

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

In the Matter of the Reduction in Force of:

LYNN DANIEL-CEJAS, JESSICA
FISHER, AMY HUTT, JENNIFER
PETTITT, SUZANNE SMITH, and JAIME
WILSON,

Respondents.

OAH No. 2015031168

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on April 14, 2015, in San Andreas, California.

Senior Counsel Bryan G. Martin of the law firm Atkinson, Andelson, Loya, Ruud & Romo represented the Calaveras Unified School District (District). Liz Stanko, the District's director of personnel, also appeared on behalf of the District.

Attorney Ernest H. Tuttle, IV, of the Law Offices of Ernest H. Tuttle, IV, represented respondents Lynn Daniel-Cejas, Jessica Fisher, Amy Hutt, Jennifer Pettitt, Suzanne Smith, and Jaime Wilson, each of whom was present at hearing.¹

Evidence was received, the record was closed, and the matter was submitted for written decision on April 14, 2015.

FACTUAL FINDINGS

Procedural Findings

1. Bryan G. Martin serves as legal counsel for the District. He made and filed the Statements of Reduction in Force solely in his official capacity.²

¹ Ms. Fisher left during a break in the proceedings after her preliminary layoff notice was rescinded by the District.

2. At the beginning of the hearing, the parties stipulated to the following jurisdictional facts:

a. Each respondent is a probationary or permanent certificated employee of the District.

b. On October 21, 2014, upon the recommendation of Superintendent Mark Campbell, the District's Board of Trustees (Board) adopted Resolution No. 2014/15-08 reducing or eliminating particular kinds of certificated services, and decreasing a corresponding number of certificated employees, for the 2015/2016 school year. The following are the "particular kinds of services" (PKS) to be reduced or eliminated:

PKS	FTE ³
Elementary Instructional Services	5.0 FTE
Middle School CORE (History/Language Arts)	2.0 FTE
High School Math	1.0 FTE
Total Full-Time Equivalent Reduction	8.0 FTE

The services identified in Board Resolution No. 2014/15-08 are "particular kinds of services" within the meaning of Education Code section 44955, subdivision (b).

c. On November 12, 2014, Superintendent Campbell served respondents Amy Hutt, Jennifer Pettitt, and Jaime Wilson with written notice that he had recommended to the Board that each of them be given notice that their services will be reduced or eliminated in the upcoming 2015/2016 school year and setting forth the reasons therefore. Ms. Daniel-Ceja was served with such notice on November 15, 2014.

d. On February 17, 2015, upon the recommendation of Superintendent Campbell, the District's Board adopted Resolution No. 2014/15-15 reducing or eliminating particular kinds of certificated services, and decreasing a corresponding number of certificated employees, for the 2015/2016 school year. Specifically, the following PKS were identified:

PKS	FTE
Elementary Instructional Services	2.0 FTE
Middle School CORE (History/Language Arts)	1.0 FTE

² Mr. Martin prepared and served a separate Statement of Reduction in Force for each respondent.

³ "FTE" stands for full-time equivalent.

High School Social Science	2.0 FTE
High School Technology	1.0 FTE
High School English	1.0 FTE
Total Full-Time Equivalent Reduction	7.0 FTE

The services identified in Board Resolution No. 2014/15-15 are “particular kinds of services” within the meaning of Education Code section 44955, subdivision (b).

e. On March 10, 2015, upon the recommendation of Superintendent Campbell, the District’s Board adopted Resolution No. 2014/15-23 reducing or eliminating particular kinds of certificated services, and decreasing a corresponding number of certificated employees, for the 2015/2016 school year. The Board authorized the reduction or elimination of the following PKS:

PKS	FTE
High School Art	1.0 FTE
Total Full-Time Equivalent Reduction	1.0 FTE

The services identified in Board Resolution No. 2014/15-23 are “particular kinds of services” within the meaning of Education Code section 44955, subdivision (b).

f. On March 12, 2015, Superintendent Campbell served respondent Suzanne Smith with written notice that he had recommended to the Board that she be given notice that her services will be reduced or eliminated in the upcoming 2015/2016 school year and setting forth the reasons therefor.

g. Each respondent timely requested a hearing to determine if cause exists for reducing or eliminating their services in the upcoming 2015/2016 school year.

h. The District filed and timely served a Statement of Reduction in Force and related materials on each respondent in accordance with Government Code sections 11503 and 11505.

i. Each respondent timely submitted a notice of participation pursuant to Education Code section 44949, subdivision (c)(1), and Government Code section 11506.

j. The District timely served a Notice of Hearing in accordance with Government Code section 11509 on each respondent.

k. All jurisdictional requirements under Education Code sections 44949 and 44955 have been met such that an evidentiary hearing may be commenced to determine if there is cause for not reemploying respondents for the 2015/2016 school year.

3. At hearing, the District withdrew the preliminary layoff notices served on Jessica Fisher, Angela Howard, Monica Maddock, Kristi Mendosa, and Chris Mizicko.⁴

Reasons for the PKS Resolutions

4. Ms. Stanko is the District's director of personnel. As such, she is one of the District's employees responsible for overseeing the process for laying off certificated employees.

5. Ms. Stanko explained that the District was unable to meet its obligations set forth in its budget for the 2013/2014 school year, and the Calaveras County Office of Education stepped in to provide fiscal oversight. That fiscal oversight included an outside fiscal advisor.

6. The Calaveras County Office of Education approved the Board's budget for the 2014/2015 school year on the condition that certain certificated PKS would be reduced or eliminated for the 2015/2016 school year.

7. When the District began drafting its budget for the upcoming 2015/2016 school year, the Calaveras County Office of Education wanted the Board to take "early action" to show its commitment to reducing its budget. Therefore, it was recommended that the Board implement the process of laying off certificated employees for the 2015/2016 school year in two phases.

8. The Board adopted Resolution No. 2014/15-08 on October 21, 2014, reducing or eliminating the PKS identified above as "phase 1" of its process of laying off certificated employees for the 2015/2016 school year.

9. Resolution No. 2014/15-15 was adopted on February 17, 2015, as "phase 2" of the District's process of laying off certificated employees for the 2015/2016 school year.

10. As the District began to have a better understanding of its enrollment and concomitant staffing needs at the high school level for the upcoming 2015/2016 school year, it determined that it could reduce the "High School Social Science" PKS by only 1.0 FTE. Therefore, the Board adopted Resolution No. 2014/15-23 on March 10, 2015, replacing 1.0 FTE of "High School Social Science" with 1.0 FTE of "High School Art."⁵

⁴ Ms. Howard, Ms. Maddock, Ms. Mendosa, and Mr. Mizicko did not request a hearing to determine if cause exists to reduce or eliminate their services for the upcoming 2015/2016 school year and, therefore, are not parties to this action. (Ed. Code, § 44949, subd. (b).)

⁵ Ms. Stanko confirmed at hearing that the total full-time equivalent reduction of 7.0 FTE authorized by Resolution No. 2014/15-15 should be reduced by 1.0 FTE as a result of the Board's adoption of Resolution No. 2014/15-23.

“Competency” Criteria

11. Resolution Nos. 2014/15-08, 2014/15-15, and 2014/15-23 each specify the following “competency” criteria:

“Competency” for the purpose of bumping and reemployment rights as described in Education Code section 44955, 44956 and 44957 shall be based upon current possession of a preliminary or clear credential for the subject matter or grade level to which the employee may bump or be assigned; a BCLAD if the assignment requires such authorization; and a properly filed EL authorization valid for 2015-2016 school year which authorizes instruction to EL students. Further, due to the District’s specific need to hire and retain only highly qualified teachers in academic subject areas, “competency” shall, in accordance with the NCLB, require current confirmation of academic subject competency, or verifiable eligibility for competency if not previously reviewed by the District, in all subjects of a proposed assignment, including assignments teaching multiple academic subjects and assignments in secondary alternative schools.

Respondents’ Contentions

The “High School Art” PKS

12. Suzanne Smith is a permanent certificated employee of the District. She has a seniority date of July 20, 2006, and is ranked “104” on the District’s Certificated Seniority List. She has a clear single subject credential in art. She has taught art to all grade levels at Calaveras High School since she began her employment with the District. Ms. Smith is “highly qualified” in art in accordance with the NCLB. She received notice from Superintendent Campbell that her services would be reduced or eliminated for the 2015/2016 school year as discussed above.

13. Brenda (a.k.a. Karen) Wallace is a permanent certificated employee of the District. She has a seniority date of October 14, 2004, and is ranked “97” on the District’s Certificated Seniority List. She has a clear multiple subject credential, with supplemental authorizations in science and art. Her supplemental authorization in art allows her to teach art in Grade 9 and below.

On May 6, 2014, however, the Board adopted Resolution No. 2013/14-23 authorizing Ms. Wallace to teach ceramics to Grades 9 through 12 during the 2014/2015 school year pursuant to Education Code section 44263.⁶ Ms. Wallace accepted such assignment, and she

⁶ Education Code section 44263 provides:

taught ceramics to Grades 9 through 12 at Calaveras High School during the 2014/2015 school year. Prior to that assignment, she taught science at Toyon Middle School. She is “highly qualified” to teach art in accordance with the NCLB based on her completion of 32 semester units in that field.

14. There was a discrepancy in the testimony at hearing about the anticipated enrollment in art at Calaveras High School for the upcoming 2015/2016 school year. Ms. Smith explained that her principal, Mr. Merrill, told her that she was receiving a preliminary layoff notice because the anticipated enrollment in art is 90. Ms. Stanko, on the other hand, explained that Mr. Merrill told her that there are only 60 students actually enrolled in art for next year, and his staff added an additional 30 students to that number because several students often do not indicate an “elective” when they turn in their registration sheet.

For the reasons discussed below, a resolution of this discrepancy is not outcome determinative.

15. Ms. Stanko will seek Board-authorization for Ms. Wallace to continue teaching ceramics at Calaveras High School during the upcoming 2015/2016 school year on April 21, 2015.

16. Once Ms. Stanko determined that Ms. Smith was the most junior certificated employee teaching High School Art, she was obligated to make an initial determination whether Ms. Smith is certificated and competent to perform the services of any certificated employee with less seniority who is being retained. (*Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334, 340.) Ms. Stanko explained that after she identified Ms. Smith as the most junior certificated employee teaching High School Art, she reviewed the District’s Certificated Seniority List to determine if there was a more junior certificated employee who was performing a service that Ms. Smith was certificated and competent to perform. Concluding there was none, a preliminary layoff notice was issued to Ms. Smith. Ms. Stanko satisfied the District’s duty under *Hildebrandt*.

A teacher licensed pursuant to the provisions of this article may be assigned, with his or her consent, to teach a single subject class in which he or she has 18 semester hours of coursework or nine semester hours of upper division or graduate course work or a multiple subject class if he or she holds at least 60 semester hours equally distributed among the 10 areas of a diversified major set forth in Section 44314. A three-semester-unit variance in any of the required 10 areas may be allowed. The governing board of the school district by resolution shall provide specific authorization for the assignment. The authorization of the governing board shall remain valid for one year and may be renewed annually.

17. Ms. Smith argued at hearing that Ms. Wallace, the certificated employee being retained to teach High School Art during the 2015/2016 school year, is not “competent” to perform that service, as that term has been defined by the Board. As discussed in Factual Finding 11, the Board adopted the following definition of “competency:” “‘Competency’ for the purpose of bumping and reemployment rights as described in Education Code section 44955, 44956 and 44957 shall be based upon current possession of a preliminary or clear credential for the subject matter or grade level to which the employee may bump or be assigned” Ms. Smith holds a single subject credential in art, whereas Ms. Wallace holds a multiple subject credential with a supplemental authorization in art and, as such, is credentialed to teach art only in Grades 9 and below. Therefore, Ms. Smith argued, Ms. Wallace is not “competent” to teach all grades of High School Art, whereas she is.

18. The Board’s definition of “competency” is relevant only to determining Ms. Smith’s right to “bump into” a service being performed by another certificated employee *with less seniority* who is being retained. (See, *Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 131fn. 1 [“For purposes of a school district reduction in force, ‘bumping’ refers to a senior teacher moving into the position of a junior teacher.”]; see also, *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 569 [a school district’s board may adopt competency criteria for determining bumping rights].) Here, Ms. Smith is the *junior certificated employee* and, therefore, has no right to bump into the service being performed by Ms. Wallace. (*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2007) 145 Cal.App.4th 1260, 1273 [“No permanent employee may be laid off if a probationary employee, or any other employee of less seniority, occupies a position the permanent employee is certificated and competent to fill.”]; citing, Ed. Code, § 44955, former subd. (c), now subd. (b).) Ms. Smith did not establish legal grounds for compelling the District to rescind her preliminary layoff notice.

Angela Howard’s seniority date

19. Angela Howard is a certificated employee of the District. Her first date of paid service with the District was July 1, 2013. While she is not “ranked” on the District’s Certificated Seniority List, her name and pertinent information appears on that List between rankings “126” and “127.” She holds a clear multiple subject credential and a preliminary administrative services credential.

20. The Board hired Ms. Howard to fill the position of “Elementary Assistant Teaching Principal” at Jenny Lind Elementary School, effective July 1, 2013. The current 2014/2015 school year is her second year in that position. She has no prior teaching experience with the District. It is anticipated that Ms. Howard will be assigned to a teaching position consistent with her credentials for the upcoming 2015/2016 school year.

21. At hearing, Ms. Stanko was unable to state with specificity the number of hours Ms. Howard spends performing administrative duties versus teaching duties. She stated, however, that Ms. Howard spends “less than 50 percent” of her day teaching students, estimating that it is between “two to three hours each day.”

22. Ms. Stanko stated that she determined Ms. Howard's seniority date with the District to be July 1, 2013, her first date of paid service with the District. While Ms. Howard was hired to fill an administrative position, Ms. Stanko testified to her understanding that Education Code section 44956.5 allows her to give Ms. Howard credit towards her seniority with the District for the two years she has served as a site administrator at Jenny Lind Elementary School.

23. Ms. Daniel-Cejas, Ms. Hutt, Ms. Pettitt, and Ms. Wilson, all of whom have seniority dates after July 1, 2013, argued that the date on which Ms. Howard first rendered paid service in the District is irrelevant because the entire language of Education Code section 44845 reads: "Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on that date upon which he first rendered paid service *in a probationary position*." (Italics added.) According to respondents, Ms. Howard was not a probationary certificated employee because her employment contract identified her classification as "Management," whereas employment contracts for teachers newly hired by the District list their classification as "probationary."

24. Respondent's argument is not persuasive. Ms. Stanko correctly interpreted and applied Education Code section 44956.5, which gives school site administrators credit towards their seniority date with the District for purposes of Education Code sections 44955 and 44956 of "up to a maximum of three years seniority while serving as site administrators." Since Ms. Howard has served as an a site administrator at Jenny Lind Elementary School for less than three years, Ms. Stanko gave her credit for all her years with the District.

25. No permanent or probationary certificated employee with less seniority is being retained to render a service for which respondents are certificated and competent to perform.

26. The reduction or elimination of the particular kinds of services set forth in Resolution Nos. 2014/15-08, 2014/15-15, and 2014/15-23 are related to the welfare of the schools and the students thereof within the meaning of Education Code sections 44949 and 44955. The Board's decision to reduce or discontinue those services was neither arbitrary nor capricious, but rather a proper exercise of its discretion.

LEGAL CONCLUSIONS

1. Education Code section 44949 provides, in pertinent part, the following with regard to a school district's authority to layoff certificated employees:

(a)(1) 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, or in the case of a school district that has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

(2) Until the employee has requested a hearing as provided in subdivision (b) or has waived his or her right to a hearing, the notice and the reasons therefor shall be confidential and shall not be divulged by any person, except as may be necessary in the performance of duties. However, the violation of this requirement of confidentiality, in and of itself, shall not in any manner be construed as affecting the validity of any hearing conducted pursuant to this section.

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. A request for a hearing shall be in writing and shall be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified in that subdivision, which shall not be less than seven days after the date on which the notice is served upon the employee. If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision.

(c) If a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency in that chapter, except that all of the following shall apply:

(1) The respondent shall file his or her notice of participation, if any, within five days after service upon him or her of the District Statement of Reduction in Force and he or she shall be notified of this five-day period for filing in the District Statement of Reduction in Force.

[¶]...[¶]

(3) 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 of the schools. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. 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. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds.

The parties stipulated at hearing that the District complied with all notice and jurisdictional requirements set forth above.

2. Education Code section 44955, subdivision (b), provides the following:

Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, 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.

3. A “certificated person” is defined in Education Code section 44006, which provides: “The term ‘certificated person’ refers to a person who holds one or more documents such as a certificate, a credential, or a life diploma, which singly or in combination license the holder to engage in the school service designated in the document or documents.

4. When effectuating a reduction in force, the general rule is that certificated employees must be laid off in inverse order based on seniority. (See, e.g., *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2007) 145 Cal.App.4th 1260, 1273 [“No permanent employee may be laid off if a probationary employee, or any other employee of less seniority, occupies a position the permanent employee is certificated and competent to fill.”]; citing, Ed. Code, § 44955, former subd. (c), now subd. (b).)

5. Once a school district’s governing board authorizes the reduction or discontinuance of particular kinds of service, the district’s first step is to identify those certificated employees providing the particular services to be reduced or discontinued. (Ed. Code, § 44955, subd. (b).) The district has a mandatory duty to make an initial determination whether those certificated employees who are performing the services to be reduced or discontinued are certificated and competent to perform the services of any certificated employee with less seniority who is being retained. (*Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334, 340.) But once that initial determination has been made, the burden shifts to the certificated employee asserting the right to bump the junior employee to prove that the former is certificated and competent to perform the service for which the latter is being retained. (*Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, 656.)

6. A certificated employee’s classification with her employing school district “shall be made at the time of employment and thereafter in the month of July of each school year.” (Ed. Code, § 44916.) “The Education Code establishes four possible classifications for certificated employees: permanent, probationary, substitute and temporary.” (*Stockton Teachers Association CTA/NEA v. Stockton Unified School District* (2012) 204 Cal.App.4th 446, 455, internal quotes and citation omitted.) “[P]ro probationary status is the default classification when the Code does not specify another classification.” (*Id.* at p. 456; Ed. Code, § 44915.)

7. With regard to certificated employees initially hired in an administrative position, however, Education Code section 44956.5 provides the following:

For a certificated employee initially employed in an administrative position on or after July 1, 1983, who transfers to a teaching position, the period of employment in the

administrative position shall not be included in determining seniority for purposes of Sections 44955 and 44956, except for school site administrators who shall earn up to a maximum of three years seniority while serving as site administrators.

8. The preliminary layoff notices issued to Jessica Fisher, Angela Howard, Monica Maddock, Kristi Mendosa, and Chris Mizicko have been rescinded by the District, and there is no legal basis for the Board to issue any of them a final layoff notice. (Factual Finding 3.)

9. Cause exists for not reemploying Suzanne Smith during the 2015/2016 school year, and the Board has a legal basis for issuing her a final layoff notice. (Factual Findings 12-18.)

10. Cause exists for not reemploying Lynn Daniel-Cejas, Amy Hutt, Jennifer Pettitt, and Jaime Wilson during the 2015/2016 school year, and the Board has a legal basis for issuing each of them a final layoff notice. (Factual Findings 19-24.)

11. Except as discussed in Legal Conclusion 8, cause exists to give notice to respondents that their services will be reduced or eliminated for the 2015/2016 school year because of the reduction or elimination of particular kinds of services.

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

RECOMMENDATIONS

1. Cause exists for the Calaveras Unified School District to reduce or eliminate 15.00 full-time equivalent certificated positions for the 2015/2016 school year.

2. As set forth in Legal Conclusion 8, the Calaveras Unified School District shall rescind the preliminary layoff notices issued to Jessica Fisher, Angela Howard, Monica Maddock, Kristi Mendosa, and Chris Mizicko.

3. Other than as set forth in Recommendation No. 2, notice may be given to respondents that their services will be reduced or eliminated for the 2015/2016 school year. Notice shall be given in inverse order of seniority.

DATED: April 23, 2015

/s/
COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings