

**BEFORE THE  
GOVERNING BOARD OF THE  
BAKERSFIELD CITY SCHOOL DISTRICT  
STATE OF CALIFORNIA**

**In the Matter of the Reduction in Force of:**

**CERTAIN CERTIFICATED EMPLOYEES of the BAKERSFIELD  
CITY SCHOOL DISTRICT,**

**Respondents.**

**OAH No. 2024030576**

**PROPOSED DECISION**

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on April 10, 2024, in Bakersfield, California.

Candace M. Bandoian, Dannis Woliver Kelly, represented the Bakersfield City School District (District). Jean Shin, Staff Attorney, California Teachers Association (CTA) represented Respondents Gordon Porter, Ed.D., and Theresa Blair, who attended the hearing.

Oral and documentary evidence was received. The record was held open until April 15, 2024, so that the parties could submit briefs. District was granted the ability to renew its objections to statements offered by Respondents during the hearing, the statements attributed to a former District Assistant Superintendent of Human

Resources. District's brief was timely received and is identified as Exhibit 11.

Respondents' brief was timely received and is identified as Exhibit B.

The record closed and the matter was submitted for decision on April 15, 2024.

Thereafter, on April 25, 2024, the ALJ issued an order reopening the record and directing Respondents to lodge a copy of Exhibit A, by April 30, 2024. On April 29, 2024, Respondents uploaded a copy of Exhibit A to the Case Center evidence platform, and the record again closed and the matter was submitted for decision.

## **FACTUAL FINDINGS**

### **The Parties and Jurisdiction**

1. Complainant Christine Cornejo filed and maintained the Statement of Reduction in Force while acting in her official capacity as Assistant Superintendent, Human Resources, of the District.

2. Respondents Gordon Porter, Ph.D. and Theresa Blair are certificated employees of the District. Both are employed as Office Teachers.

3. On February 27, 2024, the Governing Board of the District (Board) adopted Resolution No. 2024-03, titled "Resolution to Reduce the Number of Certificated Employees Due to a Reduction or Discontinuance of Particular Kinds of Services." (Ex. 1, p. A1; hereafter "Reduction Resolution.")

4. The Reduction Resolution requires the of elimination of two full-time positions, the kinds of services to be eliminated being those services provided by Office Teachers.

5. The services which the District seeks to discontinue or reduce are particular kinds of services that may be reduced or discontinued under Education Code section 44955. (All further statutory citations are to the Education Code.)

6. The decision by the Board to reduce or discontinue services was neither arbitrary nor capricious, but rather was a proper exercise of the District's discretion.

7. The reduction and discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Board.

8. On February 28, 2024, Respondents were served with a written notice that it had been recommended that their services would not be required during the upcoming 2024-2025 school year. The notice advised each Respondent of their right to request a hearing to determine whether there was cause to not reemploy them in the 2024-2025 school year, and the notice provided the deadline for requesting a hearing, which was March 8, 2024.

9. Each Respondent submitted a written request for hearing in a timely manner. Thereafter, on March 21, 2024, Complainant caused a Reduction in Force packet to be served on each Respondent. The Reduction in Force packet contained a written statement, copies of provisions of the Government Code and the Education Code, a District Statement of Reduction of Force—the operative pleading in this matter—and a Notice of Participation form.

10. On March 22, 2024, each Respondent submitted a completed Notice of Participation, requesting a hearing. On March 25, 2024, Complainant served each Respondent with a Notice of Hearing. This proceeding ensued.

11. All jurisdictional requirements have been met.

## **Seniority List**

12. District staff created a seniority list, which sets forth such information as each certificated employee's first date of paid service, credential(s), and current assignment. The Board adopted the seniority list by its Resolution No. 2024-04 on February 27, 2024. Respondents did not contest the accuracy of the seniority list.

13. No tie-breaking criteria was established, as only two positions, of the same type, are being eliminated. However, the resolution adopting the seniority list provides that the Board determined that between employees who first rendered service in a probationary position on the same date, the order of employment would be based solely on the needs of the District and the students thereof. (Ex. 2.)

## **Respondents' Case**

14. Each Respondent testified on their own behalf. Each has been employed by the District for over 30 years, and both respondents hold advanced degrees. For example, Blair has a master's degree in school counseling, and Dr. Porter holds a Ph.D. in education services. Each Respondent has more than one credential. Respondents were school counselors for many years, and then became Office Teachers. Their testimony indicated the District laid off school counselors in approximately 2011, eliminating school counselor services in the District, and Respondents were able to attain the Office Teacher positions they now hold.

15. Currently, Respondents concentrate on keeping attendance up among the student population, which can involve reviewing attendance data, working with students, parents, and sometimes social workers or the police. Blair spoke to their role

of paying some oft-needed attention on a young student who simply needs some attention. Respondents are proud of the work they do and believe their work is valuable to the District, the students, and their families. Each Respondent has had other work experience during their tenure with the District. Dr. Porter had a four-year stint as a vice-principal, and Blair has also acted as a vice-principal, and has participated in the delivery of special education services, running Individual Education Plan meetings.

16. Each Respondent testified that the former Assistant Superintendent for Human Resources, Dr. Diane Cox, told them that they would be able to work as Office Teachers until they retired. Each Respondent testified that the conversation occurred around the time that they were transitioning from school counselors to Office Teachers. Blair believed the conversation occurred in 2011, while Dr. Porter recalled the conversation took place in approximately 2013 or 2014. To be clear, the conversations were one-on-one with Dr. Cox.

17. Each Respondent testified they believed Dr. Cox's statements. Dr. Porter explained the context of the conversation; he had conversations with Dr. Cox about how the Office Teacher position was being redefined, and he testified he had concerns about his future having been through a reduction in force process before becoming an Office Teacher. He testified he relied on Dr. Cox's statement and based the rest of his career on it. Blair testified the conversation occurred in Dr. Cox's office and the two were discussing the transition from counselor to Office Teacher; she attested that she relied on Dr. Cox's statement believing Dr. Cox to be a person of her word.

18. Steve Comstock, Jr., testified. He has been employed by the District for 16 years, and has been on a leave of absence during the last eight years so that he can serve as President of the Bakersfield Elementary Teachers Association, the bargaining

unit for the District's teachers. While Comstock was not present during either of the conversations Respondents had with Dr. Cox on the subject of finishing their careers as Office Teachers, he had communications with Dr. Cox that led him to believe the District was committed to maintaining the Office Teacher positions.

19. District objected to Respondent's testimony regarding Dr. Cox's statements on the grounds of inadmissible hearsay. Those objections were overruled, but renewed in District's closing brief, and are discussed hereafter.

## **LEGAL CONCLUSIONS**

1. Jurisdiction was established to proceed in this matter, pursuant to sections 44929.5, 44949, and 44955, based on Factual Findings 1 through 11.

2. Under section 44955, subdivision (b), there are four situations where a school district may decrease the number of probationary or permanent teachers it employs. One such situation arises "whenever a particular type of service is to be reduced or discontinued not later than the beginning of the following school year, . . . "As noted by the Court of Appeal, section 44955, subdivision (b), allows a district to reduce particular kinds of services "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.) Here the District has determined that a particular type of service shall not, hereafter, be performed by anyone.

3. The services to be discontinued by the District are particular kinds of services within the meaning of section 44955. The Board's decision to discontinue the

identified services was neither arbitrary nor capricious and was a proper exercise of its discretion. 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. 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 at p. 167.) Such policy-making decisions are not subject to arguments as to the wisdom of their enactment, their necessity, or the motivations for the decisions. (*California Teachers Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1529.) Such decisions and action must be reasonable under the circumstances, with the understanding that "such a standard may permit a difference of opinion." (*Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) Thus, the ALJ may not substitute his judgement for the Board's.

5. The District's Motion to Strike, set out in its closing brief, must be denied. District asserts that Dr. Cox's statements are hearsay, and District's closing brief details its arguments that no hearsay exceptions apply. Respondents argue that Dr. Cox's statements are not hearsay, relying on an appellate case holding that an oral assurance of job security is not hearsay, that case being *Faigin v. Signature Holdings, Inc.*, (*Faigin*) (2012), 211 Cal.App.4th 726, 749. Respondents' reliance on *Faigin* is well placed, in part because its holding comports with the general rule that the terms of a contract, actual or alleged, are not hearsay. (See *State of Oregon v. Sup. Ct. (Lillard)* (1994) 24 Cal.App.4th 1550, 1555, fn. 1 [disapproved on other grounds in *Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 465, fn. 8]; *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 316; 1 Witkin, Cal. Evidence. (6th Ed. 2023), Hearsay, §36.)

6. The parties disagree on the issue of whether Dr. Cox had the authority to bind the District to maintain Respondents' positions as Office Teachers until they retired. Respondents cite section 35035, noting the statute provides a superintendent has the authority to enter into contracts for a school district. However, Respondents did not accurately quote the statutory provision. The pertinent language is found at section 35035, subdivision (h), and states a superintendent may: "Enter into contracts for and on behalf of the school district *pursuant to Section 17604.*" (Emphasis added.)

7. Section 17604 states:

Wherever in this code the power to contract is invested in the governing board of the school district or any member thereof, the power may by a majority vote of the board be delegated to its district superintendent, or to any persons that he or she may designate, or if there be no district superintendent then to any other officer or employee of the district that the board may designate. The delegation of power may be limited as to time, money or subject matter or may be a blanket authorization in advance of its exercise, all as the governing board may direct. *However, no contract made pursuant to the delegation and authorization shall be valid or constitute an enforceable obligation against the district unless and until the same shall have been approved or ratified by the governing board, the approval or ratification to be evidenced by a motion of the board duly passed and adopted.* In the event of malfeasance in office, the school district official invested by the governing board



with the power of contract shall be personally liable to the school district employing him or her for any and all moneys of the district paid out as a result of the malfeasance.

(Emphasis added.)

8. Aside from the issue of whether an assistant superintendent has the same contracting power as the superintendent of the district, and aside from the issue of whether the Board's power and right to determine what sort of courses may be provided in the district could be delegated to a superintendent of any stripe, there is no evidence that such authority was ever delegated to Dr. Cox, and there is no evidence that the Board approved or ratified her statements to Respondents, as required by section 17604. Thus, section 35035, subdivision (h), is not availing.

9. District's assertions that teacher tenure is statutory, not contractual, and in any event is subject to the statutory reduction in force process, are persuasive. *Board of Education v. Round Valley Teachers Assn.* (1996), 13 Cal.4th 269, held that a collective bargaining agreement could not vary statutory procedures for the process of not reelecting probationary teachers. The court also noted that the relevant statute vested exclusive discretion in the school district to decide whether to reelect probationary teachers, and such discretion could not be limited or modified by contract. Here the relevant statute, section 44955, subdivision (b), vests the discretion to discontinue certain types of services exclusively with the Board, and it cannot be delimited by contract.

10. Respondents argue that the District is estopped to deny their alleged contract. Respondents cite *Lentz v. McMahon*, (1989) 49 Cal.3d 393, which set out the elements of equitable estoppel, i.e., that the party to be estopped was apprised of the

facts; the party intended his or her conduct be relied upon or acted so that the other party had a right to believe it was intended; the other party was ignorant of the true state of the facts; and the party relied on the conduct to his or her injury.

11. Respondents have not proven a basis for an estoppel. Just what Dr. Cox intended is not established, given she did not testify. What facts she was apprised of is not shown from the record, i.e., was she apprised of some Board policy to never eliminate the services of Office Teachers? And, Respondents have not established the sort of detrimental reliance that is needed. At bottom, they kept doing their jobs, receiving remuneration. For example, there is no evidence they turned down other opportunities based on Dr. Cox's statements. Finally, District's reliance on *Reems v. Cooley* (1915) 171 Cal. 150 and *Santa Monica Unif. Sch. Dist. v. Persh* (1970) 5 Cal.App.3d 954, for the proposition that estoppel will not lie against a public entity where the mode of contracting is established by law is justified. As stated by the Court of Appeal in *Merco Const. Engineers, Inc. v. Los Angeles Unified Sch. Dist.* (1969) 274 Cal.App.2d 154, 160,

Estoppel may be invoked against a governmental agency only when the agency has the power to do that which it promised to do or which it led the opposing party reasonably and justifiably to believe it would do. Where, however, the procedure specified in a statute is the measure of the agency's power to act, estoppel cannot be applied to enlarge that power.

Here the proffered estoppel would require the District to cede its rights, powers, and even duties to determine what sort of services to provide, and its rights, powers, and duties to lay off teachers whose services are no longer necessary.

12. Cause exists, pursuant to sections 44949 and 44955, to reduce the number of certificated employees of the District due to the discontinuation of particular kinds of services. The District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued.

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

## **ORDER**

The District may serve final lay off notices to Respondents Dr. Gordon Porter and Theresa Blair.

DATE: 05/01/2024

*Joseph Montoya*

JOSEPH D. MONTOYA

Administrative Law Judge

Office of Administrative Hearings