

BEFORE THE
GOVERNING BOARD OF THE
OROVILLE UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA

In The Matter of the Accusations
(Reduction In Force) against:

Keely White, Stephanie Greco,
Lindsay Himmelspace and Kurt Libby,

Respondents.

OAH No. N2007031010

PROPOSED DECISION

Ann Elizabeth Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 11, 2007, in Oroville, California.

Christian M. Keiner, Attorney at Law, represented the Oroville Union High School District (District).

Donald A. Selke, Jr., Attorney at Law, filed a Notice of Defense on behalf of all of the respondents. Mr. Selke, appeared on behalf of respondents Keely White and Stephanie Greco only.

Lindsay Himmelspace and Kurt Libby did not appear. Ms. Himmelspace and Mr. Libby were timely served with a notice of the time, date and place of hearing.¹

The matter proceeded in respect to respondents Keely White and Stephanie Greco, and against Lindsay Himmelspace and Kurt Libby by default.²

Evidence was received and the matter was submitted on May 11, 2007. The parties agreed to extend timeline requirements under Education Code sections 44949 and 44955.

¹ Mr. Selke advised that he no longer represented Lindsay Himmelspace and Kurt Libby and that the two were aware of this. He also advised that Ms. Himmelspace and Mr. Libby were aware of the time, date and place of hearing.

² Twelve lay off notices were issued. Accusations were initially filed against ten employees who received lay off notices and requested a hearing. Prior to the hearing of this matter, six Accusations were withdrawn, due to employee withdrawal of a notice of defense, or to District withdrawal of lay off notice.

The parties stipulated to extend the May 7, 2007 time line in section 44949, subdivision (c) (3) to June 4, 2007. Thus, the proposed decision shall be submitted to the Governing Board of the District (Governing Board) and to the employees on or before June 4, 2007.

FACTUAL FINDINGS AND DISCUSSION

1. The District operates five high schools, including three alternative education programs; Prospect High School, Community Day School and Challenge Charter School. The District has approximately 150 certificated employees.

2. Wayne Robinson is the Superintendent of the District. His actions, and the actions of the Governing Board, were taken in their official capacities.

3. Before March 15, 2007, the District served on each respondent a written notice that it had been recommended that notice be given to respondents pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year. Each written notice set forth the reasons for the recommendation and noted that the Governing Board had passed a Resolution reducing the certificated staff by 10.7 full-time equivalent (FTE) positions.

Respondents timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year.

4. The Superintendent made and filed Accusations against each of the employees who requested a hearing. The Accusations with required accompanying documents and blank Notices of Defense were timely served on those employees.

5. Respondents timely filed Notices of Defense.

6. Respondents in this proceeding are permanent certificated employees of the District.

7. On March 7, 2007, at a regular meeting of the Board, the Governing Board was given notice of the Superintendent's recommendations that certificated and other employees holding 10.7 FTE positions be given notice that their services would not be required for the next school year and stating the reasons for that recommendation.

8. On March 7, 2007, the Governing Board adopted Resolution No. 14, providing for the reduction or elimination of the following particular kinds of services:

- A. Reduce 1.6 FTE Special Education teachers (8 sections).
- B. Reduce 2.0 FTE Math teachers (10 sections).
- C. Reduce 0.4 FTE Earth Science teachers (2 sections).
- D. Reduce 1.8 FTE Social Science teachers (9 sections).

- E. Reduce 2.2 FTE English teachers (11 sections).
- F. Reduce 0.4 FTE Health teachers (2 sections).
- G. Reduce 0.6 FTE Physical Education teachers (3 sections).
- H. Reduce 0.4 FTE French teachers (2 sections).
- I. Reduce 0.4 FTE Industrial Technology teachers (2 sections).
- J. Reduce 0.6 FTE Art teachers (3 sections).
- K. Reduce 0.10 FTE Special Education Director/School Psychologist.
- L. Reduce 0.20 FTE Psychologist.

Total 10.7 FTE

9. The District is experiencing financial difficulties. Because of budgetary shortfalls and the loss of funding, the Governing Board determined that it needs to reduce its 2007-2008 operating budget. Thus, after consideration of all positively assured attrition that had occurred as of the date of the resolution, the Governing Board resolved to reduce teaching and psychologist services, affecting employment of 10.7 FTE positions. The Governing Board's resolution to eliminate and reduce these particular kinds of services was made in order to balance its budget for the welfare of students.

10. The Governing Board also resolved that "competency for the purposes of assignment in Alternative Education shall mean at least one semester actual teaching experience in Alternative Education within the last five (5) years..."

11. The District maintains a Certificated Seniority List which contains employees' seniority dates (first date of paid service), status as tenured, probationary or temporary, and credentials and authorizations. Status, credential and authorization data are obtained from the District's records.

12. The Governing Board adopted tie-breaker criteria (Resolution No. 13-06/07) for determining the relative seniority of certificated employees who first rendered paid service on the same date.

13. The Superintendent and other District employees were responsible for implementation of the technical aspects of the layoff. The District used the seniority list to develop a proposed layoff list of the least senior employees currently assigned in the various services being reduced. The District then determined whether the least senior employees held credentials in another area and were entitled to "bump" other employees. In determining who would be laid off for each kind of affected service, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and whether they could "bump" other employees. The District then looked at employee competence for certain positions as opposed to other positions. The District determined that those who had not taught in Alternative Education for at least one semester in the preceding five years were per-se incompetent to teach in the District's Alternative Education High Schools. The District did not consider these employees eligible to compete

for positions held by junior or same-seniority employees who had taught in Alternative Education High Schools.

14. Lindsay Himmelspace has a seniority date of October 19, 2006. She holds a preliminary credential in Physical Education. She is currently assigned to teach .60 FTE Physical Education and .20 Health at Las Plumas High School. Her services are eliminated pursuant to the Governing Board's resolution. Ms. Himmelspace did not present evidence or argument in defense of her lay off. No employee junior to Ms. Himmelspace is being retained to perform services which Ms. Himmelspace is competent and certificated to render.

15. Kurt Libby has a seniority date of August 15, 2005. He is currently assigned to teach 1.00 FTE in Mathematics at Las Plumas High School. His services are reduced by .60 FTE Mathematics, pursuant to the Governing Board's resolution. Mr. Libby did not present evidence or argument in defense of his reduction in services. No employee junior to Mr. Libby is being retained to perform services which he is competent and certificated to render.

16. Keely White has a seniority date of August 14, 2006. She holds a clear credential in Social Science. She is currently assigned to teach .80 FTE in Social Science and .20 FTE in Health at Oroville High School. Her services are eliminated pursuant to the Governing Board's resolution. Ms. White argues that a teacher with the same seniority date as she is being retained to perform .80 Social Science services which she is competent and certificated to render. She does not assert that junior employees are being retained to teach Health.

Ms. White maintains that Kurt Osterlund is being retained to teach .80 FTE, .60 of which is in Social Science at Challenge Charter School. No tie breaking criteria were applied between Mr. Osterlund and Ms. White to determine which of the two should be retained. The District maintains that it did not apply the tie breaking criteria between the two because Ms. White did not meet the competency criteria set out in the Resolution: she had never taught in an alternative education program.

17. Stephanie Greco has a seniority date of August 14, 2006. She holds a preliminary credential in English and a Multiple Subjects credential. The multiple subjects credential is not applicable here as it authorizes her to teach in elementary schools. Ms. Greco is currently assigned to teach 1.00 FTE in English at Oroville High School. Her services are reduced .80 FTE in English pursuant to the Governing Board's resolution. She retains .20 FTE in English instruction at Oroville High School.³ Ms. Greco argues that Leslie Graka is being retained to teach English at Prospect High School. Ms. Graka and Ms. Greco have the same seniority date and no tie breaking criteria were applied between the two

³ The District has offered Ms. Greco a split position between Oroville High School and Las Plumas High School. She would retain .40 FTE in English at Oroville High School and an additional .20 in English at Las Plumas High School. The District continues to search for additional sections of English which Ms. Greco can be assigned to teach.

to determine which of the two should be retained. The District acknowledges that it did not apply the tie breaking criteria between the two because Ms. Greco did not meet the competency criteria set out in the Resolution: she had never taught in an alternative education program.

18. Both Ms. Greco and Ms. White contend that they are certificated and competent to teach in the District's Alternative Education High Schools. There is no question that both are appropriately credentialed to teach their single subject in any high school. However, the issue is whether they are competent to teach in Alternative Education Programs.

19. Superintendent Robinson testified that the students in the District's Alternative Education High Schools are "100 percent at risk for not graduating." Many have been expelled from other high schools and many "lead or partake in dysfunctional lifestyles." As a result of these challenges, the District is "very careful who we hire for these positions." The District maintains that teachers who instruct students with these issues require training and experience in alternative programs. As a result, the District adopted the "competency requirement" in Resolution No. 14, requiring at least one semester of actual teaching experience in an alternative education school within the last five (5) years for reassignment of laid off teachers into District alternative education high schools. The Superintendent stated that this time period was chosen because it would be long enough for the teacher "to prove fit and to become knowledgeable in dealing with the students."

20. Neither Ms. Greco nor Ms. White have taught in alternative education programs. They argue that there is no special competency necessary to teach Social Science or English in alternative education environments. They established that some of the teachers who were employed at the District Alternative High Schools in the 2006-2007 school year, as well as in previous years, did not have one semester of teaching experience in alternative high schools at the time they were employed.⁴ The point of this argument was to establish that it is not necessary that teachers possess this experience to be regarded as competent, and that the requirement the Board adopted is thus arbitrary. This argument was persuasive.

21. A review of the Challenge Charter High School Petition (Petition) supports respondents' argument. The Governing Board regards the Challenge Charter High School as an Alternative Education High School. The Superintendent included this school with the other two Alternative Education High Schools in the District when he described the challenges of the student populations and the need for teachers with special training or experience in handling these populations. Yet, the Petition, which is the document authorizing and describing the operation of the Challenge Charter High School, does not

⁴ For instance, Jeanean Falletti did not have the requisite teaching experience when she was employed in September 2006 to teach at the Community Day School. Further, it was likely that Kurt Osterlund and Heide Hostetter had no prior experience in alternative education before they were employed in 2006 to teach in the District's Alternative Education High Schools.

require prior alternative education experience in its selection criteria for certificated employees. Qualifications for teachers refer to:

...the ability to motivate students who have a historical lack of motivation, work well with a close knit community of teachers, staff, students, and parents and be innovative and flexible in their teaching and methodology. As Challenge Charter High School runs like a large family, all charter school employees must be 'people-oriented' and have good rapport with students of diverse backgrounds....Preference will be given to experienced teachers with demonstrated ability in specific fields/disciplines as needed by the Charter School...

22. While it is predictable that not every teacher can successfully manage and instruct difficult student populations, the District does not appear to have had a clear set of standards for selecting the teachers who teach in its Alternative Education High Schools. The District Superintendent, in a general sense, identified the problems presented by the population, but did not identify the specific qualifications necessary to teach this population, such as a particular training program or particular skills. The District relied heavily upon the fact that the Governing Board established these "competency criteria" by Resolution. The District's reliance on the Resolution fails.

23. In part, the District's view is based upon an Administrative Law Judge's (ALJ) proposed decision in a prior reduction in force.⁵ This proposed decision upheld the Board's imposition of competency criteria which required that teachers have taught in their certificated subjects at least one semester in the previous five years.⁶ At the time the Board's competency criteria resolution was adopted, the District was facing layoffs of administrators and others who held teaching credentials but who had not taught for many years, in some cases for decades. The ALJ examined the teaching experience of each employee who was attempting to move into a teaching position after years away from a classroom. The ALJ found that under the circumstances presented in each case, application of the "competency criteria" did not violate the District's duties under Education Code section 44955.

The proposed decision did not authorize Governing Boards to adopt wholesale competency criteria which circumvent the seniority protections of the Education Code. At most, the proposed decision established that a District could examine a credentialed teacher's length away from classroom experience to determine whether the teacher remained competent to teach a particular subject.

24. In contrast, here the wholesale application of the Resolution "competency criteria" to all teachers subject to lay off does not permit evaluation of the individual

⁵ At the hearing of the instant matter, the ALJ's proposed decision was not admitted in evidence, as it was used only to refresh the memory of a witness. However, after the matter was submitted, this ALJ, sua sponte, reopened the record to admit the proposed decision (Exhibit J) into evidence, for the purpose of explaining the Board's reliance upon it in formulating Resolution No. 14.

⁶ The proposed decisions of Administrative Law Judges in teacher reduction in force cases are not precedential or binding, regardless of whether the Board adopts the proposed decision.

competency of the teacher in question to handle the student population in the District's Alternative Education High Schools. The criteria conclusively presume that a teacher is incompetent to teach a particular group of students, unless that teacher has taught a similar group of students in the past. For instance, a teacher may have a strong background in psychology, probation, or in managing difficult persons in general, but has not taught in an alternative school. A teacher may have significant training in alternative education, or have come from circumstances similar to the student populations' and thus might be able to handle the particular issues these students present. There are a myriad of ways in which a teacher may demonstrate competence to teach difficult students. The fact that one has taught in an alternative education school for five or six months in the last five years is not the only avenue to competency in teaching difficult students. Nor does the mere fact that one has taught in an alternative education school, in itself, establish competency to teach difficult students. Resolution No. 14, in respect to its "competency criteria" is arbitrary and not in the best interests of pupils.

25. The District employees receiving notices that their services would not be required next year, whether temporary or certificated employees, have all rendered valuable services to the District.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945 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 Governing Board's decisions were a proper exercise of its discretion.

3. The services identified in Board Resolution No. 14 are particular kinds of services that could be reduced or discontinued under section 44955. The Governing Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. 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.

4. 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.)

5. The 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 notices, adequately describe particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838. See, also, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

6. Education Code section 44955, provides in pertinent part:

¶...¶

(b) Whenever in any school year ... whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, ...or whenever the amendment of state law requires the modification of curriculum, and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. *Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.* (emphasis added)

¶...¶

7. Education Code section 44955 provides that when certificated employees face layoffs due to economic exigency, 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 Districts from laying off senior teachers while retaining junior teachers. 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...

8. As set forth in the Factual Findings and Legal Conclusions, the District may not circumvent the seniority based protections of the Education code by establishing that

three quarters of its schools are "off limits" to senior teachers who have not taught in alternative education. This is the effect of the "competency criteria" adopted by the Board, although it certainly may not be an intended effect. The Education Code requires that the District establish the incompetency of a senior teacher to teach a designated course before it may refuse to assign the senior teacher to a position held by a junior teacher. The District has failed to show that Ms. White is not competent to teach Social Sciences in the Challenge Charter High School. The District has failed to show that Ms. Greco is not competent to teach English in the Prospect High School.

9. Ms. Greco shares a seniority date with Ms. Graka and Ms. White shares a seniority date with and Mr. Osterland. Education Code section 44955, subdivision (b), provides in pertinent part:

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

10. Although the District had adopted tie breaking criteria, it did not apply the criteria to White, Osterland, Greco and Graka, on the assumption that the Board could bar White and Greco from teaching in its Alternative High Schools.

11. Nor did the District establish that Osterland or Graka occupied positions of such a specialized nature, and they had such specialized skills, that it was necessary to retain them, pursuant to section 44955, subdivision (d).⁷ They were retained over White and Greco merely because they had occupied their positions more than a semester.

⁷ The District is permitted to depart from a seniority-based economic layoff in situations where the District "demonstrates a specific need for personnel to teach a specific course or course of study... and that the certificated employee (to be exempted from layoff) 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." (Education Code section 44955, subdivision (d)(1)). A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.)

12. The District also argues that it cannot place White in Challenge Charter High School because, under the terms of the Petition, the Board cannot appoint a teacher to the school unless a hiring committee approves the teacher. While this procedure may be appropriate for hiring teachers, an educational program, which is by law a part of the District school system and employs District teachers, cannot exempt itself from the requirements of the California Education Code. The Education Code sets forth specific requirements the District must employ in the event of a layoff. Efforts to bypass certain teachers in the lay off process (skipping) or to bar certain teachers from moving into (bumping) positions held by junior teachers seek to deviate from the Education Code section 44955. The Legislature recognized that there would be instances where Districts could legitimately deviate from a strictly seniority based lay off, but these circumstances do not present themselves here. Persons who are credentialed and experienced teachers are not per se incompetent to teach challenging students, just because they have not completed one semester of teaching in alternative education. Persons who do teach in alternative education programs do not by virtue of their placement possess such specialized skills, within the meaning of Education Code section 44955, subdivision (d), that it is necessary to retain them over junior teachers.

13. Finally, respondents assert that, after considering attrition, the scope of the layoff was too broad and more teachers were laid off than authorized in the Board's Resolution. This argument is without merit. The Board considered all attrition at the time it authorized layoff of 10.7 FTE. Subsequent attrition was considered, and some layoff notices were withdrawn. Respondents' calculations, that 9 FTEs were recaptured due to attrition, was based on the unsupported premise that the subsequent attrition was in the subject areas taught by the affected teachers. There was no evidence that subsequent attrition resulted in vacancies which respondents could have occupied.


ORDER

1. The Accusation against Keely White as to .80 FTE of her services in Social Sciences is Dismissed.
 2. The Accusation against Keely White as to .20 FTE of her services in Health is Affirmed.
 3. The Accusation against Stephanie Greco as to .80 FTE of her services in English is Dismissed.
 4. The Accusation against Lindsay Himmelspace as to .80 FTE of her services in Affirmed.
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5. The Accusation against Kurt Libby as to .60 FTE of his services in Affirmed.

Notice shall be given to Lindsay Himmelspace, Kurt Libby, and Keely White (.20 FTE) that their services will not be required for the 2007-2008 school year because of the reduction and discontinuance of particular kinds of services.

DATED: May 29, 2007


ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings