrators take turns supervising the students. Another option is changing the program scheduling to reduce its hours and retaining a substitute for those hours.

The District maintains that the ISS program does not require a credentialed teacher. Therefore, ISSP was not designated as a PKS to be reduced in the 2004-2005 school year, and no teacher subject to layoff was considered to replace the substitute teacher. The respondents contend that the program is a "classroom", "taught" by a certificated teacher and requires a certified teacher because of the need to supervise and assist students in completing the classwork assigned by the suspended pupils' teachers. The District and respondent Mr. Reis agree that if the ISSP position is a credentialed position, Mr. Reis is certificated and competent to assume the ISSP position.

Supervised suspension classrooms are authorized pursuant to Education Code section 48911.1. The respondents argue that the language of this section and language elsewhere in the Education Code support their contention that ISSP classes must be conducted by certificated teachers. These arguments were not persuasive. Section 48911.1 (c) provides only that school districts who wish to claim ADA apportionment for pupils assigned to a supervised suspension classroom staff the supervised suspension classroom "as otherwise provided by law." The District agrees that the language "as otherwise provided by law" in section 48911.1 means that when a District is receiving ADA apportionment for pupils in an ISSP, that program must be staffed by a certificated employee.

Section 48911.1 also provides that when Districts claim ADA for their ISSP, the pupils' teachers assign class work and tests to their students who are in suspension. If no such work is assigned, "the person supervising the suspension classroom shall assign schoolwork". Section 48911.1 (c) (4).

These two provisions of 48911.1, staffing as provided by law and assignment of schoolwork to pupils, apply only when the District claims ADA apportionment. There is no such requirement in section 48911.1 for ISS programs which do not claim ADA apportionment.

The District presented persuasive evidence that it does not claim ADA apportionment for pupils in its ISSP. Superintendent Funk testified that the District does not receive ADA apportionment for the time students are attending the supervised suspension classroom. There was testimony suggesting that students are attending the ISSP for part of the day, while the District claimed ADA apportionment for their attendance in a regular classroom. Dr. Funk testified that this is a proper accounting and was approved by the California Department of Education. There was no competent evidence to the contrary.

The evidence was persuasive that the District's ISSP does not require staffing by a certificated employee. Therefore, the District may take such action as it deems appropriate in staffing the ISSP and no respondent may bump into the position staffing that program.

OTHER ISSUES

18. Cruz Gutierrez is an intern, teaching under a Pre-Intern Certificate -General K-12 Self Contained class. Mr. Gutierrez is not a permanent or probationary employee of the District. The District has no legal duty to retain Mr. Gutierrez or to consider his retention under Education Code section 44955.

19. Mr. Sormano expressed concerns regarding the seniority date assigned to him by the District. Mr. Sormano's seniority date was not addressed as it was not at issue in this proceeding. Mr. Sormano was lawfully "skipped" by the District.

20. Deborah Waller and Rob Gregor have the same seniority date. The Governing Board's failure to adopt tie breaking criteria was not at issue in this proceeding; as there are no positions occupied by junior employees for which Ms. Waller or Mr. Gregor are qualified and competent to assume.

21. The District employees receiving notices that their services would not be required next year, whether temporary or certificated employees, have all rendered valuable services to the District.

LEGAL CONCLUSIONS AND DISCUSSION

1. All notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945 were met.

2. 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 Assn 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 decisions were a proper exercise of its discretion.

3. The services identified in Board Resolution No. 2003/04 #9 are particular kinds of services that could be reduced or discontinued under section 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 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.

4. A 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 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.

6. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

7. 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. Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities 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 Board* (1981) 116 Cal.App.3d 831.

8. The District may deviate from terminating certificated employees in order of seniority, pursuant to Education Code section 44955 (d). The District must prove that it has a specific need for personnel to teach a specific course and that certificated employees it

seeks to retain have special training and experience necessary to teach that course of study, which others with more seniority do not possess. The District has met this burden in respect to retaining Scott Gates and Vince Sormano to teach Community Day School.

9. The District has not demonstrated a specific need to retain Rob Gregor in the Quest/Disciplinarian position while laying off more senior employees. Senior employee and respondent, James Rizzuto is qualified and competent to hold this position.

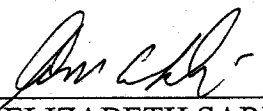
10. The In School Suspension Program does not require staffing by a certificated employee. No respondent may "bump" into this position.

ORDER

1. Notice shall be given to employees occupying 6.49 full-time equivalent certificated positions that their services will not be required for the 2004-2005 school year because of the reduction and discontinuance of particular kinds of services, including the following respondents: Cruz Gutierrez, Tony Reis (.57), Valerie Erb (.49), and Deborah Waller.

2. The Accusations against James Rizzuto as to .79 FTE, Scott Gates, and Vince Sormano are dismissed.

DATED: May 5, 2004



ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings