

BEFORE THE
GOVERNING BOARD OF THE
ANTELOPE VALLEY UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of:

OAH No. L2008030389

The Reduction in Force of 35.8 Full-Time
Equivalent Positions,
Respondents.

PROPOSED DECISION

David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 24, 2008, at the Antelope Valley Union High School District, Lancaster, California.

Fagen Friedman & Fulfrost, by Howard A. Friedman, Attorney at Law, represented the Antelope Valley Union High School District (District).

Schwartz, Steinsapir, Dohrman & Sommers, by Michael R. Feinberg, Attorney at Law, represented the following four respondent teachers: Rachel Norton, Ryan Rivas, Carol Smith and David Wolter who, except for Mr. Wolter, were present at the hearing. On the day of the hearing, the Accusation against Carol Smith was withdrawn.

Evidence was received by way of stipulation, testimony and documents. The record was held open for receipt of briefs, which were received on April 30, 2008, and marked for identification as follows: The District's brief, Exhibit 12; the Respondents' brief, Exhibit F. The record was closed and the matter was submitted on April 30, 2008.

SUMMARY OF PROPOSED DECISION

The Governing Board of the District determined to reduce or discontinue particular kinds of services provided by certificated teachers for budgetary reasons. The decision was not related to the competency and dedication of the individuals whose services are proposed to be reduced or eliminated.

District staff carried out the Board's decision by using a selection process involving review of credentials and seniority. The selection process was in accordance with the requirements of the Education Code.

FACTUAL FINDINGS

1. The District provides educational services for students in grades nine through twelve in the following settings: eight comprehensive high schools, two continuation high schools, one CDC/expulsion school, one adult education school and one ROP. The District employs approximately 1150 certificated staff.

2. David Vierta is the Superintendent of the District and Tim Azevedo is the Assistant Superintendent, Personnel Services of the District. Their actions were taken in those official capacities.

3. Before March 15, 2003, the District personally served on each respondent a written notice (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 notice set forth the reasons for the recommendation and noted that the Board had passed a Resolution reducing the certificated staff by 35.8 full-time equivalent (FTE) positions. In the District, each period of scheduled class instruction or other assignment is the equivalent of 0.2 FTE, with five periods per day being the usual load for teachers.

4. Notices were personally served. Nine certificated employees each timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year.

5. The Superintendent made and filed Accusations against each of these nine employees. On April 8, 2008, the District served these employees by mail with an Accusation along with required accompanying documents and blank Notices of Defense.

6. Six employees filed a Notice of Defense: Michelle Klein, Rachel Norton, Ryan Rivas, Carol Smith, Tenecia Takamatsu and David Wolter (Respondents). By the time of the hearing, Michelle Klein and Tenecia Takamatsu were no longer Respondents in the matter. As to them, it is presumed that the Accusations were withdrawn.

7. Respondents in this proceeding are probationary certificated employees of the District.

8. On March 5, 2008, the Board of Trustees of the District (Board) was given notice of the Superintendent's recommendation that 35.8 FTE employees be given notice that their services would not be required for the next school year and stating the reasons therefore.

//

9. Board Revised Resolution 2007-2008-24, adopted on March 5, 2008, proposed a layoff of 35.8 FTE certificated employees (Resolution). Specifically, the Resolution provided for the reduction or elimination of the following particular kinds of services:

<u>FTE</u>	<u>Services</u>
19.2	Senior Project
4	Administrative Intern
7.8	Instructional Coach
1.6	Site Coordinators
3.2	Intervention

10. These services to be reduced or eliminated were described as follows:

(a) Senior Project: a program where high school seniors take courses to research and produce a project portfolio and presentation, proposed to be eliminated.

(b) Administrative Intern: if a teacher is interested in becoming an administrator, each school may release a teacher for two periods to shadow an administrator in the performance of administrative duties.

(c) Instructional Coach: a program where teachers are released for a period to help colleagues who need assistance in teaching style, technique or methodology.

(d) Site Coordinators: the athletic directors assigned to each site who have been released in the past for two periods to attend to paperwork, proposed to be reduced to one period.

(e) Intervention: a program paid for from the general fund to support smaller classes in literacy and math.

11. The Resolution also established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. It provided that the order of termination shall be based on the needs of the District in accordance with the criteria stated therein.

12. Assistant Superintendent Azevedo stated that the Resolution was required by the District's fiscal crisis and need to reduce services to balance its budget for the welfare of students. More specifically, the Board received information about the next state budget leading the Board to believe that it needed to recapture approximately \$1,968,000 to its general fund.

13. The decision to eliminate or reduce services was not related to the competency and dedication of the individuals whose services are proposed to be reduced or eliminated.

14. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments and credentials.

15. Assistant Superintendent Azevedo was responsible for implementation of the technical aspects of the layoff.

16. 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 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. The District then checked the credentials of affected individuals and whether they could "bump" other employees. The District has a high rate of attrition and, therefore, did not need to send out as many notices as the number of FTEs identified in the Resolution.

17. The District used information from the seniority list to apply the tie-breaker criteria of the Resolution.

18. The services identified in the Resolution are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Board's decisions to reduce or discontinue the identified services were neither arbitrary nor capricious, and were a proper exercise of its discretion. The decisions were based on the welfare of the District and its pupils.

19. The District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

20. Respondents' contend that the FTEs identified in the Resolution do not constitute "particular kinds of services" under Education Code section 44955 and, as a result, fewer Respondents should be subject to lay off.

21. In support of this contention, the following evidence was submitted.

(a) Senior project classes are taught by teachers in various disciplines, while senior composition classes are taught by English teachers and satisfy requirements to obtain an English credit. Some seniors take senior composition class as part of their senior project, and others do not. Respondents contend that these two types of classes are not the same particular kind of service, that the Resolution makes no distinction between them and, as a result, the total FTEs being eliminated must be reduced by the 4.6 FTEs identified as English teachers teaching senior composition,

(b) Administrative interns are not required to have any particular credential, and are certificated teachers who perform as administrative interns for a period, rather than as a full-time assignment. Respondents contend that this is no more than a nonspecific teacher on special assignment which is not a particular kind of service. Therefore, the total FTEs being eliminated must be reduced by the 0.8 FTE administrative interns identified as English teachers.

(c) Instructional coaches, although described in some job postings as full-time positions, are mostly teachers doing such functions on a part-time basis—only two are full time. The job postings denote more areas of responsibility than testified to by Mr. Azevedo. Respondents contend that the Resolution to reduce 7.8 FTEs does not distinguish between part-time or full-time positions or the limited duties described in testimony as opposed to the more extensive duties in the job postings. As a result, Respondents contend that the total FTEs being eliminated must be reduced by the 2.8 FTE instructional coaches identified as English teachers.

(d) The District does not have a job description for site coordinators. Respondents contend that it therefore cannot constitute a particular kind of service amenable to layoff and, as a result, the total FTEs being eliminated must be reduced by the 0.2 FTE site coordinators identified as English teachers.

(e) Respondents contend that the intervention service is no more than specialized or intensive remedial math or English classes, however, the District has not identified math or English as particular kinds of services to be reduced or eliminated. Therefore, the layoffs have been improperly noticed and, as a result, the total FTEs being eliminated must be reduced by the 1.6 FTE intervention providers identified as English teachers.

(f) As a result of the contentions noted above, and some differences between the numbers of FTEs identified in the Resolution as opposed to the actual number of FTEs noticed for layoff,¹ and the effects of attrition, Respondents contend that there should be no more than a 4.0 FTE reduction in English teachers. When applied to the seniority list, this would justify giving notice to Respondent Rachel Norton but not to Respondent Ryan Rivas.

LEGAL CONCLUSIONS AND DISCUSSION

1. Education Code² section 44944, subdivision (a), states in pertinent part:

“No later than March 15 and before an employee is given notice by the governing

¹ For example, the Resolution indicates 19.2 FTEs for senior project and 1.6 for site coordinator, while the District’s computations in Exhibit 9 indicate actual layoffs of 19.6 FTEs for senior project and 1.4 for site coordinator.

² All citations are to the Education Code.

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."

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. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement. . . .

"(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 44944 and 44945 were met. (Factual Findings 3 through 9.)

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.) As long as there is a change in the method of teaching, the layoff can proceed. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627.) Particular kinds of services, as that phrase is used in section 44955, means a specific offering or service, and can include specific curricular offerings, such as physical education, or services that will not be offered in the same way or method, such as eliminating a traveling art teacher but maintaining art instruction generally. (See *Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 811, and *Davis v. Berkeley School Dist.* (1934) 2 Cal.2d 770.)

In *San Jose Teachers Assn. v. Allen, supra*, 144 Cal.App.3d at page 632, the notices "gave designations of categories of services to be to be reduced or eliminated but did not identify the specific positions subject to notice." The court determined that this met the statutory requirements, and approved the use of categories such as "Administration (Building and Central Office)," "Counseling," "Department Chairpersons" and "Elementary Instrumental Music Program," among others.

5. There was sufficient information describing the categories to conclude that the particular kinds of services identified in the Resolution are sufficient under the applicable statutes. Respondents' contentions to the contrary are rejected. (Factual Findings 8, 9, 10, 20 and 21.)

6. 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.

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. No employee with less seniority than any Respondent is being retained to render a service which any Respondent is certificated and competent to render.

9. The difficulty faced by school districts in laying-off teachers in anticipation of cuts in the budgets of the state and the district is specifically acknowledged in *San Jose Teachers Association v. Allen, supra*, 144 Cal.App.3d at pages 632-33. Nevertheless, proceeding under sections 44949 and 44955 was acknowledged as proper and appropriate, absent a legislative change in the process. Under the present statutory scheme, the District and the Board acted properly in sending notices to Respondents that they would not be reemployed due to a reduction in particular kinds of services by the District.

ORDER

1. Notice may be given to employees occupying 35.8 full-time equivalent certificated positions that their services will not be required for the 2008-2009 school year because of the reduction and discontinuance of particular kinds of services. Such notices may be given to the following employees: Rachel Norton, Ryan Rivas and David Wolter.

2. Notice shall be given in inverse order of seniority. Each Respondent shall receive such a notice.

DATED: May 2, 2008.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings