

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

In the Matter of the Reduction in Force of:

CERTIFICATED TEACHERS OF THE
BELLFLOWER UNIFIED SCHOOL
DISTRICT

Respondents.

OAH No. 2011020903

CORRECTED PROPOSED DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Bellflower, California on April 27, 2011.

A correction to Factual Finding 16 alone was required, and no other corrections occurred.

Eric Bathen, Attorney at Law, represented Bellflower Unified School District (District).

Carlos R. Perez, Attorney at Law, represented respondents Kristy Bailey, Carrie Binder, Rachelle Carman, Sylvia Chandler, Ryan Cherney, Angelica Contreras, Deborah Contreras, Keribeth Dethlefsen, Lane Fleshman, John Kevin Gaffnay, Kevin Greiving, Stacy Johnson, Erin Kelly, Debra King, Monique Kroese, Kiyomi Kwak, Jeremy Lugbill, Karen Meisner, Amber Musick, Maie Rozales-Breig, and Daniel Shaheen, all of whom were present at the hearing.

Respondents Kristina Nemec, Michael Magnera, Alice Jones and Tara Hefferly did not appear.

Evidence was received by stipulation, testimony, and documents. The record was closed and the matter was submitted for decision on April 27, 2011.

FACTUAL FINDINGS

1. Rick Kemppainen is the District's Superintendent. Lisa Azevedo is the District's Assistant Superintendent for Instructional Personnel and Programs. Their actions were taken in their official capacity. Mr. Kemppainen made and filed the Accusations.

2. Respondents in this proceeding are certificated employees of the District.

3. Between March 11 and March 29, 2011, the District provided written notice to respondents pursuant to Education Code¹ sections 44949 and 44955 that their services would not be required for the 2011-2012 school year.

4. On March 22, 2011, the District filed and thereafter served the Accusations and related documents on respondents. Each respondent appearing in this matter filed a timely Notice of Defense requesting a hearing for a determination of whether cause exists for not reemploying them for the 2011-2012 school year. All prehearing jurisdictional requirements were met.

5. On March 10, 2011, the Board of Education (Board) of the District adopted *Resolution of the Board of Education's Intention to Reduce and/or Discontinue Particular Kinds of Service*, which provides for the elimination of “eighteen (18) single subject FTE reduction due to increased class size in grades 9-12, one (1) physical and health impairment FTE due to a reduction in student enrollment, three (3) mild moderate FTE due to a reduction in student enrollment, two (2) moderate severe FTE² due to a reduction in student enrollment, two (2) multiple subject FTE due to elimination of the First 5 program, three (3) designated subjects FTE due to the elimination of adult school programs, for a total of twenty (29) FTE reductions of particular kinds of services in grades pre-K-Adult School”

6. On March 10, 2011, the Board of the District adopted *Resolution of the Board of Education to Determine the Order of Termination of Certificated Personnel*, which establishes tie-breaker criteria for determining the relative seniority of certificated employees with the same date of first rendered paid service to the district as follows:

1. Special Credentials
 - A. Special Education (10 points)
 - B. School Psychologist, Speech and Language Therapist, School Counselor, and School Nurse (10 points)
2. Credentials Authorizing Service for Mathematics (10 points) or Science (10 points)
3. Professional Preparation, i.e., advanced degree (Master's or Doctorate) (4 points for each advanced degree)

¹ All statutory citations are to the Education Code, unless indicated otherwise.

² Ms. Azevedo testified that “mild/moderate” refers to resource specialist class and “moderate severe” refers to class for students with special needs.

4. After applying No.1 through No. 3 above, and ties remain the same, the following tie-breaking criterion shall be used: One (1) point for every accredited college/university semester unit (recognized by BUSD) earned after Bachelor's degree.
5. If the tie remains the same after applying No. 1 through No. 4 above, the following tie-breaking criterion shall be used: One (1) point for each college/university semester unit (recognized by BUSD) earned after Bachelor's degree in academic core subject areas.
6. If the tie continues after applying No. 1 through No. 5 above, the following tie-breaking criterion shall be used: Total years of teaching experience K-12.
7. The services set forth in Factual Finding 5 are particular kinds of services which may be reduced or discontinued within the meaning of section 44955.
8. The Board took action to reduce the services set forth in Factual Finding 5 because of uncertainty surrounding future State funding. The decision to reduce services was not related to the capabilities and dedication of the individuals whose services are proposed to be reduced or eliminated. The decision to eliminate the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.
9. Ms. Azevedo was responsible for implementation of the technical aspects of Board's Resolutions. She reviewed information in multiple personnel files as well as data from the California Commission on Teacher Credentialing to compile a tentative seniority list containing seniority dates, current assignments, and credentials and certifications. She distributed the list to certificated employees within the District for them to verify, update or correct pertinent information.
10. The District used the seniority list to develop a proposed layoff and "bumping" list of the least senior employees currently assigned in the various services being reduced. The District then determined whether more senior employees affected by the layoffs held credentials in another area and were entitled to "bump" other less senior 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.
11. The District properly considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of layoff notices to be delivered to employees by March 15, 2011.

12. The District rescinded the layoff notices to Betsy Kim, Eon McKinskey, Daniel Droessler and Toan Vo.

13. Debra King, whose undisputed seniority date is September 14, 1992, holds a public affairs credential and children center permit. She previously taught in the District's adult program. She currently teaches in the District's child development center. She contends that she should be re-assigned to teach in the adult program, or alternatively, her children center permit should allow her to "bump" into a Head Start teaching position. It was established at hearing that Ms. King's children center permit does not authorize her to teach adult education and that Head Start is a permit position allowing for no "bumping" rights. Consequently, Ms. King's contentions are meritless. The District correctly identified Ms. King as an employee subject to layoff.

14. Carrie Binder's undisputed seniority date is August 31, 2007. At hearing, Ms. Binder challenged Daniel Fong's relative seniority above her contending that his August 31, 2001 seniority date was not correct. The District offered credible documentary evidence rebutting Ms. Binder's contention. The District correctly identified Ms. Binder as an employee subject to layoff.

15. August 28, 2009 is the undisputed seniority date for both Stacy Johnson and Rachelle Carman. Both Ms. Johnson and Ms. Carmen challenged their relative seniority on the seniority list contending that unidentified colleagues told them that Darrel Turner, with a September 2, 2005 seniority date, and Gregory Huysman, with a September 3, 2006 seniority date, both took leaves of absence and then returned to the District. Neither Ms. Johnson nor Ms. Carmen offered any credible evidence to corroborate their hearsay testimony. Their challenge to their relative seniority on the seniority list is rejected. The District correctly identified Ms. Johnson and Ms. Carman as employees subject to layoff.

16. Lane Fleshman's undisputed seniority date is September 3, 2000. The position in which Ms. Fleshman currently teaches—physical and health impaired—is subject to elimination pursuant to the Resolution as set forth in Factual Finding 5. At hearing, Ms. Fleshman expressed concern about the District's future ability to meet the needs of physically impaired students as mandated by law. In determining whether the decision of a school board is reasonable as distinguished from fraudulent, arbitrary, or capricious, its action is measured by the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject. (*Campbell v. Abbott* (1978) 76 Cal.App.3d 796, 808.) Reasonable minds can differ regarding the rationale to eliminate a particular kind of service and the need for "flexibility" under uncertain financial circumstances when "determining staffing for the ensuing school year." No evidence that the Board acted in an arbitrary and capricious manner was presented. In the absence of such evidence, the Board's determination should not be disturbed. (*Ibid.*)

LEGAL CONCLUSIONS

1. Section 44949 provides in pertinent part as follows:

(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 therefore.

[¶] . . . [¶]

2. Section 44955 provides in pertinent part as follows:

(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 in any school year the average daily attendance in all of the schools district for the first six months in which school is in session shall have declined . . . , 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 certified 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 on 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 . . . 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

(c) . . . [S]ervices 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 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 demonstrated a specific need for personnel to teach a specific course or course of study . . . 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. All notice and jurisdictional requirements set forth in sections 44949 and 44955 were met.

4. The services set forth in Factual Finding 5 are particular kinds of services which may be reduced or discontinued within the meaning of 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. 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.

5. A school 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 service' 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.)

6. Cause exists pursuant to sections 44949 and 44945 to reduce the number of certificated employees of the District due to the reduction or discontinuation of the particular kinds of services set forth in Factual Finding 5. The District properly identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued.

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

ORDER

The Bellflower Unified School District may give notice to respondents Kristy Bailey, Carrie Binder, Rachelle Carman, Sylvia Chandler, Ryan Cherney, Angelica Contreras, Deborah Contreras, Keribeth Dethlefsen, Lane Fleshman, Tara Hefferly, Alice Jones, John Kevin Gaffnay, Kevin Greiving, Stacy Johnson, Erin Kelly, Debra King, Monique Kroese, Kiyomi Kwak, Jeremy Luginbill, Michael Magnera, Karen Meisner, Amber Musick, Kristina Nemec, Maie Rozales-Breig, and Daniel Shaheen that their services will not be required for the 2011-2012 school year.

Dated (Original): May 4, 2011

Dated (Corrected): May 5, 2011

JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings