

BEFORE
THE GOVERNING BOARD OF THE
VALLEY CENTER-PAUMA UNIFIED SCHOOL DISTRICT
SAN DIEGO COUNTY, STATE OF CALIFORNIA

In the Matter of the Proposed Reduction in
Force Proceeding Involving:

SUE SIMPSON, R.N.,

Respondent.

OAH No. 2013040183

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Colton, California, on April 23, 2013.

Clifford D. Weiler, of Atkinson, Andelson, Loya, Rudd & Romo, represented the Valley Center-Pauma Unified School District.

Fern M. Steiner, of Smith, Steiner, Vanderpool & Wax, APC, represented respondent Sue Simpson, who was present throughout the proceeding. Also present was Patti Bailey of the California Teachers Association.

The matter was submitted on April 23, 2013.

FACTUAL FINDINGS

The Valley Center-Pauma Unified School District

1. The Valley Center-Pauma Unified School District (District) is located in North San Diego County and serves the communities of Valley Center and Pauma Valley. The District operates and maintains one comprehensive high school, an alternative high school, one middle school, four elementary schools, and one preparatory school for independent study and home school students. The District provides educational services to approximately 4,000 students from kindergarten through 12th grades.

The District employs approximately 250 certificated employees, one of whom serves as a certificated school nurse.

The District has projected a budget deficit of approximately \$1.1 million for the 2013-2014 school year.

2. The District is governed by an elected five member Board of Education. Lou Obermeyer, Ed.D. is the Superintendent of Schools. Mark Garner is the Director of Human Resources.

The Fiscal Crisis

3. Public schools rely on financing from the State of California. A school district cannot determine the level of funding it will receive from the State of California until the state budget is chaptered, an event that is supposed to occur each year in late June. Before then, a school district's governing board, must produce and file a balanced budget with the County Office of Education and take other steps to ensure that financial ends meet if the worst-case financial scenario develops.

California's economic problems have impacted the Valley Center-Pauma Unified School District. If the District cannot meet its financial obligations, the San Diego County Office of Education has the authority to intervene and take over the District's operations.

The District's Response

4. In response to the projected budget shortfall for the 2013-2014 school year, the District determined that it could trim expenditures in the 2013-2014 school year by eliminating the school nursing position, a particular kind of service that was being provided by Sue Simpson, R.N., a credentialed employee.

5. On March 14, 2013, the Board adopted Resolution No. 2012-03, which provides:

WHEREAS, because of budget and revenue considerations statewide and including within this school district, because of the desire and need to reassess educational priorities and the delivery of certificated services, and it being necessary to commence implementing program changes in a timely fashion within the current structure of the law, this District's Governing Board determines that it is in the best interests of the District and the welfare of the schools and the pupils thereof, to commence certificated layoff proceedings to discontinue a particular kind of services ("PKS") as hereinafter enumerated and to reduce the corresponding number of certificated staff no later than the beginning of the 2013-2014 school year;

WHEREAS, this discontinuance of certificated services shall result in the layoff of certificated personnel in accordance with Education Code sections 44955 and 44949 which provide a process whereby particular decisions, actions and notifications must be undertaken beginning no later than March 15 of each school year regarding layoffs of certificated personnel in order to reduce the number of certificated staff, and this Board desires to reduce certificated staff as permitted by law;

WHEREAS, this Governing Board desires to discontinue the particular kind of certificated service of nursing services in the amount of one (1.0) full time equivalent ("FTE") not later than the beginning of the 2013-2014 school year;

WHEREAS, that discontinuance of service will be accomplished by providing at least services which are mandated to be performed by nurses, in a different method and manner as are currently being provided;

WHEREAS, in the opinion of the Governing Board, it will be necessary as a result of the Discontinuance of this particular kind of services to decrease the number of certificated permanent and/or probationary employees by a corresponding number of full-time equivalent positions;

WHEREAS, in determining the extent of staff FTE discontinuance and services to be reduced, the Governing Board has considered all assured and/or known attrition as of this time to the extent required by law;

NOW, THEREFORE, BE IT RESOLVED,
DETERMINED AND ORDERED by this
Governing Board, as follows:

1. All of the above recitals are true and correct;
2. The particular kind of service of nursing services is hereby to be and shall be discontinued and otherwise eliminated to the described extent (1.0 FTE, i.e., all services) not later than the

beginning of the 2013-2014 school year, within the meaning of Education Code section 44955, subdivision (b)

3. It is the opinion of this Governing Board, in view of the Discontinuance of this particular kind of services, that it is necessary to decrease the number of permanent and/or probationary employees serving in positions requiring certification qualifications within this school district at the close of this school year by a corresponding number of full-time equivalent positions;

4. Subject to requirements (if any) within the Educational Employment Relations Act, that for purposes of “competency” as to “bumping” (displacement) rights within the meaning of Education Code section 44955(b) and as to reemployment rights within the meaning of Education Code sections 44956 and 44957, to the extent such might apply, “competency” shall be based upon all of the following:

- possession and current filing (no later than March 10, 2013) of a preliminary or clear credential for the subject matter into which the employee would bump for the 2013-2014 school year or as to which reemployment would apply;

- highly qualified status within the meaning of the No Child Left Behind Act for the subject matter into which the employee would bump for the 2013-2014 school year or as to which reemployment would apply;

- an appropriate EL certification for the subject matter into which the employee would bump for the 2013-2014 school year or as to which reemployment would apply; and

- active employment in this school district of at least one complete school semester at .50 FTE (50% workload) or more within the last two school years of the effective date of what would be active service and based upon a preliminary or clear credential, serving within the particular kind of service into which the employee would

bump for the 2013-2014 school year or as to which reemployment would apply;

5. For purposes of seniority tie-breaking criteria within the context of layoff and reemployment within the meaning of Education Code section 44955, subdivision (b) (third paragraph), section 44846 (second paragraph), section 44956 and section 44957, the Governing Board determines that seniority ties shall be broken in accordance with the criteria listed within Exhibit A, said criteria being based solely upon the current needs of the District and the students thereof.

6. The Superintendent or the Superintendent's designee(s) is(are) instructed to take the steps necessary pursuant to the Education Code including, in part, sections 44955 and 44949, to implement the above and to reduce the certificated staff as set forth hereinabove;

7. The actions of this Governing Board will not, in any way, be considered to prejudice the rights of any certificated employee to whom notice will be given of the superintendent's recommendations, should any employee request a hearing to contest this matter.

The Nursing Services Provided by Respondent

6. Respondent Sue Simpson, R.N. ably provides certificated nursing services for the Valley Center-Pauma Unified School District. Ms. Simpson is the only certificated employee who provides certificated nursing services within the District. Ms. Simpson does not have the seniority and a credential that would allow her to "bump" into a position held by any junior certificated employee.

The Particular Kind of Service

7. The nursing services identified in Resolution 2012-03 is a particular kind of service that can be reduced under the Education Code. The enactment of Resolution No. 2012-03 was neither arbitrary nor capricious; its enactment was well within the Board's discretion, even though other persons or entities may have reached a different conclusion; as a result of the enactment of Resolution 2012-03, nursing services will not be lowered to a level below that mandated by state or federal law; Resolution No. 2012-03 arose out of the economic crisis, the Board's duty to balance its budget, and a desire to obtain greater flexibility in the provision of nursing services; the enactment of Resolution 2012-03 was, to

that extent, in the best interest of the District and the students thereof.

The Issuance of Preliminary Layoff Notices/Jurisdictional Documents

8. Respondent was the only employee who was required to receive a preliminary layoff notice under Resolution 2012-03.

Service of Preliminary Layoff Notices and Notices of Hearing

9. The District timely served respondent with a preliminary layoff notice and all other required documents. Respondent requested a hearing. The District timely served respondent with a Notice of Hearing, setting the hearing in this reduction in force proceeding for April 23, 2013, to commence at 10:00 a.m., at the District's Office in Valley Center, California.

The Administrative Hearing

10. On April 23, 2013, the record in this reduction in force proceeding was opened. Respondent stipulated to the truth of the allegations set forth in paragraphs I, II, IIA, IV, V, VI, VII, and XII of the Accusation, and to the truth of the matters alleged in paragraph III B except that respondent contested the allegation that the elimination of nursing services was "necessary." In addition, respondent disputed the conclusions set forth in paragraphs VII, X and XI. Respondent stipulated to the admission of Exhibits 1 through 21, and the District stipulated to the admission of Exhibits A and B. Jurisdictional documents were introduced; the caption was amended to delete any reference to an accusation; opening comments were given; sworn testimony was taken; closing arguments were given, the record was closed and the matter was submitted.

Director Garner's Testimony

11. Mark Garner is the District's Director of Human Resources. He testified that as a result of the District's budgetary situation and a desire to obtain more flexibility in the delivery of nursing services, the Board enacted Resolution 2012-03. Director Garner was familiar with the nature and extent of the mandated nursing services the District is required to provide, and he was aware of the nursing services that Ms. Simpson was providing. The District was satisfied with Ms. Simpson's services, and the enactment of Resolution 2012-03 had nothing to do with any complaint and it was not a subterfuge for a dismissal for cause. Director Garner testified that the District will provide mandated nursing services through independent contractors, including vision and hearing screening and testing, scoliosis testing, IEP nursing assessments, physical examinations, emergency medical services, medication administration, the training of health clerks and substitutes, providing EpiPen training, meeting with parents, and other nursing services. Director Garner testified that fire stations are located in close proximity to all campuses and that the EMT response time following a District contact concerning a life-threatening event was two to four minutes. Director Garner testified that by obtaining nursing services from an outside vendor, more than one nurse

could be present at the same time at a school site or at an event, and that would result in greater flexibility. Director Garner testified that the District had not sought the provision of nursing services from an outside vendor pending the resolution of this reduction in force proceeding. Director Garner was confident that the District would provide all mandated services as required by law.

On cross-examination, Director Garner conceded that the District's reserves were well funded and that the projected cost savings arising out of the elimination of nursing services likely would be somewhere between \$11,000 and \$37,000 per year. Director Garner believed a certificated school nurse provided through an outside vendor would be present at the District 20 to 40 hours per week.

Respondent's Testimony

12. Ms. Simpson is a certificated school nurse who has been employed by the District for six years. She works each school day from 8:00 a.m. until 3:00 p.m., and she frequently works additional hours, at no cost to the District, completing reports and other paperwork and meeting with parents and others in the community. Ms. Simpson provides nursing services at all school sites. Her mandated services include vision screening; IEP assessments for Special Education students; attending IEP meetings as required for health-related issues; scoliosis screening; the training of all health clerks and their substitutes; and the provision of insulin and other medications as required.

Ms. Simpson provided a narrative "day in the life" statement that outlined what she does as a certificated school nurse on a daily basis. In that statement, Ms. Simpson discussed nursing ratios and her employment as a substitute and an Adult ED teacher before she was hired as a certificated school nurse. She wrote: "School nursing is a complex and difficult job, especially when you are the sole RN. Many nurses quit when they realize how much is involved. In fact, the nurse hired before me only stayed one year. You have to want to be a school nurse. I have always believed that 'nursing is the gentile art of caring.'"

Ms. Simpson's day may include such tasks as responding to telephone messages from parents, teachers, and administrative staff; reviewing and responding to numerous emails, some of which involve county-wide communicable disease issues; substituting for health care aides who are ill; administering medications to students as required; determining who should accompany a student with a severe allergy to bee stings on a class outing; supervising the administration of insulin to students; providing hearing and vision screenings; making referrals to insurance carriers and physicians; assessing students; completing required paperwork; and addressing community groups on health-related issues.

As a result of her long terms service with the District, Ms. Simpson has developed close relationships with students and their families; she is aware of their unique needs; the students and parents trust her. Ms. Simpson is very concerned about the health, safety and welfare of students within the District if her nursing position is given to the highest bidder.

The Reduction in Force Proceeding

13. The enactment of Resolution No. 2012-03 was the result of a budgetary crisis and the need to increase flexibility in the delivery of nursing services; Resolution No. 2102-03 was enacted in good faith, was necessary, and was reasonable, even though other persons or entities similarly situated may have reached a different conclusion. Enacting Resolution 2012-03 was deemed to be in the best interest of the District and its students. No junior employee was retained to provide services that Ms. Simpson was credentialed and competent to provide. The District complied with all jurisdictional requirements.

LEGAL CONCLUSIONS

Statutory Authority - Reduction in Force Proceedings

1. Education Code section 44949 provides in part:

(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 . . . 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. A request for a hearing shall be in writing and shall be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified in that subdivision, which shall not be less than seven days after the date on which the notice is served upon the employee. 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 . . .

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

(2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefor within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds . . .

(d) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee. . . .

(e) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Section 11524 of the Government Code, the dates prescribed in subdivision (c) which occur on or after the date of granting the continuance and the date prescribed in subdivision (c) of Section 44955 which

occurs after the date of granting the continuance shall be extended for a period of time equal to the continuance.

2. Education Code section 44955 provides in part:

(a) No permanent employee shall be deprived of his or her position for causes other than those specified . . . and no probationary employee shall be deprived of his or her position for cause other than as specified . . .

(b) Whenever . . . 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.

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. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) Notwithstanding subdivision (b), 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.

Jurisdiction

3. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied as to all respondents.

The Reduction of Particular Kinds of Services

4. A school board may determine whether a particular kind of service should be reduced or discontinued, and it cannot be concluded that the governing board acted unfairly or improperly simply because it made a decision it was empowered to make. (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 174.) A school board's decision to reduce or

discontinue a particular kind of service need not be tied in with any statistical computation. It is within the discretion of a school board to determine the amount by which it will reduce or discontinue a particular kind of service as long as the school district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.)

In *San Jose*, the school district terminated 409 full-time certificated employees pursuant to its decision to reduce or discontinue particular kinds of services. In their appeal, the employees contended, among other things, that the district could not eliminate all junior and senior high school counseling positions because an estimated 10 percent of the counselors' services consisted of statutorily mandated services for handicapped students. The appellate court disagreed, reasoning that "[t]he record indicates that special counseling services would be provided under special contract. As long as the required services will be provided, the district could properly change the manner of their provision and reduce or eliminate the existing particular kind of service used to provide them. (*San Jose Teachers Assn. v. Allen*, *supra*, 144 Cal.App.3d 627, 639-640.)

An argument that it may be financially irresponsible to hire contract professionals to provide mandated services that have been provided previously by an in-house professional District involves nothing more than an improper attempt to substitute a party's judgment for that of the District. (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571, 1588-1589.)

Determination

5. The charges set forth in the matter of the reduction in force proceeding against Sue Simpson were established by a preponderance of the evidence. As a result of the Board of Education's lawful reduction of particular kind of service, good cause exists under the Education Code to authorize the District to give final notice to respondent Sue Simpson that her employment will be terminated at the close of the current school year and that her services will not be needed by the District for the 2013-2014 school year.

RECOMMENDATION

It is recommended that the Board of Education of the Valley Center-Pauma Unified School District issue a final layoff notice to Sue Simpson advising her that her services as a certificated school nurse will not be required by the District in the 2013-2014 school year.

Dated: April 25, 2013

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings