

BEFORE THE GOVERNING BOARD
OF THE CAMINO UNION ELEMENTARY SCHOOL DISTRICT
EL DORADO COUNTY, STATE OF CALIFORNIA

In the Matter of the Accusation (Reduction in
Force) Against:

HELEN GRAY and
GINA DE SANTIS,

Respondents.

OAH No. 2008030642

PROPOSED DECISION

Administrative Law Judge Marilyn A. Woollard, Office of Administrative Hearings (OAH), State of California, heard this matter in Camino, California, on April 10, 2008.

Camino Union School District (District) was represented by Ann Murray, of Kronick, Moskovitz, Tiedemann & Girard. District Superintendent Elizabeth Haines was also present on the District's behalf.

Respondents Helen Gray and Gina De Santis were present and represented themselves regarding specific seniority issues. Margaret Geddes, Beeson, Tayer & Bodine, represented respondents regarding common issues.

Oral and documentary evidence was presented and the parties offered oral closing arguments. The record was then closed and the matter was submitted for decision on April 10, 2008.

FACTUAL FINDINGS AND DISCUSSION

1. Elizabeth Haines is the Superintendent of the Camino Union School District (District), which has a student population of 455. Ms. Haines's actions and the actions of the District Governing Board (Board) were taken in their official capacities.

2. Respondents Helen Gray and Gina De Santis are certificated employees of the District.

3. On March 11, 2008, the Board adopted Resolution No. 07/08-07, authorizing the reduction and elimination of particular kinds of service (PKS) for the 2008-2009 school year. The Board determined that it was necessary to reduce the PKS itemized below not later than the beginning of the 2008-2009 school year:

1. Reduction of the Primary School Teaching Program, resulting in the elimination of 2.0 full time equivalent (FTE) certificated teacher positions;
2. Elimination of the Supplemental Instructional Reading Program, resulting in the elimination of .86 FTE certificated teacher position.
3. Elimination of the Computer and the Physical Education (PE) Preparation Program, resulting in the elimination of 1.14 FTE certificated teacher positions.
4. Not Adopted.¹
5. Reduction of the Resource Specialist Program resulting in the elimination of a .7 FTE certificated teacher position.
6. Reduction of the Administration Program resulting in the elimination of a .14 FTE certificated administrator position.

The reduction of these PKS resulted in the decrease of certificated employee positions by 4.18 at the close of the 2007-2008 school year. After considering attrition, the Board resolved that it was necessary to terminate 3.7 FTE certificated employees as a result of this reduction in 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 Education Code section 44949.

As part of its Resolution, the Board adopted "tie-breaker" criteria, to be used to establish who should not be laid off when two or more employees have the same first date of paid service as probationary certificated employees. The Board directed the Superintendent to take all appropriate action needed to implement the resolution, including the sending of appropriate notices to all employees whose positions would be affected by the Resolution.

4. On March 12, 2008, Superintendent Haines personally delivered a letter to respondents advising them of her recommendation to the Board that they be given notice that their services would not be required for the 2008-2009 school year.

¹ The Board did not adopt the District's recommended item 4, which called for the PKS reduction of the GATE Program, resulting in the elimination of a .5 F.T.E. Certificated Teacher position.

Respondents were advised of their right to request a hearing. Respondents were provided copies of Resolution 07/08-07, Education Code sections 44949 and 44955, and a blank Request for Hearing Form.

5. On March 14, 2008, Superintendent Haines advised the Board that notice had been given to the following six certificated employees that their services would not be required for the 2008-2009 school year: Dolores Zombory (.7 FTE); Kathleen Trilevski (.5 FTE), Helen Gray (.5 FTE), Tammy Fraser (1.0 FTE) and Gina DeSantis (1.0 FTE).

6. Respondents timely requested a hearing.

7. On March 27, 2008, Superintendent Haines signed an Accusation to reduce or eliminate PKS pursuant to the Resolution and to eliminate respondents' services for the 2008-2009 school year. Respondents were served with the Accusation, and a statement advising them of the need to file a Notice of Defense to request a hearing, a blank Notice of Defense form, the Resolution, and pertinent statutes.

8. Respondents timely filed their Notices of Defense and requests for hearing.

Respondents raised no challenges to the manner in which they were noticed by the District of their layoffs pursuant to Education Code sections 44949 and 44955.

Implementing the Resolution

9. In implementing the Resolution, the District determined that it was necessary to reduce a smaller FTE within two PKS reductions than those approved by the Board. Specifically, the Supplemental Instruction Reading Program was reduced by only by .67, rather than the .86 FTE approved in the Resolution, and the Computer and PE Preparation Program was reduced by only by .67, rather than the 1.14 FTE approved in the Resolution. Superintendent Haines testified that the elimination of PE Preparation, which is required by the collective bargaining agreement, was an error in the Resolution, and that the reduction only affected the computer program. These changed figures had no impact on the District's overall need to reduce the total of 3.7 FTE certificated employees as authorized by the Board's Resolution and did not prejudice respondents.

10. *Seniority List:* Prior to implementing the Resolution, the District created a Certificated Seniority List (Seniority List) that listed each employee's name, start date, FTE entitlement, status as permanent or probationary, 2007-2008 assignments, and credentials, including master's degrees and special certificates. The Seniority List was made available to District certificated employees on two occasions, and was revised by the District in consultation with its attorney.

Pursuant to the Seniority List, seven certificated employees, including respondents, shared the same start date, or first date of paid service to the District. In implementing the Resolution and determining which certificated employees would receive layoff notices, the District used the Resolution's tie breaker criteria for these employees. An integrated seniority list was not created after the tie breaker was implemented; however, a separate list indicated the relative positions of the affected employees.

11. *Tie Breaker Criteria:* As set forth in Resolution 07/08-07, the Board adopted the following tie breaker criteria, based upon its determination of the needs of the District and its students:

1. Individuals with full time employment at [the . . .] District during the 2007-08 school year will be given preference over those with part-time employment. If these factors are identical, then
2. Individuals with more than one year's experience (that is, experience beyond the current school year) serving students in the . . . District will be given preference. If these factors are identical, then
3. Individuals credentialed to teach a departmentalized science program to seventh and eighth grade students will be given preference. If these factors are identical, then
4. Individuals with the most extra-duty/coaching experience at Camino School will be given preference. If these factors are identical, then
5. Individuals holding a Master's Degree will be given preference.

12. *Gina DeSantis:* Respondent DeSantis is a probationary employee whose first date of paid service with the District was August 13, 2007. Ms. DeSantis has a multiple subject credential and a single subject (English) credential. She has a master's degree and a CLAD certificate. During the 2007-2008 school year, Ms. DeSantis was employed full time (1.0 FTE) and assigned to teach in the second grade. She is affected by the reduction in PKS in the District's Primary School Teaching Program.

13. *Helen Gray:* Respondent Helen Gray is a probationary employee. Ms. Gray first began to work with the District in 2005. According to the Seniority List, Ms. Gray was a probationary I employee with a first date of paid service with the District of August 13, 2007. Ms. Gray has a multiple subject credential, a CLAD certificate, and a master's degree in curriculum instruction with emphasis in language development and early learning programs. During the 2007-2008 school year, Ms.

Gray was employed part time (.5 FTE) and assigned to teach in kindergarten/first grade. She is also affected by the reduction in PKS in the District's Primary School Teaching Program.

As discussed below, Ms. Gray asserts that the District failed to give her a written notice that she was hired as a temporary employee before she began working in this capacity in September 2005. She argues that, as a consequence, her seniority date is incorrect and she cannot be laid off.

14. Under the approved tie breaker criteria, respondent Ms. Gray was eliminated on the first criteria, as a part-time .5 FTE teacher. Even though Ms. Gray had worked with the District in various capacities since 2005 and therefore satisfied the second criteria, no subsequent tie breaker criteria were applied to her. Respondent Ms. DeSantis was eliminated on the second criteria because she had not worked in previous years with the District. Even though Ms. DeSantis met the fifth criteria by having a master's degree, no subsequent tie breaker criteria were applied to her.

Respondents contend that the District's selection and application of the tie breaker criteria did not meet the legal standard because the criteria adopted did not meet the needs of the District and its students. Specifically, respondents contend that use of the "drop down" method of applying the criteria [i.e., elimination of the employee by the first criteria he/she does not meet], demands that the most important criteria be placed first. Respondents argue that having master's degrees should be considered to be of greater importance to the best interests of the District and its students than teaching full time or previously with the District. Respondents further assert that, because the District has occasionally authorized part time teaching in the past, the criteria preferring full-time over part-time teachers is arbitrary and capricious.

15. Education Code section 44955 establishes the primacy of seniority in implementing layoffs, and mandates that the "services of such employees shall be terminated in the inverse of the order in which they were employed. . ." (Educ. Code 44955, subd. (c).) To determine relative seniority between certificated employees who began rendering paid service to the District on the same date, subdivision (c) provides, in pertinent part, that:

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. . .

16. Respondents' argument is not persuasive. The selection of tie breaker criteria is within the sound discretion of the Board and will not be disturbed absent a showing that the Board failed to follow proper procedures, or that its exercise of discretion was fraudulent, arbitrary or capricious. (*Santa Clara Federation of*

Teachers v. Governing Board of Santa Clara Unified School District (1981) 116 Cal.App.3d 831, 845.) The Resolution expressly provides that the Board considered and determined that the criteria adopted are in the best interests of the District and its students. The criteria are objective and reflect the considered opinion of the Board. Prior to adopting the proposed tie breaker criteria, the Board amended the criteria to expand extra duty that would be considered [i.e., from "extra-duty coaching experience" to "extra-duty/coaching experience"]. While respondents' concerns are understandable, reasonable minds can differ on what is within the best interests of the District and its students. The Board is the policy making body. The evidence does not support a finding that the tie breaker criteria, either as adopted or as applied, are fraudulent, arbitrary or capricious.

17. *Class Size Reduction Program* The effect of the Resolution was to reduce the number of teachers in the District's Primary School Teaching Program from ten FTE in 2007-2008 to eight FTE in 2008-2009. Respondents argue that the District's Primary School Teaching Program is not a PKS that can be reduced because the District currently participates in the Class Size Reduction Program (CSRP) and cannot maintain the required class size ratio if 2 FTE teachers are eliminated.

There is no merit to this argument. First, the CSRP is a categorical program. Although the District currently participates in the CSRP for kindergarten through third grade, the CSRP is not a state or federally mandated program. Second, the District will rehire primary school teachers as necessary during the 2008-2009 school year to maintain its eligibility for the CSRP. The testimony of District's Chief Financial Officer (CFO) Vanessa Constancio established that the District has careful mechanisms in place to monitor and maintain the CSRP ratio (20.44 pupils to 1 teacher by April 15th), including hiring additional teachers as necessary.

18. *Status of Sarah Schreiber*: Ms. Schreiber is a probationary employee who shares the August 13, 2007 first date of paid service. Ms. Schreiber has a multiple subject credential and a supplementary authorization to teach introduction to science. She also has a CLAD certificate and a master's degree in environmental policy and science. Based upon her coursework, the District determined that Ms. Schreiber met the "highly qualified" criteria for NCLB. After application of tie breaker No. 3 (individuals credentialed to teach a departmentalized science program to seventh and eighth grade students), Ms. Schreiber was not issued a lay off notice.

Ms. Schreiber's supplementary authorization status was subject to questioning. The weight of the evidence establishes that Ms. Schreiber currently has an application for credential authorizing her to teach introductory science pending evaluation with the California Commission on Teacher Credentialing (Commission). In reliance on her completion of required coursework, the El Dorado County Office of Education issued Ms. Schreiber a supplementary authorization to teach this subject that is valid through September 15, 2008, "or until the credential applied for is either granted or denied by the . . . Commission . . . , or the application is withdrawn by the applicant."

Consequently, the District appropriately applied this criterion to Ms. Schreiber to remove her from the layoff process.

Status of Respondent Helen Gray

19. Before the 2007-2008 school year, Ms. Gray's relevant work history with the District is as follows: During the 2005-2006 school year, Ms. Gray taught sixth grade full time at the District as a temporary employee. Ms. Gray applied for but was not hired for the 2006-2007 school year. In January 2007, she was rehired as a temporary, part-time, multiple subject teacher and a temporary hourly-programs teacher. Ms. Gray remained on the District's substitute list and was hired to teach summer school in June 2007.

Pursuant to the Seniority List, Ms. Gray's first date of paid service as a District probationary certificated employee was August 13, 2007, when she began working a .5 FTE for the 2007-2008 school year. On August 24, 2007, Ms. Gray signed an "Understanding of Employment for Certificated Personnel" for fiscal year 07/08, which showed her employment status as "Prob. I." Prior to the 2007-2008 school year, the District did not have a practice of having their employees sign a document outlining the understanding of employment.

20. At issue is whether Ms. Gray became a probationary employee in September 2005, as a matter of law, because the District failed to provide her with written notice of her status as a temporary employee at the initial time of her employment, pursuant to Education Code section 44916, which provides that:

The classification shall be made at the time of employment and thereafter in the month of July of each school year. At the time of initial employment during each academic year, each new certificated employee of the school district shall receive a written statement indicating his employment status and the salary that he is to be paid. If a school district hires a certificated person as a temporary employee, the written statement shall clearly indicate the temporary nature of the employment and the length of time for which the person is being employed. If a written statement does not indicate the temporary nature of the employment, the certificated employee shall be deemed to be a probationary employee of the school district, unless employed with permanent status.

21. On August 10, 2005, before the beginning of the 2005-2006 school year, the District posted a Certificated Vacancy Notice for a one year position of "full-time sixth grade teacher (Temporary)." On August 11, 2005, Ms. Gray saw the notice. She was interested and immediately wrote a handwritten letter of application

to Ms. Haines. Ms. Gray testified that she understood that the position was temporary.

22. Ms. Gray's initial employment for the 2005-2006 school year was as a substitute sixth grade teacher. She worked as a substitute teacher for the last 15 days of August while waiting response to her application.

23. On September 14, 2005, the Board approved the District's "Recommendation for Certificated Employment" of Ms. Gray as a temporary sixth grade teacher, by changing her position from that of substitute to temporary employee. The "starting date" indicated on the document was September 1, 2005. District CFO Ms. Constancio testified that, typically, the hiring date would be prospective from the date of Board approval. The Board made Ms. Gray's hiring as a temporary employee retroactive to September 1, 2005, as a benefit to ensure she received a full month's credit for retirement purposes with CalSTRS.

24. The Board's decision to make Ms. Gray a temporary employee was confirmed in a September 19, 2005 memorandum to her from administrative secretary Jody Westfall.

25. Superintendent Haines acknowledged that Ms. Gray did not receive a written notice from the District advising her of her temporary status before she began to serve in the temporary position. During the 2005-2006 school year, Superintendent Haines learned that an employee hired in a temporary status was entitled to written notice before beginning such employment. On February 28, 2006, Superintendent Haines sent Ms. Gray a memorandum "to confirm in writing that you and I discussed your temporary status for the 2005-06 school year." At the superintendent's request, Ms. Gray signed the memo "to indicate that we have had this conversation to confirm your temporary status for the 2005-06 school year."

26. Ms. Gray was reemployed by the District for the 2006-2007 school year on a temporary status beginning in January 2007. No written documentation of Ms. Gray's employment status with the District for the 2006-2007 school year was offered.

27. Prior to the reductions in force at issue, Ms. Gray did not advise the District of any changes or corrections to be made to her seniority date on either of the two occasions the District provided a Seniority List.

On January 25, 2008, Superintendent Haines sent a memo to all certificated staff, including Ms. Gray, with a Seniority List that the employees were asked to review, sign and return to District administrative secretary Ms. Westfall. At the time this Seniority List was compiled, the District's practice was to use the first date after the Board approved a hiring as the employee's "date hired." This Seniority List

identified Ms. Gray's "date hired" as June 5, 2007. Ms. Gray signed and returned the Seniority List, without correction, on January 25, 2008.

On February 6, 2008, Superintendent Haines sent a memo to all certificated employees, including Ms. Gray, regarding their "date of hire." The superintendent advised that, after meeting with legal counsel, the "hire date for certificated personnel is the first day that the employee is in paid status as a district employee." The Superintendent provided a revised Seniority List to reflect this change. Employees were asked to sign and return the new Seniority List and to see the Superintendent with any questions or concerns. Ms. Gray's revised "date hired" was listed as August 13, 2007. Ms. Gray signed this form, without correction, on February 7, 2008 and returned it to the District.

28. In *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal. 4th 911, a teacher filed a petition for a writ of mandate, alleging that the District had a duty to classify her as a probationary employee pursuant to Education Code section 44916 because it had failed to provide her with timely written notice that she was only a temporary employee. The Supreme Court determined that:

Section 44916 thus mandates that a school district comply with three requirements if it desires to hire a "new certificated employee" . . . as a temporary employee: it must (a) notify the employee of his or her salary and status as a temporary employee; (b) do so in a written notice; and (c) give such notice "[a]t the time of initial employment."

The Court determined that the time the notice was provided to a new certificated employee was crucial:

As we have seen, the time of classification is important in determining a teacher's rights to reelection and promotion, if any, and to determining the level of procedural protections to which a teacher is entitled should he or she be dismissed or nonreelected. Because section 44916 places the burden on the governing boards of school districts to inform teachers of their classification and salary, and enforces this burden with a default classification that benefits teachers, we conclude the Legislature's intent and purpose in enacting section 44916 was to benefit teachers. Stated differently, section 44916 reveals the Legislature's intent that certificated teachers be informed of their classification at a time that is sufficiently early in the process to enable them to make informed decisions regarding their future employment.

The Court held that, because she did not receive such notice on or before her first day of paid service, Ms. Kavanaugh was not given written notice of her status as a temporary employee "at the time of [her] initial employment." Accordingly, the Court determined that, pursuant to section 44916, she must be considered a probationary employee as a matter of law.

29. Under Education Code section 44916, Ms. Gray became a probationary employee by operation of law no later than the Board's approval of her change in status to temporary on September 14, 2005. Although Ms. Gray was aware that the position for which she was hired was temporary, and subsequently signed documents at the superintendent's request confirming that this had been discussed,

any contractual provision purporting to waive the protections accorded certificated school employees by the Code, including the provisions governing their classification and termination, is "null and void." (citations omitted). . . "The statutory provisions in the Education Code, governing the rights of teachers, are an expression of public policy; they cannot be bargained away either expressly or impliedly." (*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal. App. 4th 1260, 1275, quoting *Hart Federation of Teachers v. William S. Hart Union High Sch. Dist.* (1977) 73 Cal. App. 3d 211, 214.)

Similarly, given the complexity of the Education Code's classification system for certificated employees, it is not reasonable to expect Ms. Gray to have understood the effect of the lack of notice in 2005, when presented with the District's Seniority Lists in 2008. Her layperson's understanding of her classification status was reinforced by the fact that she signed an understanding of employment making her a probationary employee in 2007, and the revised Seniority List was consistent with this agreement.

30. Because Ms. Gray became a probationary employee on September 14, 2005, the District did not establish that no employee junior to Helen Gray is being retained to perform the services which she is competent and certificated to render.

LEGAL CONCLUSIONS

1. Education Code section 44949 provides, in pertinent part, as follows:
 - (a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his

or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

[¶] . . . [¶]

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. . . If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision.

2. Education Code section 44955 provides, in pertinent part, that:

(b) Whenever in any school year . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, . . . and when in the 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.

[¶] . . . [¶]

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.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

3. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. As set forth in Factual Findings 1 through 8, 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 are factually and legally appropriate.

4. The Governing Board may reduce, discontinue or eliminate a particular kind of service and then provide the needed services to the students in another manner. (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571; *California Teachers Association v. Board of Trustees of Goleta Union School Dist.* (1982) 132 Cal.App.3d 32.) A school board may reduce services within the meaning of the statute either by determining that a certain type of service shall not be performed at all or by reducing the number of district employees who perform such services. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.)

As set forth in Factual Findings 3 and 17, the services set forth in Board Resolution 07/08-07 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 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 Education Code section 44949.

5. In the course of reducing, discontinuing or eliminating a particular kind of service, the Governing Board may retain certificated employees junior to respondents to perform services which respondents are not certificated and competent to render. (*Moreland Teachers Association v. Kruse* (1980) 109 Cal.App.3d 648.)

8. As set forth in the Factual Findings and Legal Conclusions as a whole, the District has established that no employee junior to Gina DeSantis is being retained to perform the services which Ms. DeSantis is competent and certificated to render.

9. As set forth in the Factual Findings and Legal Conclusions as a whole, and particularly in Factual Findings No. 19 through 30, the District has not

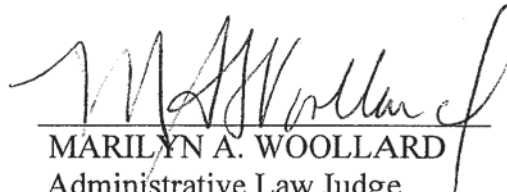
established that no employee junior to Helen Gray is being retained to perform the services which Ms. Gray is competent and certificated to render.

ORDER

1. Notice shall be given to respondent Gina DeSantis that her services will be reduced by 1.00 FTE in the 2008-2009 school year, because of the reduction and discontinuance of particular kinds of services.

2. The Accusation for layoff against respondent Helen Gray is dismissed.

DATED: May 5, 2008


MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings