

BEFORE THE
GOVERNING BOARD OF THE
WASHINGTON UNION HIGH SCHOOL DISTRICT
COUNTY OF FRESNO
STATE OF CALIFORNIA

In the Matter of the Accusation/Reduction In
Force:

ROBERT KIMBALL,

and

AARON FITZGERALD,

Respondents.

OAH No. 2011031604

PROPOSED DECISION

Ann Elizabeth Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Fresno, California, on May 27, 2011.

Roberta Rowe, Attorney at Law, of Lozano Smith represented the Washington Union High School District (District).

Barry J. Bennett, Attorney at Law, of Bennett & Sharpe, Inc. represented respondent Robert Kimball.

Respondent Aaron Fitzgerald untimely filed a Request for Hearing. He was served with an Accusation, and then withdrew his Request for Hearing. Mr. Fitzgerald did not file a Notice of Defense to the Accusation or appear at hearing. Although Mr. Fitzgerald has waived his right to hearing, the District requests that this Proposed Decision uphold his layoff. Therefore, he is identified as a respondent.

Evidence was received, the hearing was closed, and the matter was submitted for decision on May 27, 2011.¹

¹ The hearing was continued from April 28, 2011, by stipulation of the parties and an OAH order of April 20, 2011. Pursuant to the stipulation and order, the deadlines specified in Education Code sections 44949 and 44955 were extended.

FINDINGS

1. John Pestorich is the District Superintendent. The actions of Superintendent Pestorich and the actions of the District Governing Board (Board) were taken in their official capacities.

2. The District serves high school students in non-compartmentalized classes. There are four high schools and a continuation school, with a total enrollment of just over 1200 students. The District is facing a severe budget deficit for the 2011-2012 school year. Because of the projected budget deficit, the Superintendent recommended to the Board that it was necessary to reduce certificated business teaching services by two full-time equivalent (FTE) positions no later than the beginning of the 2011-2012 school year. In making his recommendation, the Superintendent took into account all positively assured attrition.

3. On March 7, 2011, the Board adopted Resolution No. 19-10, (Resolution) which reduced certificated business teaching services by two FTE positions no later than the beginning of the 2011-2012 school year.

4. The Board further determined that it was necessary by reason of the reduction of services to decrease the number of permanent and/or probationary certificated employees at the close of the 2010-2011 school year by a corresponding number of FTE positions and directed the Superintendent or his designee to proceed accordingly by notifying the employees affected by the Board's determination.

5. On March 18, 2011, the District served the affected employees with a written notice, pursuant to Education Code sections 44949 and 44955, that their services would be terminated for the next school year (Preliminary Notice). Each Preliminary Notice set forth the reasons for the recommendation. The Preliminary Notice attached and incorporated the Resolution by reference.

7. Mr. Kimball timely filed a Request for Hearing to determine if there was cause for not re-employing him for the next school year. Mr. Fitzgerald filed an untimely Request for Hearing and later withdrew it. The Superintendent made and filed Accusations against Mr. Kimball and Mr. Fitzgerald. Mr. Kimball timely filed a Notice of Defense.

Implementation of Layoff

8. The District maintains a seniority list which includes the teachers' credentials and authorizations, first dates of paid service and current assignments.

9. District staff reviewed the seniority list and identified the least senior persons occupying the positions affected by the 2 FTE reductions. Mr. Fitzgerald and Mr. Kimball were the two least senior of the three business instructors. District staff determined that there was no junior teacher being retained to teach courses which Mr. Kimball or Mr. Fitzgerald were competent and certificated to teach.

10. Mr. Kimball holds a Single Subject Credential in Business and a Supplemental Authorization in Introductory English. He also holds a Master's Degree in Business. He is currently assigned to teach Business and Senior Projects. Mr. Kimball has a seniority date of August 10, 1999.

11. Mr. Kimball maintains that with the elimination of his business teaching services, he (1) should be retained to teach English classes being taught by junior teachers; (2) he should be retained to teach Senior Projects classes being taught by junior teachers; (3) he should be retained to teach AVID classes being taught by junior teachers; or (4) the District should fashion a position for him commensurate with his experience and credentials.

Displacing English Teachers

12. Mr. Kimball maintains that he should be retained to teach English classes being taught by junior teachers because he holds a Supplemental Authorization in Introductory English and he has been teaching Business English in college classes for many years. He also teaches English and grammar in his business classes and senior project curriculum. Additionally, he argues that the District initially hired him in 1999 to teach English, but he was then assigned to teach Business classes. Finally, he maintains that several years ago another teacher with a Supplemental Authorization in English was assigned to teach English classes to all grades.

13. According to the Commission on Teacher Credentialing (CTC), supplementary authorizations are subjects added to multiple subject, single subject, and other teaching credentials. The authorizations are based on 20 semester units or 10 upper division or graduate units in the subject. Single subject credentials with supplemental authorizations allow teaching as follows: If the supplemental authorization is in an introductory subject, the holder is authorized to teach only the subject matter content typically included for that subject in curriculum guidelines and textbooks for study in grades nine and below. If the supplemental authorization is in a specific subject(s) the holder is authorized to teach the specific subject at any grade level, preschool through 12, and in classes organized primarily for adults. If a supplemental authorization accompanies the multiple subject credential the holder is authorized to teach departmentalized classes related to the supplementary authorization in grades nine and below.

14. Mr. Kimball's Supplemental Authorization is in an introductory subject, Introductory English. Accordingly, he is authorized to teach only the subject matter content typically included for English in curriculum guidelines and textbooks for study in grades nine and below.

15. The District maintains that it has no positions teaching English to only the ninth grade. Teachers in core subjects such as English are assigned to teach in all four high school grades. Additionally, the District maintains that even if Mr. Kimball was certificated to teach English in the high school classes, he does not meet the Board's competency criteria, adopted on March 7, 2011, in Resolution No. 21-10. The pertinent criteria is possession of one year of full time contractual District experience within the past five years teaching English. His experience teaching business English courses in Fresno City College classes does not qualify under this criteria, as it is not experience teaching high school students. Nor does his teaching Business English as a component of his elective high school Business classes qualify as one year of English instruction. The District points out that Business English, whether high school or college classes, focuses on grammar, speaking and writing, and does not encompass other components of English instruction, such as literature. The District also points out that it requires its English teachers to be NCLB compliant, as they are teaching a core subject. Single Subject holders in English are generally NCLB qualified by virtue of their credentials. A Supplemental Authorization in Introductory English does not establish NCLB compliance. Mr. Kimball is not otherwise NCLB compliant.

16. The District's arguments are persuasive. The District is prohibited from assigning a teacher with a Supplemental Authorization in Introductory English to teach English classes to students in 10th through 12th grades. The fact that the District may have permitted this in the past, after obtaining a Board waiver/approval, is not relevant to this proceeding. All the teachers currently assigned to teach English, including those junior to Mr. Kimball, hold a Single Subject English Credential. Even if the District had the authority to place Mr. Kimball in a position teaching English to 10th through 12th grade students, Mr. Kimball does not meet reasonable competency criteria designed to ensure that he has experience teaching English; nor is he NCLB compliant in English. Accordingly, Mr. Kimball may not displace a junior teacher assigned to teach English.

17. Mr. Kimball maintains that in the 2010-2011 school year there were two teachers who taught English to ninth graders only, with the exception of one 10th grade class. Both of these teachers have Single Subject Credentials in English and have the flexibility to teach classes other than ninth grade English. One of these two teachers was a probationary employee who was non-re-elected. Even assuming that the District assigned the other teacher, Michael Curran, to all ninth grade English with the exception of one 10th grade class, the District is not scheduling an all ninth grade English position in the 2011-2012 school year. The District cannot be compelled to continue providing this type of scheduling.

18. Further, the District cannot be compelled to fashion a unique position for Mr. Kimball, teaching only ninth grade students. The District is not required to disrupt its teaching assignments and class schedules and separate ninth grade classes from ninth through 12th grade teaching assignments in order to create a full time position teaching only ninth grade English.²

Senior Projects Classes

19. Several teachers, including Mr. Kimball, are assigned to teach Senior Project in addition to their subject matter coursework. Senior Project is a program where seniors select a career they have an interest in and prepare a presentation about that career. The project is not related to the subject matter of the course to which the Senior Project is attached. For instance, the senior students who took Mr. Kimball's elective Business classes and who were assigned to take Senior Project often make presentations on careers other than business careers. The Senior Project instructor is responsible for assisting students with their research and presentation.

20. Mr. Kimball maintains that there are several junior teachers who are assigned Senior Projects and that he could teach the Senior Project components of their assignments. He acknowledged that there are no teachers he is aware of who are teaching Senior Project alone without a subject area class.

21. The District maintains that Senior Project is not organized as a single teaching assignment, but it is a component of a designated class, such as English, Business or Health. No teacher is assigned to provide just Senior Project instruction. The District is attempting to attach Senior Projects to career programs, such as health careers, as well as academic courses. The District points out that one of the reasons the Board discontinued offering Business courses is that students are choosing other electives, especially occupational electives, over Business courses.

22. Mr. Kimball would have to be certificated in another subject offered to seniors in order to also provide Senior Project instruction. As noted above, his Supplemental Authorization in Introductory English would not permit him to teach English to seniors. Therefore, he cannot teach an English and Senior Projects assignment. The District cannot be compelled to remove Senior Project instruction from the courses to which it is tethered and cobble the Senior Project classes together to create a full-time Senior Projects assignment for Mr. Kimball.

² An employee with seniority is not entitled to compel a school district to split positions to create a position for him. (*Hildebrandt v. St. Helena USD* (2009) 172 Cal. App. 4th, 334, 343.)

AVID Program

23. Mr. Kimball maintains that he is certificated and competent to teach in the District's AVID (Advancement Via Individual Determination) program. There are eight teachers in the AVID program. At least seven of these teachers are junior to Mr. Kimball. AVID is a national program developed in the 1980s to assist students in the "academic middle" to help them enter college. The major focus of the program is assistance in organizational and study skills. Secondary emphasis is on academic skills such as writing. AVID is an elective course. Last year, the District began integrating AVID instruction with core subjects such as Science and Math.

24. The District acknowledges that AVID teaching does not require a particular certification. The District also acknowledges that there are teachers with less seniority than Mr. Kimball who teach AVID. However, the District maintains that Mr. Kimball cannot bump any of the AVID teachers because he does not have the training required for AVID instruction and he does not meet the competency criteria of having taught AVID for one year in the last five years. Additionally, he does not hold another single subject credential that would permit him to teach AVID along with his subject area.

25. In respect to the training required for AVID instruction, AVID instructors must attend a five-day summer training Institute and continue with in-service training throughout the school year. The District acknowledges that it is regularly recruiting for its teachers to become AVID trained. There is no requirement that the new recruits have AVID experience. Accordingly, the competency criteria of teaching the subject for one year in the last five, is unreasonable in respect to AVID teaching. Mr. Kimball is certificated and competent to teach AVID.

26. However, the District maintains that most AVID teachers have a single subject credential in a core academic area, such as Foundational Math, English or Science. Two have credentials in Physical Education, but teach in alternative education. (Mr. Kimball does not claim that he should displace junior alternative education teachers.) All of the AVID teachers teach classes in their single subject area as well as the AVID classes. The students in AVID begin together in ninth grade and remain in the same cohort throughout the 12th grade. The AVID teacher is assigned that cohort and teaches the same AVID students through 12th grade. Mr. Kimball's certification would only permit him to teach AVID in connection with ninth grade English classes, which poses great difficulty in cobbling together a ninth grade only position, and which makes it impossible for him to teach a cohort of AVID students throughout their high school years. The issue of cobbling a position together was discussed above, in relation to Mr. Kimball's assertion that he should be assigned all Senior Projects, or Senior Projects attached to ninth grade English classes. For these reasons, Mr. Kimball cannot compel the District to fashion a position of all AVID or AVID and ninth grade English classes.

Other Arguments

27. All other arguments of the parties not specifically addressed herein were considered and are rejected.

Conclusion

28. There are no certificated employees junior to Mr. Kimball or Mr. Fitzgerald who are being retained to render services for which Mr. Kimball or Mr. Fitzgerald are certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in these sections were satisfied. Each respondent is presently a certificated probationary or permanent employee of the District.

2. The Board's decision to reduce or discontinue the particular kinds of services identified in Resolution No. 19-10 was not arbitrary or capricious, but constituted a proper exercise of discretion.

3. The services identified in Resolution No. 19-10 are particular kinds of services that could be reduced or discontinued under section 44955. Cause exists to reduce the number of certificated employees of the District due to the reduction or discontinuance of particular kinds of services. Cause for the reduction or discontinuance of services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949.

4. 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. 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) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and *services of such employees shall be terminated in the inverse of the order in which they were employed ...*

... 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...

(Emphasis added)

6. As set forth in the Findings, there are no certificated employees junior to Mr. Kimball or Mr. Fitzgerald who are being retained to render services for which Mr. Kimball or Mr. Fitzgerald are certificated and competent to render.

7. The Board may give Mr. Kimball and Mr. Fitzgerald final notice that their services will not be required for the 2011-2012 school year.

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ORDER

The Accusations served on respondents are sustained. Final Notices shall be given to respondents that their services will not be required for the 2011-2012 school year because of the reduction or discontinuation of particular kinds of services.

Dated: June 22, 2011.

ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings