

BEFORE THE GOVERNING BOARD OF THE  
OROVILLE CITY ELEMENTARY SCHOOL DISTRICT  
COUNTY OF BUTTE  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

LAURA FILBECK,  
RONALD HOTMER,  
MARY JEPPSON,  
PATRICK J. JOHNSON, JR.,  
LISA D. KITCHEN,  
SHIRLEY STUMBAUGH,

Respondents.

OAH No. N2004040004

**PROPOSED DECISION**

Catherine B. Frink, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in Oroville, California on April 26, 2004.

Christian M. Kiener, Attorney at Law, Girard & Vinson, 1006 Fourth Street, Eighth Floor, Sacramento, CA 95814-3326, represented the Oroville City Elementary School District.

Donald A. Selke, Attorney at Law, Wells, Small, Selke & Graham, 292 Hemsted Drive, P.O. Box 991828, Redding, CA 96099-1828, represented respondents.

The matter was submitted on April 26, 2004.

**FACTUAL FINDINGS**

1. Donald Remley, Ed.D., Superintendent of the Oroville City Elementary School District ("District"), filed the Accusation in his official capacity.
2. Laura Filbeck, Ronald Hotmer, Mary Jeppson, Patrick J. Johnson, Jr., Lisa D. Kitchen and Shirley Stumbaugh ("respondents") were at all times mentioned herein and now are certificated employees of the District.
3. On March 10, 2004, the governing board of the District ("Board") adopted Amended Resolution No. 03-04-12, ("Amended Resolution") in which the Board determined

that there had been a decline in the average daily attendance ("ADA") in the District for the first six months in which school had been in session for the 2003-04 school year below the corresponding period of either of the two previous school years, resulting in the need to decrease a corresponding number of certificated employees, and resolved to reduce 8.0 full-time equivalent ("FTE") K-6 multiple subject ("MS") teachers, District-wide. The Board further resolved to reduce or discontinue the following particular kinds of services ("PKS") for the 2004-2005 school year and directed the superintendent to send notice to certificated employees that their services would be terminated at the end of the 2003-2004 school year:<sup>1</sup>

|   |             |
|---|-------------|
| Choral Music Teacher, Grades K-8, District-wide | 1.00 FTE    |
| Librarian, Central Middle School                | 1.00        |
| Counselor, grades K-8, District-wide            | 1.00        |
| English/language arts teachers, grades 7 and 8  | 1.50        |
| Mathematics teacher, grades 7 and 8             | 0.50        |
| Social Studies teacher, grades 7 and 8          | 0.33        |
| Life Science teacher, grades 7 and 8            | <u>0.17</u> |
| Total Full-Time Equivalent Reduction            | 5.50 FTE    |

4. The services identified in the superintendent's recommendation 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.

5. On March 11, 2004, the superintendent gave written notice to respondents and to other certificated employees of the District that it had been recommended that notice be given them that their services would not be required for the 2004-2005 school year ("March 11 Notice"). Respondents filed timely requests for hearing and notices of defense. The parties stipulated that all jurisdictional requirements of Education Code sections 44949 and 44955 have been met.

6. At the hearing, the district rescinded the accusations against respondents Ronald Hotmer, Mary Jeppson and Patrick J. Johnson, Jr., all of whom will be retained for the 2004-05 school year.

7. Education Code section 44955(b) states in part that, "[w]hen 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 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

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<sup>1</sup> On February 25, 2004, the Board adopted Resolution #03-04-11, Resolution to Adopt Tie-Breaking Criteria in Reference to the Reduction of Certificated Personnel. ("tiebreaker criteria"). The tiebreaker criteria was not utilized in determining the order of layoffs in this proceeding.

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....”

8. With respect to the District’s proposed layoff of 8.0 FTE K-6 multiple subject teachers due to a decline in ADA, the parties agreed that the District had experienced a 6.7 percent decline in ADA, as compared to the base year (2001-02) ADA, which allowed the District to reduce the base year certificated staff by up to 9.96 FTE, to 138.71 FTE. After deducting 9.84 FTE for the PKS layoff from the 2002-03 school year, the District is able to retain 128.87 FTE; inasmuch as the District currently employs 137.70 FTE certificated employees, this resulted in a maximum possible reduction of 8.83 FTE (137.70-128.87 FTE) due to a decline in ADA.

9. On February 24, 2004, prior to the adoption of the Amended Resolution, the District received a letter of resignation from Cheryle Brothers, a 1.0 FTE life sciences teacher. As a consequence of this resignation, the District was not required to lay off a certificated employee to achieve the 0.17 FTE life science teacher PKS reduction specified in the Amended Resolution (Finding 3). The remaining 0.83 FTE attributable to the resignation of Ms. Brothers permitted the District to reduce the number of FTE positions designated for layoff due to a decline in ADA from 8.83 FTE to 8.0 FTE.

10. The District prepared a “bumping chart” to determine the employees who would be given layoff notices to effectuate the reductions or eliminations in PKS and the reductions due to a decline in ADA (District Exhibit L). With respect to the 8.0 FTE ADA reductions, the District issued March 11 Notices to the eight least senior MS credentialed teachers who did not have other specific credentials that would permit them to be retained, or “skipped” by the District.

11. As a result of the District’s proposed PKS reduction of 1.5 FTE English/language arts, the District identified respondent Shirley Stumbaugh (#161 on the District’s seniority list) 1.0 FTE English/language arts (ESL) teacher at the District’s middle school, and Ronald R. Hotmer (#145 on the seniority list) 0.5 FTE language arts, as the two certificated employees with the least seniority in language arts. However, Mr. Hotmer is also credentialed to teach mathematics, among other subjects; therefore, Mr. Hotmer was able to “bump” employee Kori Hosler (#188 on the seniority list) 1.0 FTE mathematics teacher at the District’s middle school, from 0.5 FTE of her position.<sup>2</sup> As noted in Finding 5, the District withdrew the accusation against Mr. Hotmer at the hearing.

12. As a result of the District’s proposed reduction of 1.0 FTE choral music teacher, the District sent a March 11 Notice to Rose Manera (#51 on the seniority list).

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<sup>2</sup> In addition, the District proposes to lay off Ms. Hosler for the remaining 0.5 FTE of her 1.0 FTE position due to the PKS reduction of 0.5 FTE mathematics.

However, Ms. Manera holds a MS credential and has sufficient seniority to “bump” Kimberly Dryden (#171 on the seniority list), the least senior MS teacher who had not been previously identified for layoff due to the ADA reduction. Ms. Dryden also received a March 11 Notice. Neither Ms. Manera nor Ms. Dryden filed requests for hearing. However, the District intends to retain Ms. Manera as a K-6 classroom teacher for the 2004-05 school year.

13. Mary Jeppson (#42 on the seniority list) is the only certificated librarian in the District. As a result of the proposed PKS elimination of 1.0 FTE librarian, Ms. Jeppson was issued a March 11 Notice. However, Ms. Jeppson holds a standard secondary teaching credential in English, which permits her to teach English/language arts at the District’s middle school. Therefore, Ms. Jeppson “bumped” Patrick J. Johnson, Jr., (#107 on the seniority list) an English/language arts teacher with less seniority than Ms. Jeppson. As noted in Finding 5, the District withdrew the accusation against Ms. Jeppson at the hearing, and she will be retained for the 2004-05 school year.

14. On or about March 15, 2004, the District received the letter of resignation of Rebecca Smith, a 1.0 FTE language arts teacher. As a result of this resignation, the District determined that it would not be necessary to lay off Mr. Johnson, the next most senior certificated employee slated for layoff (after Ms. Jeppson) who is credentialed to teach English/language arts. As noted in Finding 5, the District withdrew the accusation against Mr. Johnson at the hearing, and he will be retained for the 2004-05 school year.

15. In early April of 2004, the District received the letter of resignation of Cynthia Pank, a 1.0 FTE K-6 MS teacher. As a result of this resignation, the District will not need to lay off one of the MS credentialed teachers currently designated for layoff due to a decline in ADA. Respondent Laura Filbeck (#175 on the seniority list) is the most senior respondent holding a MS credential. However, there are four certificated employees holding MS credentials with more seniority than respondent Filbeck who received March 11 Notices, none of whom filed requests for hearing<sup>3</sup>. The District shall be required to retain the most senior MS credentialed teacher, Kimberly Dryden, as a consequence of the resignation of Ms. Pank.

16. Respondents contend that applicable case law requires that the 8.83 FTE reduction in K-6 MS teachers due to the decline in ADA be reduced to 5.83 FTE as a result of the three teacher resignations. Respondents argue that this “positively assured attrition” must be used to reduce the number of respondents subject to termination due to a decline in ADA. The District contends that it has properly accounted for attrition in determining the employees noticed for layoff.

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<sup>3</sup> Kimberly Dryden (#171 on the seniority list), Victoria Ann Wonacott (#172 on the seniority list), James Allen Lewis (#173 on the seniority list), and Lisa Marie Leandro (#174 on the seniority list) are all 1.0 FTE certificated employees.

Case law has established that “normal attrition” must be used to offset layoffs made possible by a decline in ADA since ignoring such attrition “results in a reduction of force not necessarily require by decline in average daily attendance.” *Burgess v. Board of Education*.<sup>4</sup> Two years later, citing *Burgess*, the court in *Lewin v. Board of Trustees*<sup>5</sup> held that “[b]ecause the number of employees may be reduced only when it is ‘necessary’ to do so, the governing board must consider normal attrition in the work force as a part of any reduction in employment.” But, reasoning that “[b]oard members are not soothsayers,” the court held that only “positively assured attrition”—that known to the board by the time of its final determination on May 15—and not “potential attrition”—expected retirements and resignations occurring up to the start of the next school year—needed to be considered. See also, *Moreland Teachers Association v. Kurze*.<sup>6</sup> In *San Jose Teachers Association v. Allen*,<sup>7</sup> the court determined that positively assured attrition need not be considered in a PKS layoff.

Respondents’ contention that the ADA layoff should be reduced from 8.83 FTE to 5.83 FTE due to “positively assured attrition” of 3.0 FTE is not persuasive. As previously set forth, the District properly accounted for the February 24, 2004 resignation of Ms. Brothers prior to sending out the March 11 Notices (Finding 8), and it accounted for the March 15, 2004 resignation of Ms. Smith by rescinding the accusation against Mr. Johnson (Finding 13). While *San Jose Teachers Association v. Allen* does not require positively assured attrition to be considered in a PKS layoff, neither does it preclude the District from considering whether it is necessary to lay off a certificated employee to achieve the necessary reduction in PKS as a result of a resignation after the Amended Resolution had been adopted. As noted in Finding 14, the District shall be required to reduce the ADA layoff by 1.0 FTE as a result of the resignation of a K-6 MS credentialed employee in April of 2004. However, for the reasons set forth in Finding 14, this will not result in the retention of any of the respondents herein.

17. Megan Neely (#181 on the seniority list) possesses a MS general credential and a Bilingual, Crosscultural Language and Academic Development (“BCLAD”) certificate. She is employed for the 2003-04 school year as a bilingual resource teacher, 80 percent time, and a fifth grade classroom teacher, 20 percent time (one day per week), as part of a jobsharing arrangement between the District and Jeanne Albrecht (#60 on the seniority list), a 0.80 FTE certificated K-6 teacher. The District proposes to employ Ms. Neely as a 1.0 FTE bilingual resource teacher for the 2004-05 school year.<sup>8</sup> The District elected to “skip” Ms. Neely and did not serve her with a March 11 Notice; hence, she will be retained for the 2004-05 school year.

<sup>4</sup> (1974) 41 Cal.App.3d 571, at 579.

<sup>5</sup> (1976) 62 Cal.App.3d 977, at 980-983.

<sup>6</sup> (1980) 109 Cal.App.3d 648, at 654.

<sup>7</sup> (1983) 144 Cal.App.3d 627.

<sup>8</sup> The District provided information to respondents in discovery on Friday, April 23, 2004 concerning the proposed assignments of teachers for the 2004-05 school year that indicated that Ms. Neely would retain her current assignment, i.e. 80 percent bilingual resource teacher and 20 percent fifth grade classroom teacher, for the 2004-05 school year. However, at hearing, the District Superintendent, Dr. Remley, testified persuasively that Ms. Neely would be serving in a 1.0 FTE bilingual resource teacher position in 2004-05.

18. Shirley Stumbaugh (#161 on the seniority list) possesses a single-subject credential in English composition, introductory English and Social Science, with a Crosscultural Language and Academic Development ("CLAD") emphasis. Her teaching assignment for the 2003-04 school year is teaching English Language Learners ("ELL")<sup>9</sup>. When respondent Stumbaugh was hired by the District, she taught eighth grade language arts, seventh grade language arts and U.S. History. In her current assignment teaching ELL, she replaced a teacher who was not bilingual. Respondent Stumbaugh does not hold a BCLAD certification; it was not established whether respondent Stumbaugh is bilingual. Respondent Stumbaugh contends that she is capable of teaching the bilingual resource teacher position now held by Ms. Neely, who has less seniority than respondent Stumbaugh.

19. Education Code section 44955 states in pertinent part as follows:

"...

"(b)... 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.

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<sup>9</sup> According to Education Code section 306(a), an "English learner" means "a child who does not speak English or whose native language is not English and who is not currently able to perform ordinary classroom work in English, also known as a Limited English Proficiency or LEP child."

“(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... and that the certificated employee has special training and experience necessary to teach that course or course of study... which others with more seniority do not possess.

“...”

20. As the language of Education Code section 44955 reflects, economic layoffs are generally to be done on the basis of seniority. The District has an affirmative obligation to reassign senior teachers who are losing their positions into positions held by junior teachers if the senior teacher has both the credentials and competence to occupy such positions. In order to depart from a seniority-based economic layoff, Education Code section 44955(d)(1) requires the District to “demonstrates a specific need for personnel to teach a specific course or course of study... and that the certificated employee (to be skipped) has special training and experience necessary to teach that course or course of study...which others with more seniority do not possess.” In this case, the bilingual resource teacher position is a “specific course,” and the District has demonstrated a specific need for personnel to teach said course. The District has further demonstrated that possession of BCLAD certification is a necessary qualification for the bilingual resource teacher position, and that Ms. Neely has special training and experience, i.e., a BCLAD authorization and bilingual ability in Spanish, which others with more seniority (including respondent Stumbaugh) do not possess.

21. As set forth in Education Code section 305, subject to certain exceptions, “all children in California public schools shall be taught English by being taught in English. In particular, this shall require that all children be placed in English language classrooms. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year. Local schools shall be permitted to place in the same classroom English learners of different ages but whose degree of English proficiency is similar. Local schools shall be encouraged to mix together in the same classroom English learners from different native-language groups but with the same degree of English fluency. Once English learners have acquired a good working knowledge of English, they shall be transferred to English language mainstream classrooms.” As set forth in Education Code section 306(d), “‘sheltered English immersion’ or ‘structured English immersion’ means an English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language.” Dr. Remley testified that the District established a requirement that ELL students receive 30-45 minutes of ELL instruction per day.

22. Respondent Stumbaugh testified that, as a result of her layoff, she believes middle school ELL students will be placed in regular language arts classes for the 2004-05

school year. She believes it will be "difficult" for the District to provide 30 minutes of ELL instruction to those students, given the 45-minute class periods and the fact that not all middle school language arts teachers have CLAD certifications. The evidence provided by respondents was insufficient to establish that the District will be unable to provide mandated services to ELL students for the 2004-05 school year.

23. Respondents contend that, if Megan Neely is retained to provide 20 percent FTE elementary classroom instruction, there are two respondents, Laura Filbeck (#175 on the seniority list) and Lisa Kitchen (#176 on the seniority list) who have greater seniority than Ms. Neely and are credentialed and qualified to fill that position. As noted in Finding 17, footnote 8, the District does not presently intend to assign Ms. Neely to fill that 20 percent FTE classroom teaching position. In the event the District is unable to assign retained personnel to that jobsharing position, it will be obligated to retain the most senior MS credentialed teacher currently designated for layoff (See Finding 15, footnote 3). It was not established that either respondent Kitchen or respondent Filbeck would be the teacher with the most seniority to fill that position, if the need arises.

#### LEGAL CONCLUSIONS

1. Cause exists to reduce the number of certificated employees of the District due to a decline in ADA and the reduction and discontinuation of PKS. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

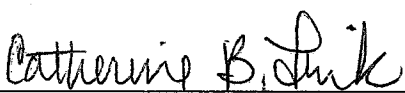
2. By reason of Findings 15-16, the reduction of certificated employees due to a decline in ADA shall be 7.0 FTE K-6 MS teachers, District-wide, as a result of positively assured attrition as of the date of hearing.

3. No employee with less seniority than any respondent is being retained to render a service that any respondent is certificated and competent to render.

#### ORDER

Notice may be given respondents that their services will not be required for the 2004-2005 school year.

DATED: 5-3-04

  
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CATHERINE B. FRINK  
Administrative Law Judge  
Office of Administrative Hearings