

BEFORE THE
GOVERNING BOARD
SAN JUAN UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Statement of Reduction
in Force Against:

JASON KEITH,

Respondent.

OAH No. 2017020675

PROPOSED DECISION

Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 5, 2017, in Carmichael, California.

Linda C. T. Simlick, General Counsel for the San Juan Unified School District, represented the District.

Michael N. McCallum, Attorney at law, represented respondent Jason Keith.

Evidence was received, the record was closed and the matter was submitted on April 5, 2017.

FACTUAL FINDINGS

1. Kent Kern is the Superintendent of the San Juan Unified School District (SJUSD or District). The actions of Superintendent Kern, and those of the District's staff and Governing Board (Board), were taken solely in their official capacities.

2. Before March 8, 2017, Superintendent Kern determined that student attrition necessitated the reduction or elimination of certain particular kinds of services (PKS). Superintendent Kern's recommendation to eliminate and reduce administration and teaching services was made solely for the welfare of the District's schools and the students thereof.

3. On February 28, 2017, the Board adopted Resolution No. 2836 (PKS Resolution), providing for the reduction or elimination of PKS, resulting in the reduction or elimination of 30.46 full time equivalent (FTE) certificated positions in the K-12 program. Areas identified for reduction or elimination included administration, classroom instruction,

and counseling. In particular, the PKS Resolution identified .67 FTE, Auto Maintenance and Light Repair (Auto MLR I), for reduction or elimination.

The PKS Resolution set forth the District's certificated and competency criteria for those teaching both Regional Occupational Programs (ROP)/Career Technical Education (CTE), as well as those teaching non-ROP/CTE classes.

On the same date, the Board adopted Resolution No. 2837, specifying criteria to be used in determining the order of termination of certificated employees who first rendered paid service as a probationary teacher to the District on the same date (tie-breaking criteria).¹

4. The services set forth in the PKS Resolution are particular kinds of services that may be reduced or discontinued within the meaning of Education Code section 44955. The Board's decision to reduce or discontinue the identified services was not arbitrary or capricious. The reduction or elimination of services constituted a proper exercise of the Board's discretion, within the meaning of Education Code section 44955.

5. Respondent is presently a certificated permanent employee of the District. On March 7, 2017, Paul Oropallo, the District's Assistant Superintendent, Human Resources, gave respondent written notice, entitled "Preliminary Notice of Recommendation That Service Will Not Be Required," (Preliminary Notice) pursuant to Education Code sections 44949 and 44955, of his recommendation that respondent's services would be terminated at the close of the current school year, and the reasons therefor.

6. Deann Carlson, Director of Certificated Personnel, Human Resources, for the District, made and filed a Statement of Reduction in Force against respondent on March 15, 2017. The Statement of Reduction in Force with required accompanying documents and a blank Notice of Participation were timely served. Respondent timely filed a Notice of Participation. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955.

7. The District has over 2,300 certificated employees, and has approximately 60 schools and centers, with approximately 39,600 students. The District maintains a seniority list which contains employees' hire dates, the credentials and licenses held, position descriptions, and the employees' work location. The list is updated annually.

8. In November 2016, the District sent a verification notice to all of its certificated employees. The notice stated, in part:

Human Resources is currently in the process of reviewing employee information in our database. This information is used to generate reports for the district to contact employees, and to ensure credential information, status and seniority date are

¹ Neither the skipping criteria nor the tie-breaking criteria were applied in this case.

accurate. This data is also used to determine your rights in the event of Board reductions or layoffs. Therefore, it is critical that Human Resources has your accurate information on file.

¶ . . . ¶

Please review the information ABOVE and BELOW for any incorrect data. Please make changes to any incorrect information on this document and return it to the Human Resources Department (Attn: Employee Verification) by December 16, 2016.

If this form is not returned with corrections by this date, Human Resources will assume that the information provided herein is correct.

¶ . . . ¶

ALL CHANGES MUST BE RETURNED TO HUMAN
RESOURCES BY
December 16, 2016.

(Capital letters in original.)

The purpose of the verification notice was for certificated employees to correct any personnel information that the District had on file. In the top portion of the form, respondent's seniority date was identified as "8/16/2006." Respondent did not send back the verification form with any corrections. Therefore, the District deemed the information in respondent's verification notice as correct.

9. On March 6, 2017, Ms. Carlson specifically sent an email to respondent, as the only certificated employee identified to receive a Preliminary Notice, informing respondent that he had the right to view the District's seniority list. Ms. Carlson provided a link to the District's seniority list for respondent to review. The District also provided a hard copy of the seniority list to the San Juan Teacher's Association. Respondent did not respond to Ms. Carlson's email. In fact, respondent did not contact Ms. Carlson at all regarding his personnel status or his seniority date.

10. Ms. Carlson testified credibly about the seniority list which was referenced in her email to respondent. She stated that respondent was originally hired by the District on August 20, 2004, then rehired on August 16, 2006, which was his seniority date. The seniority list showed respondent's degree on file with his college course units, used by the District for salary placement. The seniority list also showed respondent's credentials on file with the District, and his assignments in the District. Respondent was assigned at San Juan High School as a teacher in the regular program for grades 9 to 12, a .33 FTE assignment.

Respondent was also assigned at San Juan High School with a .67 FTE assignment in the Freshman Academy, CTE Pathway, as a teacher in Vocational Education ROP, where he taught auto mechanics. The PKS Resolution identified .67 FTE, Auto Maintenance and Light Repair (Auto MLR I) for reduction or elimination.

11. Ms. Carlson explained that respondent's credentials were identified on the seniority list, and were used to "see if there is anybody junior who has an assignment for which they can bump into. So, in the specific case of Mr. Keith, we would have looked at anybody junior who had an assignment which he could teach with his designated subject, vocational auto mechanic credential." Ms. Carlson further explained that in addition to the credentials, the District looks at the seniority date, status, and competency criteria established by the Board when going through the bumping process.

12. Ms. Carlson also testified credibly about the PKS Resolution, which contained the District's certificated and competency criteria. She stated the purpose of the PKS Resolution was to establish the certificated and competency criteria for bumping, establish skipping criteria, and identify the specific PKS that would be reduced for the upcoming school year. The District looked at the areas of declining enrollment for purposes of layoff proceedings.

13. Ms. Carlson also explained the District's bumping process, where the District referenced the PKS Resolution and its seniority list. The District looked at attrition, and whether it was necessary to retain the particular position, or the person associated with it. There was not enough student attendance in the areas of Auto Maintenance and Light Repair (Auto MLR I), Automotive Technology, and Technology Exploration in the District. Mr. David Burkhard, an automotive technology teacher with a seniority date of September 1, 2005, was affected by the PKS Resolution.

The District reviewed the seniority list to identify any assignments that Mr. Burkhard could bump into with the credential he held. Mr. Burkhard held a career technical education (CTE) credential in transportation and therefore was qualified for respondent's position. Because he was senior to respondent, Mr. Burkhard "bumped" respondent. The District then went through the same process to determine if respondent could bump anyone junior to him. The District looked at respondent's teaching credential, which authorized him to teach vocational automotive mechanics for grades 12 and below, and classes organized primarily for adults in the technical trades or vocational education. The District determined that there was nothing else that respondent could teach with his credential.

14. Ms. Carlson addressed respondent's seniority date of August 16, 2006, which was different than his first date of employment with the District. Respondent entered into a temporary contract with the District on September 14, 2004, for the 2004-2005 school year. On July 29, 2005, respondent submitted his signed letter of resignation to the District. He wrote, in pertinent part:

It is my deepest regret to inform you that I am resigning from my position as the ROP Automotive Instructor for Del Campo High School and the San Juan Unified School District.

I am resigning from my position to expand my teaching and educational experience in the corporate world.

15. Ms. Carlson did not specifically recall speaking to respondent about his resignation at the time, but she “probably did,” because she was a personnel technician who would have processed his resignation. Ms. Carlson was not aware of whether respondent was issued any notice that he would not be employed for the 2005-2006 school year, and there was no record in respondent’s personnel file, other than his letter of resignation, of being released from the District’s employment.

June 8, 2011 Petition for Writ of Mandate

16. On June 8, 2011, the San Juan Teachers Association and certain certificated employees of the District (which included respondent) filed a Petition for Writ of Mandate, in the case entitled *San Juan Teachers Assn. and Certificated Employees of the San Juan Unified School District v. San Juan Unified School District*, Case No. 34-2011-80000875-CU-WM-GDS, in the Superior Court of California, County of Sacramento, challenging the District’s May 10, 2011 layoff decision regarding the classification of and/or seniority dates assigned to various District employees. With respect to respondent and three others, the court held that the District misclassified its ROP teachers as temporary employees, when they should have been classified instead as probationary. The court established respondent’s seniority date as August 16, 2006.

17. The District complied with the court’s ruling, and changed respondent’s seniority date to August 16, 2006. The District informed respondent of the change by its letter of February 15, 2012. Respondent’s seniority date of August 16, 2006 was established in all of the District’s documents on February 15, 2012.

Respondent’s Evidence

18. Respondent was first hired by the District in August 2004. Respondent asserted that he and three other “auto shop” teachers received layoff notices near the end of the 2004-2005 school year because the District did not need their services for the upcoming school year. Respondent talked to his school administrators at the time, who were Paula Tarpenning, his program director, and Carol Ference, his direct supervisor. Respondent was deeply concerned about the layoff notice, because he had just received his teaching credential, quit working in the automotive industry as an automotive technician, bought a house, and just had a second child. He asked his administrators whether they could guarantee that he would be recalled at the end of the summer for a teaching position, and was told that “they couldn’t do that officially.”

19. Respondent needed an income, so he began looking for a job. He found a job as an automotive teacher with Universal Technical Institute (UTI) in early July 2005. In early August 2005, the District called respondent offering to rehire him for the 2005-2006 school year. Respondent declined the offer because he had already accepted the position at UTI. Two weeks later, respondent received another phone call requesting that he come to the District Office to resign, so that the District could hire another teacher. Respondent believed that he was speaking to Ms. Carlson at the time. Respondent did not recall drafting his resignation letter, but he did recall signing and dating it July 29, 2005.

20. Respondent asserted that had the District offered him the position before he accepted the job at UTI, he would have accepted the District's offer. Ms. Ference testified that respondent would not have resigned from the District because he loved his job, and indicated that "something else" would have had to compel respondent to leave his job. Ms. Ference did not have any independent recollection of her conversations with respondent at the time that he resigned. There was nothing in the record to establish that respondent received a preliminary notice of layoff for the 2005-2006 school year.

Collateral Estoppel

21. Respondent asserted that despite the Superior Court's ruling establishing his seniority date of August 16, 2006, he should not be collaterally estopped from changing his seniority date to August 20, 2004, the date that he was first employed as an ROP teacher for the District. If allowed to do so, Mr. Burkhard would not be able to "bump" respondent. The District disagreed, citing *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, which held that collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. The court stated:

Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with the party to the former proceeding.

The District argued that each of the threshold requirements were met in this case, and that respondent is estopped to argue that his seniority date is something other than August 16, 2006. However, respondent argued that the parties never litigated the present issue of whether respondent, if he was in effect laid-off from this then-probationary position at the end of the 2004-2005 school year, was entitled to retain his original date of hire as his seniority date when he was rehired on August 16, 2006.

22. The Superior Court determined respondent's seniority date for purposes of layoff by the District. In this regard, the threshold requirements set forth in *Lucido* were met, and respondent is collaterally estopped from asserting a seniority date of August 20, 2004. The evidence established that respondent voluntarily resigned from the District on July 29, 2005, in order to accept another job. Respondent accepted an offer of employment from the District for the 2006-2007 school year, one year after resigning from the District. "When a permanent certificated employee resigns and is reemployed within 39 months, the reemployment restores all individual rights, benefits and burdens of a permanent employee; however, for seniority purposes, the employee does not regain his or her original hiring date." (*San Jose Teachers Association v. Elizabeth Allen* (1983) 144 Cal.App.3d 627, 630.) Respondent's resignation was a break in service, and when he returned to the District one year later, his seniority date became his return date of August 16, 2006, not his initial hire date in 2004.

Conclusion

23. The District's decision to reduce respondent's services was due solely to the needs of the District. Superintendent Kern correctly identified respondent as the certificated employee providing the PKS directed to be reduced. Respondent's seniority date was established as August 16, 2006. Respondent did not have the credentials and qualifications to teach a subject or be employed in a position other than the subject he was teaching. No junior certificated employee was scheduled to be retained to perform services for which respondent was certificated and competent to render.

LEGAL CONCLUSIONS AND DISCUSSION

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met.

2. The services identified in the PKS Resolution are PKS that can be reduced or discontinued under section 44955. Superintendent Kern's decision to reduce or discontinue the identified service in this case was neither arbitrary nor capricious, and was a proper exercise of his discretion.

3. The District may reduce or discontinue 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 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.) The burden is on the District to demonstrate that the reduction or elimination of the PKS is reasonable and that the District carefully considered its needs before laying off any certificated employee. (*Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 807-808.)


4. An expected decline in enrollment for the next school year is appropriate basis for a reduction in services under section 44955. Superintendent Kern's decision was a proper exercise of his discretion.

5. Cause exists for the reduction of the PKS and for the reduction of full-time equivalent certificated positions at the end of the 2016-2017 school year pursuant to Education Code sections 44949 and 44955. No employee with less seniority than respondent is being retained to render a service which respondent is certificated and competent to render. The Board may give final notice to respondent that his services will be reduced by .67 FTE for the ensuing school year, 2017-2018.

RECOMMENDATION

Notice shall be given to respondent Jason Keith that his services will be reduced up to .67 FTE for the ensuing school year, 2017-2018, because of the reduction and discontinuance of particular kinds of services.

Dated: May 2, 2017

DocuSigned by:

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DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings