

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

In the Matter of the Accusation Against:

ELIZABETH BUCHANAN,
MICHELLE CHAFFIN, JENNIFER GARCIA,
MORIAH MIRANDA, ELIZABETH McHUGH
BRETT ROSLOSNIK, JONATHAN SOUZA,
and JACINDA WATTS

Respondents.

OAH No. 2009040028

PROPOSED DECISION

On April 23, 2009, in Eureka, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Stephen L. Hartsell, General Counsel, North Coast Schools Legal Consortium, 901 Myrtle Avenue, Eureka, California 95501, represented Gordon Dexter, District Superintendent, Fortuna Union High School District.

Paul Hagen, Attorney at Law, of Bragg, Perlman, Russ, Stunich & Eads, LLP, 1036 Fifth Street, Suite E, Eureka, California 95501, represented Respondents in this matter. However, Respondent Elizabeth Buchanan, Michelle Chaffin, Jennifer Garcia, Moriah Miranda, Elizabeth McHugh, and Jacinda Watts failed to appear at the hearing of this matter; but, each of them remained a respondent in this matter.

Although he filed a Request of Hearing form, Respondent Brett Roslosnik did not file with the Superintendent a Notice of Defense form in accordance with Government Code section 11505. And Respondent Roslosnik failed to appear at the hearing in this matter. As no evidence exists to show his mistake, inadvertence, surprise or excusable neglect in failing to file a Notice of Defense, Respondent Roslosnik was in default with regard to this administrative adjudication proceeding within the meaning of Government Code section 11520.

On April 23, 2009, the parties submitted the matter and the record closed.

FACTUAL FINDINGS

1. On April 7, 2009, in his official capacity, Gordon Dexter, Superintendent for the Fortuna Union High School District, made and filed the respective Accusations regarding

Respondents Elizabeth Buchanan, Michelle Chaffin, Jennifer Garcia, Moriah Miranda, Elizabeth McHugh, Brett Roslosnik, Jonathan Souza, and Jacinda Watts.

2. Respondents are certificated employees of the Fortuna Union High School District, who contest the instant proposed teacher lay-off action. Respondents are either probationary teachers or permanent (tenured) teachers with the District.

3. On March 10, 2009, the Superintendent presented the District's Board of Trustees a recommendation that the District give notice that particular kinds of services (PKS), then offered through the District, be reduced or eliminated by the District for the ensuing school year (2009-2010).

4. On March 10, 2009, the District's Governing Board adopted Revised Resolution No. 8. The resolution recites that, pursuant to Education Code sections 44949 and 44955, it has become necessary for the District to reduce and/or to eliminate, no later than the beginning of the 2009-2010 school year, particular kinds of services in the form of 9.2 full time equivalent (FTE) certificated positions as follows:

0.4 FTE	Music teacher position;
0.4 FTE	Science teacher position;
1.0 FTE	Social Science teacher position;
0.2 FTE	Physical Education teacher position;
1.0 FTE	Community Day School teacher position;
0.6 FTE	Industrial Technology teacher position;
0.4 FTE	Agriculture teacher position;
0.4 FTE	Art teacher position;
0.2 FTE	Special Education teacher position;
0.6 FTE	Social Worker Counselor position;
0.2 FTE	Childcare Center teacher position;
0.4 FTE	Academic Counselor position;
1.4 FTE	English teacher positions;
1.0 FTE	Spanish teacher position;
1.0 FTE	Mathematics teacher position.

5. The written preliminary notice to each respondent from the District's Superintendent states legally sufficient reasons of the District's Board's intent to eliminate the course as taught by respondents.

6 Respondents each timely requested in writing a hearing to determine whether or not cause exists for not reemploying each respondent for the ensuing school year.

7. The District's Superintendent timely served upon each respondent the Accusation, dated April 7, 2009, and related documents.

Except for Respondents Miranda and Roslosnik, the respondents filed timely notices of defense. As to Respondent Miranda, the Superintendent stipulated and agreed that despite her failure to timely file a Notice of Defense, she could participate in the administrative adjudication proceeding and have her interests represented by counsel. (And, as set out above, Respondent Roslosnik, who failed to file a Notice of Defense form, was in default with regard to the hearing.)

8. Before March 15, 2009, the Superintendent did not present the Governing Board with a list of the names of the certificated employees who had been identified as being subject to the proposed reduction of teachers due to the elimination or reduction of services for the ensuing year. However, the failure did not operate to prejudice the interests or rights of the affected respondents.

9. Except as set out above in Factual Finding 8, the pre-hearing jurisdictional requirements were met.

10. At the hearing of this matter, the District withdrew the Accusation against Respondent Jennifer Garcia. By its withdrawal of the Accusation against that respondent, the District will retain the services of Jennifer Garcia.

Respondents' Contentions

11. Respondent Souza offered evidence at the hearing of this matter that the proposed lay-off action's outcome will deprive students, who are enrolled in the music instruction classes, of essential educational services, which are best offered in the settings of the music teaching services that Respondent Souza has delivered over his tenure with the District. Mr. Souza further contends that he has always acted in good faith in providing services through the District, but he believes that District should be equitably estopped from executing the layoff action against him because of his impression that over the years of his employment the District has not fairly treated him in that the District did not inform him of the best course he should have followed so as to attain points or credits to be have attained a level of competency in order to be retained for employment relative to other teachers who have the same first date of paid service to the District as Respondent Souza possesses.

And Respondent Miranda, through her counsel, advanced a contention that although she is a part-time certificated employee in counseling at the Academy of the Redwoods, where she holds a 0.6 FTE position (and next year she wishes to remain a part-time District employee), that she has the right to bump into the 1.0 FTE full-time counselor position at the Academy of the Redwoods that the District plans to be held by a single counselor during the coming school year. And in the alternative, Respondent Miranda argued, through her lawyer, that the District lacked a legally sufficient basis to move a junior counselor from a full-time FTE academic counselor position at the District high school into a full 1.0 FTE academic-oriented counselor position at the Academy of the Redwoods as now held by Respondent Miranda, albeit on a part-time basis even though Respondent Miranda's training has been as a social work-oriented counselor.

Respondent Souza's contentions are without merit. And the arguments by Respondent Miranda's counsel are not persuasive.

12. Respondent Souza has a first date of paid service to the District as August 22, 2005. He holds a preliminary single-subject credential in music. Respondent Souza has taught various music classes over the entirety of his employment relationship with the District. Currently he holds a full-time (or 1.0 FTE) position as a music teacher. However, Respondent Souza provided no competent evidence that the District has retained any teacher junior to him for which Ms. Souza possesses a credential and is currently competent to teach. Nor did Respondent Souza establish that the Superintendent committed a procedural error in the initiation of the layoff action that adversely affects his teaching position with the District.

13. Other than Respondent Souza, no other respondent offered evidence, under oath, at the hearing of this matter. Nor did Respondents call any expert witness to offer evidence in support of the contentions argued by Respondent Souza that would affect the layoff action.

14. Respondent Miranda's counsel argued that under the District's Seniority List, Respondent Miranda has a first date of paid service to the District of August 26, 2005. Respondent Miranda holds a Clear Pupil Personnel Services credential in School Social Work. She holds a 0.6 FTE position, which she wishes to hold next year, even though the District will have only a full-time (1.0) FTE position as a counselor for the ensuing school year. The argument advanced for Ms. Miranda is that she should be bumped into the full-time position with the 0.6 FTE position she now holds and that the remaining 0.4 FTE should be held by a more junior counselor.

15. But other than Respondents Souza and Miranda, Respondents offered no persuasive argument or compelling evidence that suggests the District's action is improper insofar as the prospective elimination or reduction of 9.2 FTE positions. Respondents did not present evidence that the corresponding lay-off of credentialed employees relative to the elimination or reduction of the subject FTE positions of the District is contrary to law and unnecessary.

Acts by the District's Superintendent

16. Mr. Gordon Dexter, the Superintendent for the District (the Superintendent) appeared at the hearing of this matter to provide credible and persuasive evidence.

The prospective elimination or reduction of particular kinds of services for the 2009-2010 school year directly results from a prospective shortfall in money for the District's budget.

In order to partially aid the District in crafting a responsible budget for the ensuing school year, the Superintendent reasonably determined that certain certificated positions

must be eliminated or reduced due to diminished funds for District operations. Also the layoff action is due to the forecast of the District's declining enrollment for the coming school year.

The Superintendent in his official capacity was reasonable in his exercise of discretion in executing the procedures associated with lay-offs required by the subject resolution.

The only mandated service, which is being reduced, is Physical Education; however, the District has sufficient teaching resources to meet the state requirements for the ensuing year.

17. Regarding Respondent Souza, the Superintendent noted that over the years the District's tie-breaking criteria has been a public record for which teachers could glean the mechanism the District used to assess competency of teachers who had the same first date of paid service to the District for the purpose of retain teachers who could best serve the need of District students. And the Superintendent, argued through counsel, that the District has no duty to guide certificated employees in improving skills or attaining enhanced certificates so as to amass points in a tie-breaking dispute. Accordingly, the Superintendent was reasonable in advancing that the doctrine of equitable estoppel to preclude the layoff action against Respondent Souza was not applicable.

18. The Superintendent noted that the District has a goal for the ensuing year to have a full-time counselor (1.0 FTE position) at the Academy of the Redwoods (the AR). Respondent Miranda holds a 0.6 FTE position; and, before the commencement of the layoff process Respondent Miranda exerted her desire to hold that a part-time counselor position next year. Currently, the AR has 193 students; but, when the District instituted AR about three years ago the program served only 50 students so that part-time counselor was appropriate. In recent years a second part-time counselor, who held a 0.4 FTE position, resigned so that Respondent Miranda occupied the 0.6 FTE position and the AR principal assumed a 0.4 FTE position. But the District determined that two part-time counselors at AR did not adequately serve the needs of the District's students.

The District's goal or preference for next year is that the AR counselor should possess experience, training and skill in the academic-oriented counseling. Ms. Lund, a counselor who is junior to Respondent Miranda, holds Clear Pupil Personnel Services (PPS) credential with a specialization in academic counseling. She has a first date of paid service to the District of August 26, 2007. Ms. Lund has a degree in School Counseling and Psychology. Although Respondent Miranda holds a PPS credential, her specialization is in the area of social work. Although Respondent Miranda has provided counseling in both academic and social work counseling, she does not hold a credential that emphasizes academic counseling, whereas Ms. Lund's record shows that she does possess such educational training and experience.

The Superintendent reasonably determined that Ms. Lund has particularly keen expertise and training in serving as the full-time (1.0 FTE) counselor at the AR. While Respondent Miranda has not presented sufficient evidence that she has attained such experience or qualification as to establish competency to hold the full-time position as a counselor. Furthermore, authority shows that despite her placement on the District's seniority list, Respondent Miranda 0.6 FTE cannot be used to bump into a 1.0 FTE position.

The Superintendent was reasonable in advancing that a single full-time counselor position is programmatically sound for the District and that splitting the position into two part-time positions would be disruptive and not conducive to the objectives of offering optimum counseling services to the students at the AR.

Hence, there is sufficient reason to justify the District exercising its "skipping" prerogative to retain Ms. Lung while the reduction in force action may operate against Respondent Miranda to effect her layoff.

Ultimate Findings

19. No competent and credible evidence establishes that as a result of the proposed elimination of the full time equivalent positions respectively held by respondents, the District will retain any teacher who is junior to respondents to perform services for which respondents have been certificated or found to be competent to teach in such FTE positions for the next school year.

20. The decision of the District's Board to eliminate or discontinue a total of 9.2 FTE positions as specified in Revised Resolution No. 8, including the positions held by each respondent, was neither arbitrary nor capricious. Rather, the Board's determination was within the proper exercise of the discretion bestowed by law upon the District.

21. The Board's proposed elimination or discontinuation of the subject full-time equivalent positions, including the positions respectively held by respondents, for the ensuing school year, is related to the welfare of the District and its overall student population.

22. The Superintendent determined that it will be necessary, due to the elimination of particular kinds of services, to decrease the number of teachers before the beginning of the next academic year. The Superintendent lawfully directed the notification to respondents of the elimination of the certificated positions held by each respondent.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955.

2. The District provided all notices and other requirements of Education Code sections 44949 and 44955. This conclusion of law is made by reason of the matters set forth in Factual Findings 1 through 9.

3. Evidence Code section 664 establishes a presumption that the action or official duties of a public entity, such as the District and its governing board, have been regularly performed. Respondents offer no evidence to rebut the presumption that the District has properly performed actions related to the procedures that seek the non reemployment of respondents.

4. Judgments entered by a tribunal on the stipulation of the parties have the same effect as acts tried on the merits. (*John Siebel Associates v. Keele* (1986) 188 Cal.App.3d 560, 565.) The District stipulates to withdraw the Accusation against the certificated employee named in Factual Finding 10. The stipulation is binding on the parties.

5. Education Code section 44949, subdivision (c)(3), provides, in part, that “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.” The failure of the Superintendent to provide the Board of Trustees with a list of the names of the teachers, who were subject to the layoff, at or near the time that the Board crafted the resolution for the elimination or reduction of particular kinds of services did not operate to prejudice the due process rights of the affected teachers, who are respondents in this matter. And respondents stipulated and agreed that the oversight of the Superintendent did not prejudice their respective interests.

6. The recent decision in *Hilderbrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334, stands for the proposition that in a layoff action, a part-time permanent certificated employee, who does not seek to be employed full-time, may not exercise bumping rights with respect to a less senior full-time employee if the District reasonably and in good faith does not wish to split the full-time position into part-time positions. Accordingly, the District may give final notice of layoff to Respondent Miranda, who only wishes to hold a 0.6 FTE part-time position as a counselor at the Academy of the Redwoods, while the District retains Ms. Lund who is willing to provide academic counselor services as a full 1.0 FTE counselor at the AR.

7. Pursuant to Education Code sections 44949 and 44955 cause exists to give respondents notice of the discontinuation of full-time equivalent positions in the particular kinds of services rendered by respondents, by reason of the matters set out in Factual Findings 16 through 20, and 22.

8. The discontinuation of the subject particular kinds of service provided by each respondent relates solely to the welfare of the District and its students within the meaning of Education Code sections 44949 and 44955, by reason of the matters in Factual Finding 21.

RECOMMENDED ORDER

1. The Accusation served on Respondents Elizabeth Buchanan, Michelle Chaffin, Moriah Miranda, Elizabeth McHugh, Brett Roslosnik, Jonathan Souza, and Jacinda Watts, is sustained, except that the Accusation is dismissed as to Respondent Jennifer Garcia.

2. Notice may be given to Respondents Elizabeth Buchanan, Michelle Chaffin, Moriah Miranda, Elizabeth McHugh, Brett Roslosnik, Jonathan Souza, and Jacinda Watts that their services will not be required for the 2009-10 school year because of the reduction or discontinuance of particular kinds of services as indicated in Revised Resolution No. 8.

DATED: April 30, 2009

PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings
State of California