

BEFORE THE
BOARD OF TRUSTEES
DURHAM UNIFIED SCHOOL DISTRICT
COUNTY OF GLENN
STATE OF CALIFORNIA

In the Matter of the Reduction or Elimination
of Particular Kinds of Services and the
Employment Status of:

OAH No. 2013031140

CERTAIN CERTIFICATED EMPLOYEES
OF THE DURHAM UNIFIED SCHOOL
DISTRICT,

Respondents.

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California, heard this matter at the Durham Unified School District Office, Durham, California on April 15, 2013.

Thomas E. Gauthier, Attorney at Law, of Lozano Smith, Attorneys at Law, represented the Durham Unified School District (District). Mary Sakuma, Superintendent, appeared on behalf of the District.

Ted Lindstrom, Attorney at Law, of Langenkamp, Curtis & Price, LLP, represented respondent Michael Turf.

No other certificated employees of the District who received Preliminary Notices of Layoff (below) appeared.

The matter was submitted on April 15, 2013. On April 18, 2013, the parties submitted a Petition to Correct the Evidentiary Record (Petition), together with a stipulation that the record should be corrected in the manner proposed in the Petition. The record was reopened to consider the Petition and the stipulation. The Administrative Law Judge (ALJ) granted the Petition and made the stipulation a part of the record on April 19, 2013.

The record was closed and the matter was submitted on April 19, 2013.

FACTUAL FINDINGS

1. Mary Sakuma, (Superintendent) made and filed the Accusations in her official capacity as Superintendent of the Durham Unified School District (District).

2. All respondents are, and at all times relevant to this Decision were, certificated employees of the District subject to the provisions of Education Code sections 44949 and 44955.

3. On or just before February 20, 2013, in accordance with Education Code sections 44949 and 44955, the Superintendent notified the Board of Trustees of the District (Board) in writing of the Superintendent's recommendation that certain particular kinds of services (PKS) would have to be reduced or eliminated for the upcoming school year. The Superintendent's recommendation specified the PKS to be reduced or eliminated, as set forth below.

4. The Superintendent also notified the Board that a corresponding number of certificated employees of the District, employees occupying 4.90 full time equivalents (FTE) positions, would have to be laid off to effectuate the reduction or elimination of the PKS.

5. The Superintendent notified the Board that respondents had been identified as persons to whom notice should be given that their services would not be required for the ensuing school year. The recommendation that respondents' services for the District would not be required for the upcoming school year was not related to their skills, abilities or competencies as teachers.

REDUCTIONS/ELIMINATIONS OF PKS

6. The Board adopted Resolution #13-05 on February 20, 2013. The Board resolved to follow the Superintendent's recommendation to reduce 4.90 FTE PKS. The Resolution authorized and directed the Superintendent to give notice to an equivalent number of certificated employees of the District that their services would not be required for the upcoming school year in order to effectuate the reductions. The Resolution authorized the reduction or elimination of the following services now offered in the District:

Reduce Grades 6-8 Counseling Services	.50 FTE
Reduce Elementary Education Grades K-5 Self-Contained	2.00 FTE
Reduce 1 section 7 th Grade English Language Arts	.20 FTE
Reduce 1 section 7 th Grade Social Science	.20 FTE
Reduce 1 section 7 th Grade Mathematics	.20 FTE
Reduce 2 sections 8 th Grade English Language Arts	.40 FTE
Reduce 1 section 8 th Grade Social Science	.20 FTE
Reduce 2 sections 8 th Grade Mathematics	.40 FTE
Reduce 1 section 8 th Grade Science	.20 FTE
Reduce 7 th /8 th Grade Exploratory	.20 FTE

Reduce 1 section High School Spanish	.20 FTE
Reduce 1 section High School Art	.20 FTE
TOTAL	4.90 FTE

PRELIMINARY NOTICES OF LAYOFF

7. The Superintendent, together with her Director of Business Operations, identified six certificated employees of the District who would be subject to receiving a Written Notice of Intention to Dismiss (Preliminary Notice of Layoff) in order to carry out the instructions of the Board and make the reductions and eliminations called for by the Resolution. The Superintendent caused each of the six certificated employees so identified to be served with a Preliminary Notice of Layoff on March 8, 2013, except one respondent not material to these proceedings, who received a Preliminary Notice of Layoff a day later. The written Preliminary Notices of Layoff advised the six recipient certificated employees that their services would not be required for the upcoming school year. The Preliminary Notices of Layoff set forth the reasons for the recommendation and attached a copy of the Board's Resolution that authorized the PKS eliminations or reductions.

PROBATIONARY NONREELECTION

8. In a separate proceeding and by separate notice, the Superintendent gave one of the six persons identified by the District subject to layoff, Ms. Clunie (position number 61 on the District Seniority List (below)) a Notice of Nonreelection, advising her that her services would not be required in the upcoming school year. Ms. Clunie is a first year probationary employee of the District. Commensurate with the Education Code provisions permitting the District to make such decisions regarding nonreelection of probationary teachers during the probationary period, the District need not prove cause for the action. "Probationary employees may be nonreelected without any showing of cause, without any statement of reasons and without any right of appeal or administrative redress."¹ "A school district may choose not to reelect a probationary employee 'without providing cause or other procedural protections to the terminated employee.'"²

WAIVER FOR FAILURE TO TIMELY FILE A REQUEST FOR A HEARING

9. Of the five remaining employees subject to the layoff, only three, Mr. Turf, Ms. Bunch and Mr. Van Arsdale, timely filed written requests for a hearing to determine if there was cause for not reemploying them for the ensuing year. It was stipulated that certificated employees Turf, Bunch and Van Arsdale were each timely served Preliminary

¹ Education Code section 44948.3, *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, 917, citing *Bellflower Education Association v. Bellflower Unified School District* (1991) 228 Cal.App. 3d 805, 808

² *Kavanaugh, supra*, at p. 918, fn. 4, citing *Board of Education v. Round Valley Teacher's Association* (1996) 13 Cal.4th 269, 281.

Notices of Layoff and timely requested hearings. It was also stipulated that certificated employees Blake and Ramsden, having been timely served Preliminary Notices of Layoff, nevertheless did not request hearings. The Preliminary Notices of Layoff received by certificated employees Blake and Ramsden contained instructions that if the recipient of such a notice wanted a hearing, the recipient must timely file with the District a Request for a Hearing. The instructions advise the recipient that failure to timely file a Request for a Hearing would be deemed a waiver of the recipient's right to a hearing. Since employees Blake and Ramsden failed to timely file a Request for a Hearing in response to receipt of a Preliminary Notice of Layoff, employees Blake and Ramsden waived any right to a hearing, and the layoff action is affirmed by default with respect to them.

10. The District timely served Accusations on each of the three certificated employees who did request hearings. All three certificated employees timely filed a Notice of Defense to the Accusation. The parties stipulated that all prehearing jurisdictional requirements were met with respect to the three remaining respondents.

DEFAULT FOR FAILURE TO APPEAR

11. Notice of the date, time and place of the evidentiary hearing was duly served, pursuant to Government Code sections 11505 and 11509, on the three respondent certificated employees who timely filed Notices of Defense. Respondents Bunch and Van Arsdale failed to appear at the evidentiary hearing. Good cause was not offered or proved for respondents Bunch and Van Arsdale's failure to appear at the evidentiary hearing. The matter proceeded as a default with respect to these two respondents, pursuant to Government Code section 11520.

THE DISTRICT GENERALLY

12. The District employed 63 certificated employees to render teaching services to District students in school year 2012-2013. The District consists of three schools, an Elementary School, a Middle School (Grades Seven-Eight) and Durham High School. The District had enrollment of 992 students at the time of the 2012-2013 census.

NECESSITY FOR THE REDUCTION IN PARTICULAR KINDS OF SERVICES

13. The District is facing a deficit in the upcoming school year in excess of \$300,000, necessitating the reduction or elimination of the PKS set forth in Resolution 13-05, as well as other reductions and cuts in other services, such as reductions in the number of classified employees. The District has no legal option but to reduce its expenditures in order to balance its budget. The reductions and eliminations of PKS as set forth in the Resolution are therefore in the best interests of the District and its students.

MR. TURF (.40 FTE MIDDLE SCHOOL SOCIAL SCIENCE)

14. As a result of those respondents failing to request a hearing, and those respondents who did request a hearing, but failed to appear, only respondent Mr. Turf appeared to contest the layoff.

15. Mr. Turf is one of the most junior certificated employees of the District, occupying position number 56 on the District Seniority List (Exhibit 5). Mr. Turf's first date of paid service to the District is the beginning of the current school year, August 14, 2012. Mr. Turf's status with the District is first-year probationary.

16. Mr. Turf has a Preliminary Single Subject credential in Social Science, which authorizes him to teach Social Science at Grades 12 and below, including preschool and in classes organized primarily for adults. No certificated employee of the District is being retained to teach Social Science at either the Middle or the High School in the District for the upcoming year who has less seniority than Mr. Turf.

17. Mr. Turf currently teaches 1.0 FTE at the Middle School in a split assignment, consisting of three classes of social science (.60 FTE), one class of Academic Academy (.20 FTE) and one class of GATE (Gifted and Talented Education) (.20 FTE). As both Academic Academy and GATE are specifically eliminated by the Resolution, there was no dispute that the .40 FTE of Mr. Turf's current assignment that consists of the one class each of Academic Academy and GATE are eliminated from Mr. Turf's employment, regardless of the outcome of this matter.

18. It was also not disputed that regardless of how the Resolution-mandated reductions in PKS and the assignments of personnel in the District according to seniority, credentials and competence, take place, the Resolution's implementation will cause Mr. Turf to lose at least .20 FTE of his .60 FTE Middle School Social Science.

19. What remains at issue is Mr. Turf's contention that he should be retained for .40 FTE Middle School Social Science in the upcoming school year, and that the District's intention to retain Jennifer Herron-Bransky (seniority number 24) to teach those two Middle School Social Science classes is an error because Ms. Herron-Bransky has only an English credential.

MS. HERRON-BRANSKY AND RESOLUTION 12-24

20. Ms. Herron-Bransky is a tenured permanent employee of the District with a first date of paid service of August 22, 1996. She has a Single Subject credential in English. In the current school year, Ms. Herron-Bransky is teaching two classes of Eighth Grade ELA, one class of Seventh Grade ELA, one class of Reader's Theater, and one class of Middle School (Seventh Grade) Social Science.

21. It was not disputed that absent special status, certification or some sort of waiver of the credentialing requirements, Ms. Herron- Bransky's Single Subject English credential does not permit her to teach Social Science in the Middle School.

22. On September 19, 2012, the District adopted Resolution 12-24, based upon the authority of Education Code section 44258.2 (Departmentalized Classroom Assignment). Resolution 12-24 recites the text of section 44258.2 as its authority to allow it, as the local governing board, to permit the holder of any Single Subject or Standard Secondary Credential to teach Departmentalized Single Subjects in Grades Five through Eight in a Middle School, provided the teacher has completed 12 lower, or six upper, division semester units of coursework in the subject to be taught.

23. Resolution 12-24 authorized three teachers in the District to teach at the Middle School in Departmentalized classroom settings during the current school year, finding that each of the three teachers had completed the educational requirements set forth in section 44258.2. Resolution 12-24 authorized teacher Ron Scudder, holder of a Multiple Subject credential and a Single Subject English credential, to teach Social Science at the Middle School in Grade Seven; teacher Cheri Wiley, holder of a Multiple Subject credential and Single Subject credentials in Physical Education and Agriculture to teach Science at the Grade Eight level at the Middle School, and Ms. Herron-Bransky, holder of a Single Subject English credential, to teach Social Science at the Grade Seven level. Pursuant to Resolution 12-24's authorization, Ms. Herron-Bransky taught one class of Seventh Grade Social Science at the Middle School in the current school year.

24. Resolution 12-24 was enacted by the Board upon the Superintendent's proposal of the Resolution and her recommendation that the Board adopt it. Before proposing the Resolution and recommending its adoption, the Superintendent researched the academic qualifications of each of the three teachers who would be covered by the Resolution, via review of their transcripts of college and graduate school course completions on record with the District in their individual personnel files, to ensure that each met the academic requirements of section 44258.2.

25. The Superintendent's analysis of whether Ms. Herron-Bransky met the educational requirements of section 44258.2, in order to qualify for inclusion in Resolution 12- 24, were confirmed by review of Ms. Herron-Bransky's college and graduate school transcripts of record on file with the District. During her testimony, the Superintendent pointed out in Ms. Herron-Bransky's transcripts how she determined that Ms. Herron-Bransky met the section 44258.2 educational requirements. The Superintendent successfully demonstrated that Ms. Herron-Bransky has more than enough credits to meet either of the two alternative qualifying educational requirements of section 44258.2.

26. There is nothing new or unusual about Ms. Herron-Bransky teaching Middle School Social Science pursuant to an Education Code section 44258.2 Board Resolution authorizing the assignment. The current school year is the 11th consecutive year that Ms. Herron-Bransky has been similarly authorized by annual Resolutions of the Board to teach at

least one class of Middle School Social Science outside her single subject English credential, and she has done so continuously in each of those previous 11 years.

27. The Superintendent acknowledged in her testimony that the Board of Trustees has not considered an Education Code section 44258.2 Resolution authorizing Ms. Herron-Bransky to teach Middle School Social Science for the upcoming school year. The Superintendent pointed out that such resolutions are typically made in the Fall (note the current school year's Resolution was adopted on September 19, 2012) upon her recommendation. The Superintendent testified that it was her intention to recommend to the Board that a similar Resolution be adopted for the upcoming school year, authorizing Ms. Herron-Bransky to again teach Social Science at the Middle School, and that she has every reasonable expectation that the annual resolution will be again adopted, as it has been in the previous 11 consecutive school years in which it has been offered.

MS. HERRON-BRANSKY'S BUMP

28. The Preliminary Notice of Layoff issued to Mr. Turf was in part precipitated by an aspect of Resolution 13-05, reducing PKS that Mr. Turf did not provide but that Ms. Herron-Bransky did. One of the impacts of the implementation of the Resolution's reductions was to discontinue most of Ms. Herron-Bransky's current assignment. As Mr. Herron-Bransky has significantly more seniority than Mr. Turf, and both teach Middle School Social Science, Ms. Herron-Bransky bumped Mr. Turf from the remaining Middle School Social Sciences portion of his assignment. Ms. Herron-Bransky's bump of Mr. Turf from his Middle School Social Sciences assignments was only possible because of her authorization to teach Middle School Social Science through Resolution 12-24, and the expressed intention of the Superintendent to seek another such Resolution for the upcoming school year.

MS. TALLY STURM

29. In closing argument, counsel for Mr. Turf contended that the District made a legal error when it made it necessary for Ms. Herron-Bransky to bump Mr. Turf, when instead, Ms. Tally Sturm (position number 49 on the Seniority List), who has less seniority than Ms. Herron-Bransky, should have received a Preliminary Notice and been laid off, because Ms. Herron-Bransky should have bumped Ms. Sturm instead of Mr. Turf. The claim was unsupported by any evidence other than data drawn from the District Seniority List. Neither the Superintendent nor the District's Business Officer were questioned regarding why Ms. Sturm did not receive a Preliminary Notice of Layoff, or whether her status as less senior than Ms. Herron-Bransky should have required Ms. Herron-Bransky to bump into Ms. Sturm's English assignments (Ms. Sturm teaches .80 FTE English at the High School, plus one section of Yearbook), leaving Mr. Turf to continue in his Social Sciences assignments at the Middle School. Ms. Herron-Bransky has an English credential that would permit her to teach English at the High School level.

30. Initially, the contention was based at least in part upon an error in the District Seniority List that was corrected by the stipulation set forth above. The uncorrected Seniority List contained an error with respect to Ms. Sturm's credentials, reflecting that Ms. Sturm has both Clear Social Sciences and English credentials. Ms. Sturm does not have a Social Sciences credential. In order to teach Middle School Social Sciences, Ms. Sturm would have to be covered by a Resolution similar to that which authorizes Ms. Herron-Bransky to teach Middle School Social Sciences.

31. Whether based upon the erroneous or corrected Seniority List, the contention lacks factual and legal merit. None of Ms. Sturm's assignment was affected by Resolution 13-05, whereas most of Ms. Herron-Bransky's was eliminated. In order to effectuate the bumping suggested by counsel, the elimination of Ms. Herron-Bransky's assignment, would result in the displacement of an employee considerably senior to Mr. Turf, while he is retained. The Superintendent elected to exercise her discretion to make the direct bump, laying off the much more junior employee, rather than create the mini-cascade suggested, which would result in the unnecessary layoff of a more senior employee to preserve a portion of a more junior employee's position. Were the tables turned, and Ms. Sturm had received a Preliminary Notice of Layoff in order to effectuate the bumping suggested by counsel, Ms. Sturm would have a well-founded legal objection to being indirectly displaced by the unnecessary preservation of the assignment of a much more junior employee. Ms. Herron-Bransky is deemed, by virtue of Resolution 12-24 (and its presumed intended successor for the 2013-2014 school year), certificated to teach Middle School Social Science, and thus to bump, either Ms. Sturm or Mr. Turf. The Superintendent correctly determined that since Mr. Turf it is the more junior of the two subject employees, the preference for seniority requires that Mr. Turf as the more junior employee be bumped. This decision was within the District's discretion and observed all credentialing and seniority requirements. The District did not err in how it proceeded with respect to these three employees, Turf, Sturm, and Herron-Bransky.

32. The Superintendent, on behalf of the District, considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

33. There was no evidence that the District proposes to eliminate any services that are State or federally mandated.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. The parties stipulated that all notices and jurisdictional requirements contained in those sections were satisfied. The District has the burden of proving by a preponderance of

the evidence that the proposed reduction or elimination of particular kinds of services and the preliminary notice of layoff served on respondents is factually and legally appropriate.³

2. The services the District seeks to eliminate in this matter 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 these particular kinds of services was not demonstrated to be arbitrary or capricious, but constituted a proper exercise of discretion.

3. Education Code section 44258.2 provides as follows:

The holder of a single subject teaching credential or a standard secondary teaching credential may, with his or her consent, be assigned by action of the governing board to teach classes in grades 5 to 8, inclusive, in a middle school, if he or she has a minimum of 12 semester units, or six upper division or graduate units, of coursework at an accredited institution in the subject to which he or she is assigned.

4. Section 44258.2 resides in a section of the Education Code relating to “credentials.” Section 44258.2, along with other provisions in the same Chapter, provide local governing boards of school districts some conditional latitude from the strict credentials requirements, which, as applied in the matter here, would ordinarily prohibit assignment of Ms. Herron-Bransky to teach Middle School Social Science, because she does not have a Social Sciences credential. If the conditions of the educational qualifications and assignment limitations spelled out in section 44258.2 are met and, “by action” of a district governing board the assignment via authorized via a Resolution, a certificated employee meeting those conditions may be considered “credentialed” for the purposes of teaching the limited assignments set forth in the statute, within the meaning of Education Code section 44955. Resort to use of such a process is entirely within a district’s governing board’s discretion. The District’s Board here acted within its statutory discretion to enact the Resolution and assign Ms. Herron-Bransky to teach Middle School Social Science, using her qualifications through section 44258.2 as a credential equivalent for a limited assignment in Middle School Social Science.

5. It was not proved that the District made an error by laying off Mr. Turf from his Middle School Social Sciences assignment, or in retaining Ms. Herron-Bransky to teach Social Science at the Middle School. Resolution 12-24, and the inclusion of Ms. Herron-Bransky in the ambit of that Resolution, authorizing her to teach Middle School Social Sciences were appropriate exercises to the District’s discretion to assign and reassign its certificated personnel while observing competence, credentialing and seniority requirements.

6. The District has not yet adopted a section 44258.2 authorizing resolution for the upcoming school that would re-authorize Ms. Herron-Bransky to teach Social Science at

³ Education Code section 44949.

the Middle School, nor has the Superintendent yet proposed such a resolution. Such resolutions have a maximum life span of one year, and must be proposed and readopted each year that the District seeks to authorize personnel to teach, as it has done with Ms. Herron-Bransky and the others covered by Resolution 24-12.

7. There is no reason to believe that the Superintendent will not act according to her expressed intention at the hearing to propose and recommend such a resolution for the upcoming school year, and there is no reason to believe that the Board will not adopt the resolution, as it has for the past 11 consecutive school years. Nevertheless, if the Board does not adopt such a resolution for the upcoming school year, Ms. Herron-Bransky may not teach Middle Social Science without its limited assignment credential equivalent authorization, and Mr. Turf would be entitled to be rehired to teach the .40FTE Social Science at the Middle School.

8. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The District is facing a significant deficit for the upcoming school year and has no choice but to reduce expenditures. The reduction in particular kinds of services proposed is necessary to avert the District operating in a deficit in the upcoming school year.

9. Education Code section 44955 requires layoffs to take place in inverse order of seniority, with some notable exceptions. “Thus, the statute provides that seniority determines the order of dismissals, and that as between employees with the same first date of paid service, the order of termination is determined on the basis of the needs of the district and its students. Senior employees are given “bumping” rights in that they will not be terminated if there are junior employees retained who are rendering services which the senior employee is certificated and competent to render. Conversely, a district may move upward from the bottom of the seniority list, “skipping” over and retaining junior employees who are certificated and competent to render services which more senior employees are not.”⁴

10. There was no evidence any person receiving a Preliminary Notice of Layoff is being laid off in favor of a junior employee being skipped, or that any employee being laid off is entitled to bump into a position held by a more junior employee where the employee being laid off has the credentials and competence to take the position of the more junior employee being retained. There was no evidence that any certificated employee of the District is being retained to provide a service any of the respondents who received preliminary notices are certificated and competent to render.

11. Legal cause exists pursuant to Education Code sections 44949 and 44955 for the Durham Unified School District to reduce or discontinue 4.90 FTE of particular kinds of services, as set forth in the District’s Resolution #13-05. The cause for the reduction or discontinuation of particular kinds of services relates solely to the welfare of the schools and

⁴ *Alexander v. Board of Trustees of the Delano Unified School District* (1983) 139 Cal. App. 3d 567, 571-2, *Moreland Teacher’s Association v. Kurze* (1980) 109 Cal.App.3d 648, 655.

the pupils thereof. Legal cause therefore exists to sustain the Accusations. The Board may give respondents Final Notices that their services will not be required by the District in the upcoming school year, in inverse order of seniority.

ORDER

The Accusation is SUSTAINED.

The Durham Unified School District action to reduce or eliminate 4.90 FTE of particular kinds of services for the 2013-2014 school year is AFFIRMED.

Final Notices may be given to respondents by the District that their services will not be required for the upcoming school year. Final Notices shall be given in inverse order of seniority.

DATED: April 22, 2013

STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings