

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

In The Matter Of The Accusation Against:

James F. Boling,

Respondent.

OAH No. N2004030218

PROPOSED DECISION

M. Amanda Behe, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 7, 2004, at the Riverbank Unified School District, Riverbank, California.

Chesley D. Quaide, Attorney at Law, Atkinson, Andelson, Loya, Ruud & Romo, represented the Riverbank Unified School District.

Wesley T. Greene, Attorney at Law, Tuttle and McCloskey, represented respondent James F. Boling.

The matter was submitted on April 7, 2004.

SUMMARY OF PROPOSED DECISION

The Board of Education of the Riverbank Unified School 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 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, and determination of whether respondent is credentialed to teach in another District position. The selection process was in accordance with the requirements of the Education Code.

FACTUAL FINDINGS

1. The Riverbank Unified School District (the District) is located in Riverbank, California. Joseph Galindo is the Superintendent of the District.

2. On March 2, 2004, the District's Governing Board (the Board) was given notice in accordance with Education Code section 44949 and 44955 of the Superintendent's recommendation that certificated employees be notified that their services would not be required for the ensuing school year and stating the reasons for that recommendation.

3. Board Resolution No. 03-04-12, adopted on March 2, 2004, reduced and eliminated the following particular kinds of services:

5.0	FTE ¹	Elementary Teaching Positions
1.0	FTE	Art Teaching Position
1.57	FTE	Business Teaching Positions
1.00	FTE	Counseling Position
1.00	FTE	English Teaching Position
1.00	FTE	Foreign Language (Spanish) Teaching Position
1.00	FTE	Social Science Teaching Position
1.00	FTE	Music Teaching Position

4. Board Resolution No. 03-04-11, adopted on March 2, 2004, established competency criteria and a "skipping" protocol to address its obligation to provide instruction to students who have limited English language proficiency. It provided in relevant part that there is:

... a specific need for fully credentialed personnel to teach Core academic courses of student in the District, and, therefore, the Superintendent or designee is directed to identify those ELL certified teachers who are fully credentialed and to maintain those teachers over teachers with more seniority who do not possess full credentials, when it is necessary to have an ELL [English language learner] certified teacher in a Core academic class as defined by 20 U.S.C. section 7801(ii).

5. On March 6, 2004, by registered mail, the District served affected employees with written notice that it had been recommended that notice be given pursuant to Education Code sections 44949 and 44955 that their services would not be required for the ensuing school year and setting forth the reasons for the recommendation.

Each notice further advised the employees of their right to a hearing, including that such a request must be delivered in writing to the person sending the notice of termination, and that the failure to request a hearing would constitute the waiver of the right to a hearing.

¹ The acronym "FTE" refers to a full-time equivalent position.

6. On March 12, 2004, respondent James T. Boling (respondent) filed a timely and proper request for hearing.

7. On March 22, 2004, Superintendent Galindo filed an Accusation which was personally served on respondent that date and served by mail on that date. The Accusation packet contained information required by the Education Code including that a Notice of Defense must be filed within five days pursuant to Education Code section 44944(c)(1).

8. On March 24, 2004, respondent filed a timely and proper Notice of Defense.

9. The District considered known vacant positions for the 2004-05 School Year due to resignations, retirements, and leaves. Barbara Cortese, the District's Director of Human Resources, testified that originally 12.57 FTE positions were affected and four employees requested hearings. On March 11, 2004, the Board was notified that as the result of recent resignations and a job share request it was not necessary to provide layoff notices to three teachers.

10. The District currently has 4.0 FTE business teachers including respondent who currently teaches business applications and work experience at Riverbank High School. Ms. Cortese described that 1.57 FTE reduction in Business Teaching is necessitated by a continual decrease in student enrollments and low class loads. The reduction will affect 1.0 FTE at Riverbank High School and .57 FTE at Cardozo Middle School.

11. The District maintains a Seniority List which identifies employees' names, dates of first paid service, credentials, and authorizations. Respondent's date of first paid service is August 13, 1998, and he holds a Professional Clear Single Subject Business credential and has a CLAD² certificate.

12. Ms. Cortese was responsible for implementation of the technical aspects of the layoff. For each reduction in particular kinds of service she identified the affected incumbents, and then determined whether those individuals held credentials which would permit them to "bump"³ into another position.

To implement the 1.57 FTE reduction in Business Teaching Ms. Cortese reviewed the seniority of the four business teachers. The two other 1.0 FTE high school business teachers are senior to respondent with seniority dates of November 27, 1989 and August 13, 1987.

² The State Commission on Teacher Credentialing tests for and issues Cross-cultural, Language and Academic Development (CLAD) Certificates which authorize teachers to provide certain types of instruction to English learners.

³ Generally speaking, a senior teacher whose position is discontinued has the right to a position held by a junior teacher if the senior teacher is properly credentialed. That displacement of a junior teacher is known as "bumping." The seniority rule is not absolute, and a junior teacher with a needed credential/skill may be retained even if a more senior teacher is terminated. Such "skipping" is recognized by statute (Education Code section 44955(d)(1)) and appellate law (Santa Clara Federation of Teachers, Local 2393 v. Governing Board of the Santa Clara Unified School District (1981) 116 Cal.App.3d 831).

Mary Phoenix is the least senior business teacher with a seniority date of October 1, 2001. She is presently teaching computer applications in a 1.0 FTE position at Cardozo Middle School. Ms. Phoenix did not receive a layoff notice because she is credentialed to teach a science position which will be vacant due to a resignation.

With the exception of Ms. Phoenix respondent is the least senior business teacher. His single subject credential does not authorize him to teach any other subjects. No one less senior is being retained to teach a subject which respondent is credentialed and qualified to teach.

13. Respondent is entitled to "bump" into the .43 FTE Business Teaching position which will remain at Cardozo Middle School. Ms. Cortese noted that there is a possibility that the partial position may increase above .43 FTE if enough students enroll in the business classes at that site.

14. Respondent's CLAD certificate, while of benefit to the District's students, does not affect the subject layoff because business classes are not Core academic class as defined by 20 U.S.C. section 7801(ii). The layoff of the District's business teachers will be implemented solely on the basis of seniority and credentials.

LEGAL CONCLUSIONS

1. Education Code section 44944 provides:

"(a) 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, ..., that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

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) In the event 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 therein, except that all of the following shall apply:

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

(2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefor within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.

(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 thereof. 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 board may adopt from time to time such rules and procedures not inconsistent with provisions of this section as may be necessary to effectuate this section.

(d) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee.

(e) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Section 11524 of the Government Code, the dates prescribed in subdivi-

sion (c) which occur on or after the date of granting the continuance and the date prescribed in subdivision (c) of Section 44955 which occurs after the date of granting the continuance shall be extended for a period of time equal to the continuance."

2. Education Code section 44955 provides:

"(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.

...

(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, as determined by the board in accordance with the provisions of 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. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) ...

3. Education Code sections 44949 and 44955 establish jurisdiction for the proceeding. The notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945 were met.

4. Elementary Teaching, Art Teaching, Business Teaching, Counseling, English Teaching, Foreign Language (Spanish) Teaching, Social Science Teaching, and Music Teaching are particular kinds of services that can be reduced or discontinued pursuant to Education Code 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. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils and is necessary to decrease the number of certificated employees of the District as determined by the Board.


A school board's decision to reduce or discontinue a particular kind of service need not be tied to any statistical computation, such as the reduction in the number of students. San Jose Teachers Association v. Allen (1983) 144 Cal.App.3d 627. A school board may reduce services within the meaning of statute either by determining that a certain type of service shall not be performed at all or by reducing the number of district employees who perform such services. Rutherford v. Board of Trustees of Bellflower Unified School District (1976) 64 Cal.App.3d 167.

6. 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. No employee with less seniority than respondent is being retained to render a service which he is certificated to render.

ORDER

Respondent James Boling's services in his current 1.0 FTE position will not be required for the 2004-2005 School Year because of the reduction of particular kinds of services, specifically, Business Teaching. Respondent is entitled to "bump" into the .43 FTE Business Teaching position which will be continued in the 2004-2005 School Year.

Dated: April 8, 2004


M. AMANDA BEHE
Administrative Law Judge
Office of Administrative Hearings