

BEFORE THE
GOVERNING BOARD OF THE
CALAVERAS COUNTY UNIFIED SCHOOL DISTRICT
CALAVERAS COUNTY, STATE OF CALIFORNIA

In the Matter of the Accusation (Layoff)
Against:

CHRISTOPHER SMITH,

Respondent.

OAH No. 2008040367

PROPOSED DECISION

Administrative Law Judge Marilyn A. Woollard, Office of Administrative Hearings (OAH), State of California, heard this matter in San Andreas, California, on April 28, 2008.

Calaveras Unified School District (District) was represented by Bryan G. Martin, of DeGoede, Dunne and Martin. Elizabeth Valdez, District Personnel Coordinator, was also present on the District's behalf.

Thomas J. Driscoll, of Driscoll and Associates, represented respondent Christopher Smith who was present.

FACTUAL FINDINGS AND DISCUSSION

1. James Frost is the Superintendent of the Calaveras County Unified School District (District). Mr. Frost's actions and the actions of the District Board of Trustees/Governing Board (Board) were taken in their official capacities.

2. The District serves approximately 3600 students from kindergarten (K) through twelfth grades at its six elementary schools, Toyon Middle School (Toyon), and Calaveras High School (CHS). CHS encompasses several alternative schools, including West Point Alternative (WPA).

3. Respondent Christopher Smith is a permanent certificated employee of the District who has a single subject clear credential in business. He teaches at CHS. Respondent is a "highly qualified" business teacher under No Child Left Behind. By virtue of his business credential, respondent is authorized to teach grades K through

twelve, preschool, and classes organized primarily for adults. The single subject business credential confers authorization to teach accounting, business communications, business English, business mathematics, business management, business marketing, computer concepts and applications, consumer education, data processing, economics, general office occupations, keyboarding, marketing, shorthand, typewriting, and word processing. (Cal. Code Regs., tit. 5, § 80005, subd. (a)(3).)

4. On March 11, 2008, in Resolution 2007/08-16, the Board found it to be in the best interest of the District to reduce or discontinue the following particular kinds of services (PKS), as of the end of the 2007-2008 school year: One (1.00) Full-Time Equivalent (F.T.E.) high school certificated business department position.

The Board authorized the Superintendent or his designee "to initiate and pursue procedures necessary to not reemploy the equivalent of One (1.00) Full-Time Equivalent certificated business employee of this District pursuant to Education Code sections 44949 and 44955 because of said reduction and discontinuance of services."

On March 11, 2008, the Board also adopted Resolution No. 2007/08-17, which provided the "tie-breaking" criteria for resolving seniority ties between certificated employees with common dates of hire, pursuant to 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. On March 13, 2008, Superintendent Frost notified respondent in writing that he had recommended to the Board that respondent's services be discontinued by the District for the 2008-2009 school year. Respondent was advised of his right to request a hearing. With this notice, respondent was provided a copy of Resolutions 2007/08-16 and 2007/08-17, Education Code sections 44949 and 44955, and a blank request for hearing form.

6. On March 20, 2008, respondent requested a hearing to determine whether there was cause for not being reemployed for the 2008-2009 school year.

7. On April 1, 2008, Superintendent Frost made and signed an Accusation for layoff against respondent for the 2008-2009 school year, based upon Education Code section 44949 and 44955 and Resolution 2007/08-16 for the reduction of 1 FTE certificated employee.¹ This Accusation was served on respondent with required accompanying documents, including a blank Notice of Defense form.

¹Superintendent Frost clarified that the reference in the Accusation, at paragraph VI, to "employees" to be decreased was an error and that the Resolution only authorized the reduction of a single employee.

8. On April 7, 2008, respondent's attorney filed a Notice of Defense on his behalf.

Order of Economic Layoffs

9. As set forth in Education Code section 44955, subdivisions (b) and (c), economic layoffs are generally to be carried out on the basis of seniority, with layoffs required to proceed in the inverse order of seniority. A teacher with more seniority typically has greater rights to retain employment than a junior teacher. 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. (*Campbell Elementary Teachers Assn. v. Abbott*, 76 Cal. App. 3d 796, 813; *Wellbaum v. Oakdale Joint Union High School District* (1977) 70 Cal. App. 3d 93, 97-98.) The displacement of a junior teacher by a senior teacher is known as "bumping." The seniority rule is not absolute, and a junior teacher with a needed credential or skills may be retained even if a more senior teacher is terminated. Such "skipping" is recognized by statute (Ed. Code § 44955, subd. (d)(1)) and appellate law. (*Santa Clara Federation of Teachers, Local 2393 v. Governing Board of the Santa Clara Unified School District* (1981) 116 Cal.App.3d 831.)

In order to depart from a seniority-based economic layoff, Education Code section 44955, subdivision (d) (1), places the burden on the District to "demonstrate[] a specific need for personnel to teach a specific course or course of study... and that the certificated employee (to be skipped) has special training and experience necessary to teach that course or course of study...which others with more seniority do not possess."

10. *Respondent's Contentions:* Respondent contends that the District cannot, as a matter of law, proceed with its layoff against him because the Board did not pass a separate resolution authorizing it to "skip" less senior employees. Respondent, whose first date of service with the District was on July 21, 2000, asserts that the District had an affirmative duty to assign and reassign employees to retain him, and that it did not meet its burden of proof to skip the following less senior employees: Cynthia Larson (July 27, 2001), Jason Remmers (November 26, 2001), and/or Eileen Thorpe (February 1, 2003). Respondent also asserts that he is competent to fill the position of a retiring senior employee.

11. *Skipping Resolution:* Respondent cites no authority for the asserted requirement that the Board must pass a resolution expressly authorizing the "skipping" of junior certificated employees. Education Code section 44955, subdivision (b), requires the Board to adopt seniority tie breaking criteria. The Board complied with this mandate by adopting Resolution 2007/08-17. Education Code section 44955, subdivision (d), which addresses the circumstances under which

skipping can occur, does not contain a similar mandate. While it is the better practice to pass a skipping resolution (either separately or as part of the resolution for PKS reduction or elimination), this action is not required by either Education Code sections 44949 or 44955.

In this case, the Board's Resolution 2007/08-16 references and authorizes the Superintendent or his designees to act on its behalf to implement the layoff pursuant to this statutory authority. The language of section 44955, subdivision (d), which authorizes skipping in limited circumstances, is therefore incorporated into the Board's Resolution and the authorization it provided to the District.

Did the District Appropriately Skip Less Senior Employees?

12. The District had three certificated teachers in the business department at CHS: Kaaren Egge, whose seniority date is July 27, 1998, Richard Behler, and respondent. Mr. Behler and respondent share the seniority date of July 21, 2000. The District applied Resolution 2007/08-17's tie breaking criteria to them. Mr. Behler was retained due to his additional CLAD credential [Criteria No. 2]. Respondent stipulated that Mr. Behler was appropriately placed senior to him based upon the application of Resolution 2007/08-17.

13. Cynthia Larson has a single subject credential in business and teaches business at the District's Toyon Middle School. Ms. Larson's first date of paid probationary service to the District was July 27, 2001. As a result, Ms. Larson has one year less seniority than the respondent. She was not issued a layoff notice.

14. During the 2007-2008 school year, Ms. Larson taught six or seven classes of keyboarding at Toyon. Keyboarding is within the subjects respondent is authorized to teach with his business credential.

15. In addition to her business credential, Ms. Larson holds a vocational education credential in "basic office practice in secretarial skills." Elizabeth Valdez is the District's Coordinator of Personnel. She was responsible for determining who would be issued the layoff notification authorized by Resolution 2007/08-16. Ms. Valdez testified that Ms. Larson's vocational education secretarial skills credential did not authorize her to do anything that respondent cannot do with his business credential. Pursuant to the "Administrator's Assignment Manual" of the California Commission on Teacher Credentialing, vocational education classes may be taught by teachers holding business credentials.

16. Ms. Larson also holds a single subject credential in home economics. Due to the retirement of Toyon's full time home economics teacher, the District wants the flexibility to offer some (.5 FTE) home economics classes in the coming academic year. Board Resolution 2007/08-16 did not include home economics as a PKS to be reduced from 1 FTE to .5 FTE for the 2008-2009 school year.

17. Ms. Larson holds an "EL" certificate that authorizes her to provide instruction to limited-English proficient pupils in the areas of business and home economics.

Superintendent Frost testified that having an EL certificate was "part of having a fully credentialed teacher." He acknowledged that less than three percent of the District's students were English language learners. During the 2007-2008 school year, only 43 of the District's students were limited English proficient; one of these students was enrolled in Ms. Larson's keyboarding class.

Superintendent Frost was aware that respondent had completed his coursework for his EL certificate and had only to submit a portfolio. It was undisputed that respondent did not have his EL certificate as of March 15, 2008.

18. Superintendent Frost testified that Ms. Larson was retained over respondent because she had an EL certificate and a certificate in home economics. As a result, Ms. Larson could "meet the needs of our students" because she could have a split assignment in keyboarding and home economics.

19. In *Alexander v. Board of Trustees of the Delano Joint Union High School District* (1983) 139 Cal. App. 3d 567, the school district adopted a PKS resolution by which it determined to retain less senior employees who had Spanish speaking skills over senior teachers whose employment had not previously required bilingual ability. The appellate court reversed a decision that allowed the district to skip junior teachers who possessed Spanish language skills but who were not employed to teach classes in a formal bilingual program.

In doing so, the court analyzed the relationship between two key portions of Education Code section 44955: (1) the provision requiring retention of senior employees, over employees with less seniority, to provide any services that they are certificated and competent to render; and (2) the provision regarding establishing competency (i.e., tie breaking) criteria to rank employees with the same seniority date. The court determined that the statutory phrase "solely on the basis of needs of the district and the students thereof" only applied to tie breaking criteria between employees with the same seniority dates. Consequently, "for teachers having different employment dates, 'the needs of the district and students' [are] not a proper measure of priority." *Id.* at 574. The court explained that:

A contrary construction would place all teachers in a single group measured by the sometimes vague needs of the district and pupils, as determined by the school board. To maintain the separate treatment of teachers with different seniority dates, we perceive the problem to be one of identifying "competency" in a traditional manner, which is concerned with courses and

programs generally listed in job descriptions or course outlines. . . With respect to teachers having different seniority dates, "needs" are considered only in relation to the program requirements. *Id.*

20. As the more senior business teacher, respondent is fully credentialed and competent to teach the keyboarding businesses classes taught by Ms. Larson during the 2007-2008 school year. The keyboarding classes are not a "specific course of study" designed to teach limited English-proficient students English language skills or language development, and such an ability is not a requirement for teaching keyboarding classes. The EL certificate provides a method for the teacher to teach keyboarding, which is a specific course of study respondent is competent to teach. While an EL ability may be preferred, it is not necessary to a finding of "competence" to teach keyboarding or other business classes. It is noteworthy that Resolution 2007/08-16 did not include a definition of "competent" or "competency," as is typically included where the board's resolution includes express "skipping" authorization.

The weight of the evidence establishes that the District was, in effect, applying its tie breaking criteria to determine which teacher best met the needs of the District and its students.² Because respondent is senior to Ms. Larson, however, this result cannot prevail. The District did not meet its burden of proof to "skip" Ms. Larson and respondent's layoff cannot be upheld. Respondent is entitled to "bump" Ms. Larson.

21. Because respondent is entitled to "bump" Ms. Larson, it is unnecessary to address his remaining contentions.

LEGAL CONCLUSIONS

1. In implementing a layoff under Education Code sections 44949 and 44955, the paramount rule is that employees shall be laid off in the inverse order of seniority. Where an economic layoff is required due to a reduction in PKS, Section 44955, subdivision (b), in pertinent part, provides as follows:

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.

² Tie breaking criteria in Resolution 2007/08-17 includes: highly qualified status for NCLB (No. 1); possession of a BCLAD, CLAD or other certification to authorize the teaching of English Language Learners (No.2); and possession of multiple credentials (No.5).

"Seniority" is determined by the first date of paid service to the District as a probationary certificated employee. As between certificated 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." (Educ. Code § 44955, subd. (b).) The Board authorizes "tie-breaking" criteria to determine the relative seniority of these employees.

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

(c) 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.

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.

4. The District has the burden of proving, by a preponderance of the evidence, the factual and legal appropriateness of the proposed reduction or

elimination of particular kinds of services, of the preliminary notices of layoff served on respondent, and of the selection of the respondent for the layoff.

5. 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 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.)

6. As set forth in Factual Findings 4 and the Legal Conclusions as a whole, the services set forth in Board Resolution 2007/08-16 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.

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

8. 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. Tilapias Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District*, *supra*, 116 Cal.App.3d 831.)

9. As set forth in the Factual Findings and Legal Conclusions as a whole, and particularly in Factual Findings 13 through 21, the District did not meet its burden of establishing that a less senior employee should be "skipped" while laying off the respondent, and it has not established that no employee junior to respondent is being retained to perform the services which respondent is competent and certificated to render.

Accordingly, respondent is certificated and competent to bump Ms. Larson and his services cannot be eliminated for the 2008-2009 school year.

ORDER

The Accusation against respondent Christopher Smith is dismissed.

DATED: May 6, 2008

A handwritten signature in dark ink, appearing to read 'M. Woollard', written over a horizontal line.

MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings