

BEFORE THE
GOVERNING BOARD OF THE
PLACER HILLS UNION SCHOOL DISTRICT
COUNTY OF PLACER
STATE OF CALIFORNIA

In The Matter of the Reduction In Force of:

OAH No. 2013031030

Joyce Abbott
Dominic Brissey
Elizabeth Katsura
Jean Kelley
Jill Kirkland
Jennifer Lynn
Maureen Preston Ginty
Jon Oates
Jeff Riswold

Respondents.

PROPOSED DECISION

This matter was heard before Administrative Law Judge Dian M. Vorters, State of California, Office of Administrative Hearings, on April 19, 2013, in Meadow Vista, California.

Heather M. Edwards, Attorney at Law,¹ represented the Placer Hills Union School District (District). Also present was Fred Adam, Superintendent for the District.²

Andrea Price, Attorney at Law,³ represented all respondents. Also present was Mary Ann Luckinbill, representative of the California Teacher's Association.

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Evidence was received and the case was submitted for decision.

FACTUAL FINDINGS

1. Fred Adam is the Superintendent of the District. The actions of Mr. Adam and the District Governing Board were taken in their official capacities.

2. On or before March 7, 2013, the Mr. Adams determined that funding for the 2013-2014 school year would be reduced, thereby necessitating the reduction or elimination of particular kinds of services (PKS). On March 7, 2013, the Superintendent recommended to the Board that certain PKS be reduced or eliminated. The Superintendent's recommendation to eliminate and reduce teaching services was made solely for the welfare of students.

3. On March 7, 2013, the Board adopted Resolution No. 9:12-13 (PKS Resolution) which identified the particular kinds of certificated services of the District that "shall be reduced or discontinued" before the start of the 2013-2014 school year. The PKS resolution directed the Superintendent to send appropriate notice to all employees affected by the Board action. The PKS comprised 15.26 full-time equivalent (FTE) probationary and permanent employee positions, as follows:

- a. The equivalent of five and six-tenths (5.6) FTE Kindergarten through 5th grade multiple subject teaching services positions.
- b. The equivalent of six and sixty-six hundredths (6.66) FTE single subject teaching services positions (2.0 music, 2.66 physical education, 1.0 art, 1.0 mathematics).
- c. The equivalent of two (2.0) FTE special education teaching positions.
- d. The equivalent of one (1.0) FTE administrative services (special education coordinator/psychologist).

4. On March 8, 2013, the Superintendent and his designee, Principal Steve Schaumleffel, personally served on the affected certificated employees, notice that their services would not be required for the ensuing 2013-2014 school year (Layoff Notice). The Layoff Notice stated that the Superintendent had recommended to the Board that notice be given to respondents pursuant to Education Code sections 44949 and 44955. The Layoff Notice included a copy of the PKS resolution and advised that the Board had passed the PKS resolution in order to reduce certificated staff.

5. Nine certificated employees who were served with a Layoff Notice timely requested a hearing to determine if there was cause for not re-employing or reducing their services for the ensuing school year. (Ed. Code, §44949, subd. (b).)

6. On April 2, 2013, the Superintendent made and filed an Accusation against each respondent. Respondents, through counsel, timely filed Notices of Defense to the Accusation. (Ed. Code, § 44949, subd. (c)(1).)

7. Before hearing, the District and respondents entered into a written Stipulation that Layoff Notices issued to Jeffrey Riswold, Jonathan Oates, and Jean Kelley are rescinded. All three employees are credentialed and competent to teach in a position based on seniority.

Layoff Determinations

8. Mr. Adam testified at hearing about the process he used to identify teachers affected by the PKS Resolution. Mr. Adam used a seniority list which was created from personnel files maintained by the District. To verify the accuracy of the information, the District mailed all certificated staff a letter in December 2012, asking them to verify data in their personnel file. The information included their hire dates, credentials, education, and certifications.

9. *Joyce Abbott.* Ms. Abbott has a hire date of August 22, 2002. She was identified on the basis of the PKS reduction of 5.6 FTE in Multiple Subject (M/S) classroom teachers in Kindergarten through fifth grade. Ms. Abbott holds a professional clear M/S credential with a Cross-cultural, Language and Academic Development (CLAD) certificate and currently teaches second grade. No less senior employee is being retained who is competent to render this service.

10. *Elizabeth Katsura.* Ms. Katsura has a hire date of August 22, 2002. She was identified on the basis of the PKS reduction in M/S classroom teachers in Kindergarten through fifth grade. Ms. Katsura holds a professional clear M/S credential with a CLAD certificate and currently teaches fifth grade. No less senior employee is being retained who is competent to render this service.

11. *Jill Kirkland.* Ms. Kirkland has a hire date of August 18, 2006. She was identified on the basis of the PKS reduction in M/S classroom teachers in Kindergarten through fifth grade. Ms. Kirkland holds a professional clear M/S credential with CLAD certificate, and currently teaches fourth grade. No less senior employee is being retained who is competent to render this service.

12. *Jennifer Lynn.* Ms. Lynn has a hire date of August 18, 2004. She was identified on the basis of the PKS reduction in M/S classroom teachers in Kindergarten through fifth grade. Ms. Kirkland holds a professional clear M/S credential with a Specially Designed Academic Instruction in English (SDAIE) certificate, and currently teaches fourth grade. No less senior employee is being retained who is competent to render this service.

Skipping in Physical Education Instruction

13. 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, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, 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.
- (2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

(Gov. Code, § 44955, subd. (d).) The District determined to layoff a more senior teacher in order to fulfill an identified need for a male teacher to supervise the boys locker room before and after gym class. Respondent Marueen Ginty challenges the District's decision to skip over a less senior male teacher thereby displacing her in PE instruction. She argued that the action amounts to "gender discrimination."⁴

14. *Dominic Brissey*. Mr. Brissey has a hire date of January 16, 2007. He was identified on the basis of the PKS reduction of 2.66 FTE in Single Subject (S/S) Physical Education (PE) instruction. Mr. Brissey holds a professional clear S/S credential in PE with a CLAD certificate. He is qualified to teach Kindergarten through 12th grade physical education. His Bachelor's Degree is in Kinesiology and Physical Education. Mr. Brissey currently teaches PE full-time (1.0 FTE), at Weimar Hills Charter School, grades six, seven, and eight, co-ed instruction. Mr. Brissey is less senior than Maureen Ginty who has a hire date of November 18, 1996, and is qualified and competent to teach PE. (see Factual Finding 16.) The District determined to skip Mr. Brissey on the basis of his gender, for co-ed PE middle-school instruction. As such, two more senior female teachers, Ms. Ginty and Nancy Arnold (hire date August 25, 1994), were laid off and re-assigned. The District did serve Mr. Brissey with a precautionary layoff notice.

⁴ Gender based discrimination in employment is prohibited. Government Code section 12940, subdivision (a), states in relevant part: "It is an unlawful employment practice, unless based upon a bona fide occupational qualification, ...: (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

15. *Nancy Arnold.* Ms. Arnold has a hire date of August 25, 1994. She was identified on the basis of the PKS reduction in S/S PE instruction. Ms. Arnold holds a clear S/S PE credential with SDAIE certificate. Ms. Arnold currently teaches PE and Health, full-time at Weimar Hills School, grades four and five. A less senior employee, Mr. Brissey, is being retained who is competent to render PE instruction. As a result of the District skipping Mr. Brissey, Ms. Arnold will replace Ms. Ginty for .66 FTE, at Sierra Hills, PE instruction.

16. *Maureen Preston Ginty.* Ms. Ginty has a hire date of November 18, 1996. She was identified on the basis of the PKS reduction in S/S PE instruction. Ms. Ginty holds the following credentials: Clear Standard Elementary Education-Life, S/S English, SDAIE certificate, and Specialist Credential in Special Education with AB2913. Ms. Ginty currently teaches PE part-time (.66 FTE), at Sierra Hills School, grades one through three, co-ed instruction. A less senior employee, Mr. Brissey, is being retained who is competent to render PE instruction. As a result of the District skipping Mr. Brissey, Ms. Ginty will bump into a .66 Title I Reading Specialist position at Sierra Hills.

17. Superintendent Adam testified about the District's decision to skip over Mr. Brissey on the basis of his gender and the District's need to retain a male teacher, regardless of seniority. The District determined that adolescent middle-school boys require locker room supervision during dress time, which occurs in the five minutes before and after PE instruction. Seventh graders are required for the first time to change clothes in a group setting where teasing and commenting can lead to "significant issues." Female gym students at Weimar Hills are supervised by a female teacher, Janet Russell. Ms. Russell has a hire date of August 28, 1986 and holds a clear M/S credential with SDAIE certificate, and a S/S credential in PE. She is more senior than Ms. Ginty by more than 10 years.

Mr. Adams stated that the District considered alternatives to retaining a junior gym teacher. He met with the special education coordinator, business manager, and school principals to consider options that were financially feasible to implement. There are very few male teachers in the District. Most of them are single subject teachers who the District was reluctant to take prep-time away from in order to assign them to a locker room. The District also considered assigning a male administrator to the locker room; however, the male principal's work schedule could not be reworked to avail him to supervise the boys' gym on a daily basis. Other classified staff included only female aides on the Weimar campus so there was no pool of male employees to pull from. Finally, the District is financially unable to hire a male aide for the specific purpose of supervising the boys' locker room. Mr. Adam shared that the Board initially sought to reduce the District's budget by \$1 million and the PKS plan only accomplished \$900,000 in spending reductions for the 2013-14 school year. Hence, hiring additional staff is out of the question.

18. Mr. Brissey testified as to his experience supervising adolescent boys in the locker room. He has been teaching at Weimar Hills School since January 16, 2007. He teaches PE full-time at 1.0 FTE. His day includes six gym periods, two for each of grades six, seven, and eight. Students in seventh and eighth grades are required to change before and after gym; so four periods require locker room supervision. Mr. Brissey sits in an office that

has a window through which he can see into the locker room. He has been present at one fight and harassment occurring twice a year. He believes his presence discourages the boys from misbehaving. Mr. Brissey explained that though the students do not shower, privacy and modesty are still important concerns. Dressing in gym clothes allows for ease of movement and proper hygiene as hormones are changing and students may be sensitive to body odor present in sweaty clothing.

19. Ms. Ginty testified that the District's actions amount to unlawful gender discrimination. She asserted that she is qualified and able to perform competently in the position. She believes the District has determined to retain a junior teacher without articulating a legitimate "specific need" for Mr. Brissey to teach gym class. She pointed out that the job description for gym teachers is the same as for all other teachers, and gender-based supervision is not articulated as an essential function. The Classroom Teacher Job Description states, in relevant part that the "[b]asic functions include, but are not limited to...Supervise students in out-of-classroom activities during the assigned working day." Ms. Ginty suggested that they could stop requiring boys to dress into and out of gym clothes. Finally, Ms. Ginty argued that though she is a part-time teacher at Sierra Hills and Mr. Brissey is a full-time teacher at Weimar Hills, she should be allowed to replace Mr. Brissey at Weimar Hills for .66 FTE. It is noted that the District has offered Ms. Ginty a .66 FTE teaching position at Sierra Hills as a Title I Reading Specialist.

20. *Creation of a Part-Time Position Not Required.* A school district has discretion to define a position as full-time and define a "service" in terms of the hours required to perform it. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.) "[S]o long as the determination is reasonable and made in good faith, neither section 49455 nor any other provision of the Education Code precludes a school district from defining a position, or a 'service,' as full time." (*Id.* at p. 344.) As such, the District cannot be compelled to create a partial position in order to reassign Ms. Ginty to 0.66 FTE PE instruction and assign the remainder to another credentialed employee.

21. *BFOQ Analysis.* As stated in *Donovan v. Poway Unified School District*, "[S]chools are unlike the adult workplace and ... children may regularly interact in a manner that would be unacceptable among adults. Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 602.) The courts have provided school officials with flexibility to respond to harassment without being "second guessed," as long as their response is not "clearly unreasonable" under the circumstances. (*Ibid.*) In the context of student-on-student harassment, the school may be held liable where the behavior is severe, pervasive, and objectively offensive such as to deny victims equal access to education. (*Ibid.*)

22. In employment discrimination cases on the basis of gender, personal privacy considerations may justify a BFOQ where:

- (1) The job requires an employee to observe other individuals in a state of nudity or to conduct body searches, and
- (2) It would be offensive to prevailing social standards to have an individual of the opposite sex present, and
- (3) It is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of the opposite sex present.

(Cal. Code of Regs., tit. 2, § 7290.8, subd. (b).) The employer must normally assign job duties and make other reasonable accommodation so as to minimize the number of jobs for which sex is a BFOQ. (Cal. Code of Regs., tit. 2, § 7290.8, subd. (c).)

23. When an employer neither explores the possibility of providing reasonable accommodation nor provides a feasible accommodation which will serve both the privacy concern and the interest of equal employment opportunity, the employer may have violated the Act.⁵ (*DFEH V. San Luis Obispo Coastal Unified School District* (1998) Case No. E95-96 L-0725-00, at p. 14.)⁶ In *San Luis*, the school district evaluated a variety of rescheduling scenarios, none resulting in adequate supervision of the boys. This included an evaluation of other physical education teachers available to supervise, the availability of non-core teachers, the use of male student aides, community volunteers and supervision by a campus police officer. The Commission found in *San Luis* that the school district “met its burden of showing that reasonable accommodation was unavailable.” (Id. at p. 16.)

The District has the burden of demonstrating that reasonable accommodation was unavailable. “Even if an employer can demonstrate that certain jobs require members of one sex, the employer must also ‘bear the burden of proving that because of the nature of the operation of the business they could not rearrange job responsibilities ...’ in order to reduce the BFOQ necessity.” (*Bohemian Club v. Fair Employment and Housing Commission*, (1986) 187 Cal.App.3d 1, 19.)

24. The dress requirement is important for proper hygiene, ease of movement, and self-esteem throughout the rest of the school day. Privacy considerations support a finding that same gender supervision of the classroom is a legitimate need at the middle school level. The District has met its burden of demonstrating that reasonable accommodation was

⁵ Fair Employment and Housing Act (FEHA); see Government Code section 12900 et seq.

⁶ Decisions of the Fair Employment and Housing Commission are entitled to great respect. (*Auburn Woods I Homeowners Ass’n v. Fair Employment and Housing Commission* (2004) 121 Cal.App.4th 1578, 1591.)

unavailable. The District evaluated options to retaining a less senior male PE teacher and was not able to identify feasible options, either logistically or financially. The District has met its burden of demonstrating a need to skip Mr. Brissey for 1.0 middle-school PE instruction. (Ed. Code, § 44955, subd. (d)(1).)

25. Except as provided by statute, no other permanent or probationary certificated employee with less seniority is being retained to render a service which respondent and other noticed teachers are certificated and competent to render. As between employees who first rendered paid service to the District on the same date, the order of termination will be based solely on the needs of the District and the students thereof. The District was not required to apply tie-break criteria as part of the layoff process.

26. The District's reductions of PKS and certificated employees relate solely to the welfare of the District's schools and pupils within the meaning of Education Code sections 44949 and 44955. The decision to reduce or discontinue these services is neither arbitrary nor capricious, but rather a proper exercise of discretion of the District.

LEGAL CONCLUSIONS

Applicable Laws

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

2. The anticipation of receiving less money from the state for the next school year is an appropriate basis for a reduction in services under section 44955. As stated in *San Jose Teachers Assn v. Allen* (1983) 144 Cal.App.3d 627, 638-639, the reduction of particular kinds of services on the basis of financial considerations is authorized under that section, and, "in fact, when adverse financial circumstances dictate a reduction in certificated staff, section 44955 is the only statutory authority available to school districts to effectuate that reduction." The District must be solvent to provide educational services and cost savings are necessary to resolve its financial crisis. The Superintendent's decision to reduce particular kinds of services was a proper exercise of his discretion.

3. A 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 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.)

4. The Layoff Notices sent to respondents indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide them due process. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627; *Santa Clara Federation*

of Teachers v. Governing Board (1981) 116 Cal.App.3d 831.) The description of services to be reduced, both in the Board Resolution and in the Layoff Notices, adequately described particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838.)

5. Education Code section 44955 provides that when certificated employees face layoffs due to reduction or elimination of PKS, 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. The intent of the Legislation is clearly to prevent school districts from laying off senior teachers while retaining junior teachers. Education Code section 44955, subdivision (c) provides in pertinent part:

Services of such employees shall be terminated in the inverse of the order in which they were employed... 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...

6. The District appropriately considered all positively assured attrition which occurred during the computation period prior to submitting the PKS Resolution to the Board for its approval. As set forth in Factual Finding 7, the District rescinded notices of layoff to three certificated employees before hearing.

7. As set forth in Factual Findings 21 through 24, the District skipped middle school physical education teacher Dominic Brissey solely on the basis of his gender and the perceived need to have a male physical education teacher available to supervise the boys' locker room at the beginning and at the end of each period. A district is allowed to skip an employee after "demonstrating a specific need for personnel to teach a specific course or course of study..." (Ed. Code, § 44955, subd. (d)(1).) The District met its burden of demonstrating such need.

8. The District appropriately applied bumping rules and allowed bumping based upon the more senior employee holding a credential or authorization to teach the assignment of the less senior teacher.

9. The services identified in the PKS Resolution are particular kinds of services that can be reduced or discontinued under Education Code section 44955. Cause exists for the reduction of the particular kinds of services and for the reduction of full-time equivalent certificated positions at the end of the 2013-2014 school year pursuant to Education Code sections 44949 and 44955. 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. Therefore, cause exists to give respondents notice that their services will be reduced or will not be required for the ensuing 2013-2014 school year.

RECOMMENDATION

Cause exists for the reduction of 15.26 full-time equivalent certificated positions at the end of the 2012-2013 school year. Notice shall be given to respondents that their services will be reduced or will not be required for the ensuing 2013-2014 school year, because of the reduction and discontinuance of particular kinds of services. Notice shall be given in inverse order of seniority.

DATED: April 26, 2013

DIAN M. VORTERS
Administrative Law Judge
Office of Administrative Hearings