

BEFORE THE
BOARD OF TRUSTEES OF THE
SUTTER UNION HIGH SCHOOL DISTRICT
COUNTY OF SUTTER
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

OAH No. 2009040053

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE SUTTER UNION HIGH
SCHOOL DISTRICT,

Respondents.

PROPOSED DECISION

On April 28, 2009, a hearing was held before Karen J. Brandt, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, in Sutter, California.

Jon A. Hudak, Attorney at Law, represented the Sutter Union High School District (District).

Carolyn Langenkamp, Attorney at Law, represented respondents Gina Cole, Herbert Cooley, Roger Cox, Lewell Ferrin, Janet Finitzer, Amanda Gomes, Gary Lederer, Anne-Marie Ludec, John Olivera, and Richard Tuttle, Jr. (represented respondents).

Respondents Doug Ahler, Michael Ayotte, Lori Burrow, Scott Helmer, Michael Landa, Michael McPeters, Vandel (Bud) Myers, Matt Nelson, Tami O'Neill, Stewart Peterson, Patricia Poldervaart, Ann Reynolds, Ryan Reynolds, Charm Simlick, and Tally Sturm (unrepresented respondents) appeared on their own behalf. Respondent Ferrin, President of the Sutter Education Association, acted as a spokesperson for respondents Ryan Reynolds and McPeters.

Evidence was received on April 28, 2009. The record was left open and this matter was continued pursuant to Education Code section 44949, subdivision (e), to allow the parties to file closing and reply briefs. On May 12, 2009, the ALJ marked for identification the closing briefs received from the following parties: respondent Landa (Exhibit O); respondent Ferrin for unrepresented respondents Ryan Reynolds and McPeters (Exhibit P); respondent Burrow (Exhibit Q); the represented respondents (Exhibit R); and the District (Exhibit 16). On May 18, 2009, the ALJ marked for identification the reply briefs received from the following parties: respondent Landa (Exhibit S); respondent Ferrin for respondents

Ryan Reynolds and McPeters (Exhibit T); the represented respondents (Exhibit U); respondent Burrow (Exhibit V); and the District (Exhibit 17).¹ The record was closed and the matter was submitted for decision on May 18, 2009.

Because this matter was continued pursuant to Education Code section 44949, subdivision (e), the May 7 date set forth in Education Code section 44949, subdivision (c)(3), was extended to May 27, 2009, and the May 15 date set forth in Education Code section 44955, subdivision (c) was extended to June 4, 2009. The timelines in Education Code sections 44949 and 44955 were not otherwise changed.

FACTUAL FINDINGS

1. On March 10, 2009, the Board of Trustees (Governing Board) of the District adopted Resolution No. 2008/2009-009, entitled “Reduction in Certificated Staff by Reason of Reduction or Discontinuance of Particular Kinds of Services (Education Code sections 44949 and 44955)” (PKS Resolution).² In the PKS Resolution, the Governing Board determined that it was necessary to reduce or discontinue the following particular kinds of certificated services at the close of the 2008-2009 school year:

<u>PKS</u> ³	<u>Grade</u>	<u>FTE</u>
	<u>Level</u>	
English	9-12	1.00 reduction
Science	9-12	.16 reduction
Social Studies	9-12	.33 reduction
BPE	9-12	.50 reduction
Business	9-12	.16 reduction
Metal/Wood/Drafting Voc. Ed. #1	9-12	.16 reduction
Home Econ.	9-12	.50 reduction

¹ On May 18, 2009, respondent Ferrin also filed two additional documents: an Addendum to Reply Brief of Unrepresented Respondents, which was marked for identification as Exhibit W, and a Complaint Against Attorney of Record, which was marked for identification as Exhibit X. (Respondent Ferrin and attorney Langenkamp also copied the ALJ on emails they sent to each other, which have not been marked for identification.) In these documents, respondent Ferrin objects to certain statements made by attorney Langenkamp in the represented respondents’ reply brief. The arguments raised between attorney Langenkamp and her client, respondent Ferrin, are not relevant to the determination of the ultimate issues in this matter and are best left for resolution between counsel and her client.

² At the hearing, the represented respondents challenged the validity of the PKS Resolution because they believe that certain members of the Governing Board were not properly elected or appointed. The ALJ ruled that this issue was outside the jurisdiction of this proceeding.

³ “PKS” stands for particular kinds of services. “FTE” stands for full-time equivalent. “BPE” stands for boys’ physical education. “RSP” stands for Resource Specialist Program.

RSP	9-12	.16 reduction
Independent Studies	9-12	.50 reduction
Butte View High School Continuation School Classes	9-12	2.83 reduction and/or discontinuance*

Total: 6.30⁴

* Butte View High School educational services will be provided at Sutter High School in 2009/2010.

By reason of the above reduction or discontinuance of particular kinds of services, the Governing Board determined that it will be necessary to decrease the number of certificated employees at the close of the 2008-2009 school year. In the PKS Resolution, the Governing Board directed the Superintendent or his designee to give written notice of the non-reemployment recommendation no later than March 13, 2009, pursuant to Education Code section 44949 and 44955, to the Governing Board and the employees whose positions will or may be affected by the Board's action. The reduction or discontinuance of particular kinds of services and the termination of certificated employees are based solely upon the severe budget cuts that the District anticipates in these difficult economic times, and are not related to the skills, abilities or work performance of the affected employees.

2. On February 12, 2008, the Governing Board adopted Board Policy 4110.5, entitled "Certificated Personnel: Seniority and Order of Termination and Reemployment in the Event of Layoff" (Tie-breaking Policy). In the Tie-breaking Policy, the Governing Board set forth the criteria for the District to apply when determining the order of termination between employees who first rendered paid probationary service to the District on the same date. On April 21, 2009, the Governing Board adopted Resolution No. 2008/2009-010, entitled "Determination of Order of Termination and Reemployment of Certificated Employees who First Rendered Paid Service in Probationary Status on the Same Date" (Tie-breaking Resolution). In the Tie-breaking Resolution, the Governing Board resolved that, between employees who first rendered paid service on the same date, the order of termination would be determined on the basis of the needs of the District and its students, as set forth in the Tie-breaking Policy.

3. Prior to March 15, 2009, Superintendent Ryan Robison gave 29 certificated employees written notice that, pursuant to Education Code sections 44949 and 44955, he was recommending that their services would not be required for the 2009-2010 school year (Notice of Recommended Layoff).

⁴ In the PKS Resolution, a .16 FTE represents one class period. One class period is actually a 1/6 FTE, or about .167 FTE. Consequently, there is a rounding error in the total number of FTE's being reduced as set forth in the PKS Resolution. Because the total number of class periods proposed for reduction in the PKS Resolution is 38, the actual total reduction should be approximately 6.33 FTE. In this proposed decision, a class period will be designated as a 1/6 FTE.

4. Respondents are currently certificated employees of the District. Each respondent was properly and timely served with a Notice of Recommended Layoff and timely requested a hearing. Each was also properly and timely served with an Accusation, Statement to Respondent, form Notice of Defense, Notice of Hearing and relevant statutes, and filed a timely Notice of Defense.

5. The District maintains a Certificated Seniority List, which lists the name, seniority date, credentials, salary schedule, assignment, tie-breaker points, numerical rank, and CLAD⁵ status of the District's certificated employees. The seniority date of a certificated employee is the date that employee first rendered paid service in a probationary position.⁶

Selection of Particular Kinds of Services for Reduction

6. The represented respondents raise a number of objections to the identification of the particular kinds of services being reduced. During the hearing, the represented respondents raised issues about the reduction of "Home Econ." Those issues are addressed below in Findings 20 through 25. In their closing and reply briefs, the represented respondents also raise issues with respect to the reduction of one period of Science and one period of Business, as set forth in the PKS Resolution. At the hearing, the Superintendent stated that, given the information he has learned about next year's student enrollment since the adoption of the PKS Resolution, he would prefer not to eliminate one period of Business and to eliminate one additional period of Science.

7. When making their final layoff decisions, the Governing Board may choose to rescind any of the proposed service reductions they included in the PKS Resolution.⁷

8. The Superintendent and the Governing Board may not, however, add any additional service reductions to the PKS Resolution after the March 15 deadline set forth in Education Code section 44949, subdivision (a). Thus, neither the Superintendent nor the Board may reduce an additional period of Science not reflected in the PKS Resolution.

Selection of Certificated Employees for Layoff

9. The represented respondents argue that there is not a sufficient correlation between the PKS Resolution, which designates particular kinds of services for reduction or discontinuance, and the certificated employees who have been selected for layoff. During

⁵ A "CLAD" is a Crosscultural, Language, and Academic Development certificate.

⁶ Education Code section 44845 provides: "Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position."

⁷ Although the Superintendent stated that he believed that there was no need to reduce one period of Business, there was no evidence presented during the hearing that the Governing Board had already chosen to rescind its reduction of that period.

the hearing, the District presented its “2009 Staff Reduction Chart.” The Superintendent explained that, in creating this chart, he based his layoff determinations more on the needs of the District, which he ascertained by reviewing information he received about student enrollment after the adoption of the PKS Resolution, rather than on the exact wording of the PKS Resolution itself. In its closing brief, the District concedes that there is not a one-to-one correlation between the PKS Resolution and the 2009 Staff Reduction Chart. The represented respondents argue that, in the absence of a clear one-to-one correlation between the PKS Resolution and the certificated employees selected for layoff, the entire reduction in force must fail. The represented respondents also argue that the entire reduction in force must fail because the District has failed to state definitively which specific senior certificated employees are bumping which more junior respondents.

10. The represented respondents are correct that the District must show a clear relationship between the particular kinds of services designated for reduction in the PKS Resolution and the respondents selected for layoff, either by showing that the services that the respondents are themselves rendering are being reduced, or that the respondents are being bumped by senior employees, who either are rendering services that are being reduced or are themselves being bumped by more senior certificated employees, and who are certificated and competent to render the services that the more junior respondents are now rendering. The District may not lay off any respondents whose layoff cannot be traced back to a particular kind of service being reduced in the PKS Resolution. Consequently, the District may not lay off any respondents based either upon a reduction of a second period of Science not reflected in the PKS Resolution, as explained in Finding 8 above, or upon a reduction of academic advisor services, as explained in Finding 24 below.

11. But the Superintendent’s failure to identify definitively the senior certificated employees who will be bumping more junior respondents from their positions is not fatal to the entire layoff at this stage in the process, so long as such definitive determinations are made in accordance with Education Code sections 44949 and 44955 before the Governing Board issues its final layoff notices.

12. During the hearing, the represented respondents raised issues relating to the layoff of respondent Herbert Cooley. Those issues are addressed below. In their closing brief, the represented respondents argue that the Superintendent did not adequately explain how he arrived at the 5/6 FTE layoff of respondent Roger Cox; the represented respondents believe that respondent Cox should be laid off for no more than 4/6 FTE. At the hearing, there was not sufficient evidence presented about respondent Cox to reach a decision about the 1/6 FTE in dispute. The Governing Board and the District must assure itself as to the proper number of FTE by which respondent Cox should be laid off before issuing a final layoff notice to him. In their reply brief, the represented respondents also argue that the Superintendent did not adequately explain how he arrived at the 1.0 FTE layoff of respondent Stewart Peterson, or the 2/6 FTE layoff of Will Bowers. Because Will Bowers is not a respondent in this matter and respondent Peterson is not represented by attorney Langenkamp, the represented employees did not establish that they have standing to raise any issues on behalf of these two certificated employees.

The Closing of Butte View High School Continuation School

13. The District currently employs respondent Cooley as a half-time certificated employee, teaching three periods: two periods of consumer studies at Sutter Union High School (SUHS) and one period of math at Butte View High School Continuation School (BVHS). He holds a clear single subject teaching credential in Agriculture, with a specialization in Agriculture.⁸ His seniority date is August 9, 2004.

14. The District currently includes two high schools: SUHS and BVHS. BVHS is a continuation high school that has an average daily attendance of 17. During the 2008-2009 school year, it has served between 15 and 24 students. Students are assigned to BVHS if they are at risk of failure because they have attendance, academic and/or behavioral issues. The students at BVHS take their core academic courses at BVHS. They take their elective courses at SUHS. The Superintendent estimated that, next year, there will be only three to seven students who will require the continuation services currently provided at BVHS. Consequently, the Superintendent recommended, and the Governing Board approved, the closing of BVHS and the elimination of the 2.83 FTE positions currently at BVHS. The students who would otherwise receive services at BVHS will receive those services at SUHS. Respondent Cooley raises a number of arguments relating to the closing of BVHS.

15. First, respondent Cooley argues that the PKS Resolution does not authorize the elimination of the one period of continuation math he is now teaching at BVHS, because the District is not actually reducing or discontinuing any services currently taught at BVHS; it is just relocating those services to SUHS. In support of his argument, respondent Cooley points to the “*” in the PKS resolution, which states that “Butte View High School educational services will be provided at Sutter High School in 2009/2010,” and the agenda and minutes from the Governing Board’s March 10, 2009 meeting, which state that the Governing Board is not eliminating the services it is currently providing at BVHS; it is just moving those services to SUHS. Respondent Cooley’s argument is not persuasive.

16. Currently, there are two full-time teachers at BVHS – respondents Myers and Poldervaart. Gayle Lemenager, a District teacher who is not a respondent, now teaches four periods at BVHS. Respondent Cooley now teaches one period at BVHS. All these current positions add up to 17 classes or 2.83 FTE. As the Superintendent’s testimony made clear, the District will be shutting down BVHS and will be transferring all remaining students to SUHS. The BVHS students will generally be incorporated into the existing classes at SUHS. The District, however, will retain respondent Poldervaart in the 2009-2010 school year to teach continuation students for one period at SUHS.⁹ She has a clear multiple subject

⁸ There was no evidence offered at the hearing to explain whether respondent Cooley’s Agriculture credential authorizes him to teach the two subjects – consumer studies and math – that he is currently teaching.

⁹ Respondent Poldervaart will also bump respondent Cox for two periods of independent study, and her FTE will be reduced from 1.0 to .5. Respondent Cox has a professional clear credential in Music. His seniority date is August 15, 2000. The District asserted that this bump is justified because respondent Poldervaart’s multiple subject credential allows her to teach independent study. At the hearing, respondent Cox did not challenge this particular District assertion.

teaching credential and a seniority date of August 13, 2001. Except for the retention of respondent Poldervaart to teach one period of continuation students at SUHS, the District is eliminating all the FTE positions currently located at BVHS. This includes the one period of math respondent Cooley is now teaching. The description of the FTE reduction relating to the closing of BVHS as set forth in the PKS Resolution states a proper reduction of particular kinds of services. (*California Teachers Assn. v. Board of Trustees* (1982) 132 Cal.App.3d 32, 36 [finding that a service reduction includes reducing the number of classes but retaining the same level of service]. See also *Gallup v. Alta Loma School District Board of Trustees* (1996) 41 Cal.App.4th 1571.) The description in the PKS Resolution is sufficient to include the reduction of the one continuation math class that respondent Cooley is now teaching at BVHS.

17. Next, respondent Cooley argues that respondent Myers should not be allowed to bump into one of his periods of consumer studies. Respondent Myers's seniority date with the District is August 26, 1997. He holds a standard secondary teaching credential in Life Industrial Arts, Social Science, and Sociology. The Certificated Seniority List identifies respondent Myers's 2008-2009 assignments as the Coordinator of BVHS and the Summer School Coordinator. According to the Superintendent, because respondent Myers's full-time position at BVHS is being eliminated, his credentials and seniority date allow him to bump into five of the six periods of Metal/Wood/Drafting/Voc. Ed. #1 that respondent Lederer is now teaching,¹⁰ and one of the periods of consumer studies that respondent Cooley is now teaching. Respondent Cooley argues that, because respondent Myers is currently acting in the capacity of an administrator at BVHS and the PKS Resolution does not authorize the elimination of an administrator, respondent Myers's position at BVHS is not being eliminated; consequently, he cannot bump into one of respondent Cooley's periods of consumer studies. Respondent Cooley's argument is not persuasive.

18. Respondent Myers does not have an administrative credential. Although he is designated as the "coordinator" of BVHS, the District considers him to be a full-time teacher and pays him accordingly. The Superintendent is the principal of both SUHS and BVHS. The PKS Resolution provides that the District will be eliminating 2.83 FTE positions at BVHS. Respondent Myers currently occupies 1.0 FTE of that 2.83 FTE. The description of the FTE reduction relating to the closing of BVHS as set forth in the PKS Resolution is sufficient to include respondent Myers's 1.0 FTE.

19. Respondent Myers is more senior than respondent Cooley and is credentialed and competent to teach the consumer studies course respondent Cooley is now teaching. Consequently, respondent Myers may bump respondent Cooley for one period of consumer studies.

¹⁰ Respondent Lederer has a single subject credential in Industrial Arts and a Supplementary Authorization in Sports and Games. His seniority date is August 13, 2001. His 1.0 FTE is being terminated. Respondent Myers is bumping into five of the six positions respondent Lederer is now teaching in Metal/Wood/Drafting/Voc. Ed. #1. His sixth period of Metal/Wood/Drafting/Voc. Ed. #1 is being eliminated by the PKS Resolution. At the hearing, respondent Lederer did not submit any evidence to challenge his layoff.

Elimination of .5 FTE Home Economics

20. As set forth in Finding 1, the PKS Resolution authorizes the elimination of .5 FTE, or three periods, of Home Economics. At the hearing, the Superintendent explained that the services that actually will be reduced are the three academic advisor periods of Delisa Davis, and Ms. Davis will bump into one period of consumer studies that respondent Cooley is now teaching. Respondent Cooley argues that, because the PKS Resolution does not properly describe the academic advisor services that Ms. Davis is now providing, the District cannot lay her off; consequently, she cannot bump into one period of his consumer studies course. Respondent Cooley's argument is persuasive.

21. Ms. Davis has a seniority date of August 27, 1980. She is the most senior certificated employee in the District. She holds a clear single subject teaching credential in Home Economics and Music, with a supplementary authorization in Psychology. She is currently providing academic advisor services to students for three periods a day, advising them on matters such as their grades, attendance, interests, and plans for future studies or careers after high school.

22. While the District concedes that, in the PKS Resolution, "Academic Advisor" would have been a "preferable" term to use instead of "Home Econ.," it argues that the services that Ms. Davis now provides fall within the authorization of a Home Economics credential. The District also argues that describing the three periods of academic advisor services being reduced as "Home Econ." in the PKS Resolution did not mislead or prejudice respondent Cooley. The District's arguments are not persuasive.

23. California Code of Regulations, title 5, section 80005, subdivision (a)(6), provides that the holder of a single subject teaching credential in Home Economics may be assigned to teach "child development, clothing, consumer education, family life, foods, family economics, housing, human development, interior design, nutrition, parenting, and textiles." Although this regulation arguably may allow a teacher with a Home Economics credential to provide academic advisor services, the issue in this matter is not whether Ms. Davis may provide such services under her credential. Instead, the issue is whether the Governing Board understood that it was reducing three periods of academic advisor services when it approved the Superintendent's recommendation to eliminate three periods of "Home Econ."

24. Even though courts have allowed school districts some leeway in describing the particular kinds of services being reduced (see, e.g., *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 638 [finding that "classroom teaching" at the elementary level is a particular kind of service]), and even though there was no evidence that the Superintendent's use of the term "Home Econ." was anything other than an honest mistake, the District did not provide sufficient evidence to demonstrate that the Governing Board understood that, when it approved the reduction of three periods of "Home Econ." in the PKS Resolution, it was really approving the reduction of three periods of academic advisor

services. Consequently, the District may not reduce or discontinue the three periods of academic advisor services that Ms. Davis is now providing. Because the District may not make this reduction, Ms. Davis is not subject to layoff for her three academic advisor periods. Because she is not subject to layoff for these three periods, she cannot bump into one of the periods of consumer studies that respondent Cooley is now teaching.

Although the Governing Board approved the reduction of three periods of “Home Econ.,” there are no certificated employees listed on the Seniority List who are currently teaching Home Economics, and there was no evidence presented at the hearing to indicate that the District is currently offering any Home Economics classes that it wishes to reduce. Consequently, the reduction of “Home Econ.” should be rescinded from the PKS Resolution, and the number of particular kinds of services being reduced should be changed from 6.3 FTE to 5.83 FTE.¹¹

25. Although Ms. Davis cannot bump respondent Cooley from one of his periods of consumer studies, this does not mean that respondent Cooley cannot be bumped from that period. A review of the Certificated Seniority List and Staff Reduction Chart submitted by the District indicates that there may be other respondents designated for layoff who are more senior than respondent Cooley and who may be certificated and competent to teach consumer studies. Consequently, the District must determine whether there are any such respondents and permit the most senior of them to bump into that position for the 2009-2010 school year.

Respondent Landa’s Earth Science Assignment

26. Respondent Michael Landa has a seniority date of August 26, 1997, and a single subject teaching credential in Physical Education. Since he began teaching at SUHS, he has taught Earth Science and Boys’ Physical Education. He is currently teaching Earth Science and has been assigned to teach this course next year. Respondent Cooley argues that, because respondent Landa does not have a valid credential to teach Earth Science, he may not do so. Respondent Cooley argues further that, because his Agriculture credential authorizes him to teach Earth Science, he should be allowed to bump respondent Landa from that position. Respondent Cooley’s arguments are not persuasive.

27. Although respondent Landa does not have a teaching credential that authorizes him to teach Earth Science, pursuant to Education Code section 44332, the Sutter County Superintendent of Schools issued a Temporary County Certificate (Temporary Certificate) granting respondent Landa a Supplemental Authorization in Science, effective November 1, 2008, to November 1, 2009.¹² Respondent Cooley argues that the county did not properly

¹¹ As set forth in footnote 4, there is a rounding error in the 6.3 FTE reduction. When three periods are deducted from the 38 total periods currently included in the PKS Resolution, it leaves 35 periods, which is about 5.83 FTE.

¹² Education Code section 44332, in relevant part, provides:

(a) Except where that service is provided by a school district authorized to register certification documents pursuant to Section 44332.5, each county or city and county board of education may issue temporary certificates for the purpose of authorizing salary payments to certified employees

issue the Temporary Certificate to respondent Landa under section 44332. Whether the county properly followed applicable law in issuing the Temporary Certificate is not an issue that may be raised in this proceeding. Because respondent Landa has a Temporary Certificate, it was appropriate for the District to rely upon it in assigning him to teach Earth Science for the 2009-2010 school year.

28. Respondent Cooley also argues that, because respondent Landa's Temporary Certificate will expire by its terms on November 1, 2009, he should not be assigned to teach Earth Science for the full 2009-2010 school year. Respondent Landa is only four credits shy of obtaining a minor in physical science. He assured the Superintendent that he is enrolling in a class and would fulfill the requirements to obtain a science credential this summer. Because respondent Landa has sufficient authorization to teach Earth Science as of the beginning of the school year, and intends to fulfill the requirements for a science credential this summer, the District may assign him to teach Earth Science for the 2009-2010 school year.

29. Even if there arguably could be a question about respondent Landa's authorization to teach Earth Science, respondent Cooley did not establish that he is certificated and competent to teach that course. There was no evidence to show that respondent Cooley has ever taught Earth Science. Moreover, there was insufficient evidence to establish that respondent Cooley's Agriculture credential authorizes him to teach Earth Science. Pursuant to California Code of Regulations, title 5, section 80005, subdivision (a)(1), a certificated employee with a teaching credential in Agriculture is authorized to teach: "agricultural management, agricultural mechanics, agricultural science, animal science, forestry, horticulture, landscaping, and plant science." Even though there was testimony that there is significant overlap between an Agricultural Earth Science course and a regular Earth Science course, section 80005 does not include regular Earth Science as a course that a teacher with an Agriculture credential may teach. In addition, there was no evidence that Earth Science was within respondent Cooley's major area of postsecondary study or the equivalent thereof, or that he has passed a subject matter competency test in Earth Science. In sum, respondent Cooley failed to establish that he should be allowed to bump respondent Landa as the Earth Science teacher.

whose credential applications are being processed or to personnel employed in children's centers or other preschool educational programs whose permit applications are being processed. However, the individual must have demonstrated proficiency in basic reading, writing, and mathematic skills pursuant to the requirements of Section 44252.5. The applicant for the temporary certificate shall make a statement under oath that he or she has duly filed an application for a credential or permit together with the required fee and that, to the best of his or her knowledge, no reason exists why a certificate or permit should not be issued. The certificate or permit shall be valid for not more than one calendar year from the date of issuance.

Tie Breaker Among Respondents Cooley, Burrow and Finitzer

30. Respondent Cooley argues that he should be allowed to bump into the study skills/health class (1/6 FTE) currently taught by respondent Lori Burrow and that he should be assigned the Activity Director position (1/6 FTE) currently held by respondent Burrow, because he is senior to her. Respondent Cooley's argument is not persuasive.

31. The Certificated Seniority List indicates that respondents Cooley, Burrow, and Janet Finitzer all have the same seniority date: August 9, 2004. Respondent Burrow holds a preliminary single subject credential in Social Science. She is teaching AP U.S. History, AP Economics, and U.S. History, and is the Activities Director. Respondent Finitzer holds a preliminary single subject credential in English and is teaching ninth and eleventh grade English. The Superintendent applied the tie-breaking criteria set forth in the Tie-breaking Policy adopted by the Governing Board (Finding 2) to these three certificated employees. After applying the tie-breaking criteria, the Superintendent determined that respondent Burrow should be deemed to be the most senior, respondent Cooley the second most senior, and respondent Finitzer the least senior. At the hearing, respondent Cooley challenged the Superintendent's application of the tie-breaking criteria to him and respondent Burrow.

32. A review of the Superintendent's application of the tie-breaking criteria to respondents Cooley and Burrow is not necessary because, at the hearing, respondent Burrow established that her seniority date should be corrected to July 1, 2004.

33. Respondent Burrow entered into a School District Contract with the District dated June 1, 2004, and signed by respondent Burrow on June 4, 2004. The first sentence of her contract states: "You are hereby notified that at a meeting of the governing board held on [blank] you were elected to serve as a (full time) (part time) Teacher for the school year beginning July 1, 2004 and ending June 30, 2005." Paragraph 1 of the contract's conditions states: "Your annual salary for the school year in the above named position will be: \$36,706 x 50% = 18,353 payable as follows: In 12 equal monthly payment[s] of: \$1,529.42. COACHING: Cheerleading - \$2,213 to be paid 50% at end of football season and 50% at end of basketball season. Varsity Track - \$2,049 to be paid in lump sum at end of season." Paragraph 2 of the contract's conditions states: "Your services in the above named position will begin August 2004." Paragraph 4 of the contract's conditions states that respondent Burrow was classified as a probationary employee.

34. At the hearing, respondent Burrow explained that, before she became a certificated employee for the District, she worked as a classified employee. Her classified position ended on June 30, 2004. According to respondent Burrow, as a certificated employee, she began working as the cheerleading coach on July 1, 2004, and was paid for her time as part of her coaching stipend. Respondent Burrow took 28 students to cheerleading camp in Squaw Valley on July 25 through 28, 2004, and she began practicing with those students at least two to three weeks before camp.

35. Respondent Cooley disputes that respondent Burrow's coaching duties, which were compensated under her stipend, constituted services that may be applied toward her probationary certificated employment. Cooley's arguments are not persuasive.

36. At the hearing, the Superintendent agreed that respondent Burrow's first date of paid service as a probationary employee with the District was at least July 25, 2004, when she took students to cheerleading camp. According to the Superintendent, respondent Burrow was required, as a condition of her probationary contract, to coach the cheerleaders, and that, under her contract, she assumed responsibility for the cheerleaders on July 1, 2004. The Superintendent agreed that the stipend was part of respondent Burrow's compensation as a probationary teacher. The Superintendent also agreed that respondent Burrow was required to attend and chaperone cheerleaders at the cheerleading camp as a condition of her employment contract.

37. Given these particular facts, when respondent Burrow began coaching cheerleaders on July 1, 2004, it was a mandatory condition of her probationary contract. Consequently, she was rendering "paid service in a probationary position" as that term is used in Education Code section 44845. Her seniority date should, therefore, be changed to July 1, 2004.¹³

38. Respondent Cooley also argued that his seniority date should be changed. His arguments are not persuasive.

39. On August 9, 2004, respondent Cooley entered into a School District Contract with the District. The first sentence of his contract states: "You are hereby notified that at a meeting of the governing board of the: Sutter Union High School District held [blank] you were elected to serve as a (full time)(part time) Teacher for the school year beginning July 1, 2004 and ending June 30, 2005." Paragraph 1 of the contract's conditions states: "Your annual salary for the school year in the above named position will be: $\$39,511 \times 50\% = 19,755.50 + 1,976 \text{ VEA} + 21,731.50$ payable as follows: In 12 equal monthly payments of: $\$1,810.96$. (10% of base salary for 22 summer days work and related VEA activities beyond the 185 contract days.)" Paragraph 2 of the contract's conditions states that respondent Cooley's "services in the above named position will begin August 2004." Paragraph 4 of the contract's conditions states that respondent Cooley was classified as a probationary employee.

40. According to respondent Cooley, his seniority date should be changed to July 28, 2004, because he began providing supervision services to students on that date at the Yuba-Sutter County Fair. Respondent Cooley asserted that these supervision services were required as part of his contract, and that he believed that he was supposed to provide these services even before he entered into his contract. Respondent Cooley could not, however,

¹³ In their closing brief, the represented respondents cited proposed decisions issued by administrative law judges in other cases that reached the opposite conclusion. Given the unique facts testified to by the Superintendent, those other proposed decisions are all distinguishable from this case.

identify any students whose fair projects he was required to supervise during this time. Respondent Cooley's testimony was not persuasive. There was no credible evidence to support respondent Cooley's testimony that he was expected to provide supervision services before he entered into his contract on August 9, 2004. Consequently, respondent Cooley did not establish that his seniority date should be earlier than August 9, 2004.

41. Because respondent Burrow is more senior than respondent Cooley when her seniority date is changed from August 9, 2004, to July 1, 2004, there is no need to review the tie-breaking issues raised by respondent Cooley. Given that respondent Burrow is more senior than respondent Cooley, his assertion that he should be allowed to bump her from a study skills/health class (1/6 FTE) and the Activity Director position (1/6 FTE) is without merit.

Respondent Simlick's Seniority Date

42. Respondent Charm Simlick has a professional clear single subject teaching credential in Business. She is currently teaching Keyboarding and Accounting at SUHS. The Seniority List identifies her seniority date as August 13, 2001. During the hearing, she testified that her seniority date should be changed to July 1, 2001, because, pursuant to the terms of her contract, she was required to advise students who belong to Future Business Leaders of America (FBLA) and was required to chaperone FBLA students who attended a conference in Orlando, Florida beginning on that date. Pursuant to her contract, respondent Simlick was paid a stipend for these advising and chaperoning duties.

43. At the hearing, the Superintendent agreed that respondent Simlick was required as a condition of her contract to perform these advising and chaperoning duties. The District, therefore, stipulated that respondent Simlick's seniority date should be changed to July 1, 2001.

44. The PKS Resolution provides that the District will be reducing one period of Business. At the hearing, the Superintendent stated that he initially thought that, given this reduction, respondent Simlick would be laid off for one period. As set forth in Finding 6, he now believes that, given the more recent information he has received about enrollment for next year, the District will not be making this reduction. There was, however, no evidence that the Governing Board has rescinded this reduction.

45. The PKS Resolution states that the Governing Board, in determining to reduce or discontinue particular kinds of services, "considered any positively assured attrition (resignations, retirements, non-reelections, temporary teacher releases, and other attrition) that may occur before the start of the 2009-2010 school year." There was no evidence presented at the hearing to indicate that the District has failed to take into consideration any positively assured attrition in this matter.

46. There was no evidence that the District proposes to reduce any services that are mandated by state or federal laws or regulations below mandated levels.

47. Any other assertions put forth by respondents at the hearing or in their briefs and not addressed above are found to be without merit and are rejected.

48. Except as provided in Finding 25 with respect to respondent Cooley, no junior employees are being retained to render services that more senior respondents are certificated and competent to perform.

49. The District's reductions and discontinuances of particular kinds of services relate solely to the welfare of the District's schools and pupils.

LEGAL CONCLUSIONS

1. The District complied with all notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955.

2. The services identified in the PKS Resolution are particular kinds of services that may be reduced or discontinued under Education Code section 44955. The Governing Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuance of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

3. As set forth in Findings 7 and 8, while the Governing Board may decide to rescind any service reductions set forth in the PKS Resolution, it may not add any further service reductions.

4. As set forth in Finding 12, the Governing Board must assure itself as to the proper number of FTE for which respondent Cox should be laid off before issuing a final layoff notice to him.

5. As set forth in Finding 24, because the Superintendent did not recommend, and the Governing Board did not approve, the reduction of .5 FTE of academic advisor services, the District cannot reduce these services or permit Delisa Davis to bump Herbert Cooley from one period of consumer studies. The reduction of .5 FTE of "Home Econ." should be rescinded from the PKS Resolution, and the total number of particular kinds of services being reduced should be changed from 6.3 FTE to 5.83 FTE.

6. As set forth in Finding 25, the District must determine whether there are any respondents more senior than respondent Cooley who are credentialed and competent to teach his one period of consumer studies, and permit the most senior of such respondents to bump into that period for the 2009-2010 school year.

7. As set forth in Finding 37, Lori Burrow's seniority date should be changed to July 1, 2004.

8. As set forth in Finding 43, Charm Simlick's seniority date should be changed to July 1, 2001.

9. Cause exists to reduce certificated employees of the District due to the reduction or discontinuance of particular kinds of services. Except as set forth in Findings 24 and 25 and Legal Conclusions 5 and 6, the District properly identified the certificated employees to be laid off as directed by the Governing Board.

10. Except as set forth in Findings 24 and 25 and Legal Conclusion 5 and 6, no junior certificated employee is scheduled to be retained to perform services that a more senior respondent is certificated and competent to render.

11. Except as set forth in Findings 24 and 25, and Legal Conclusions 5 and 6, cause exists to give notice to respondents that their services will be reduced or will not be required for the 2009-2010 school year because of the reduction or discontinuance of particular kinds of services.

RECOMMENDATION

1. Cause exists for the reduction of 5.83 full-time equivalent certificated positions at the end of the 2008-2009 school year, as set forth in the PKS Resolution and amended by Legal Conclusion 5. To the extent that the Governing Board decides not to reduce or discontinue more particular kinds of services identified in the PKS Resolution, the number of full-time equivalent positions to be reduced shall be decreased accordingly. There shall be a correlation between the particular kinds of services being reduced and the respondents who are issued final notices of layoff.

2. The District shall not reduce the three periods of academic advisor services that Delisa Davis is now teaching or permit Ms. Davis to bump into one period of consumer studies that Herbert Cooley is now teaching. The District shall determine whether there are any respondents more senior to respondent Cooley who are credentialed and competent to fill one period of consumer studies that respondent Cooley is now teaching and permit the most senior such respondent to bump into that period for the 2009-2010 school year.

3. Except as provided in Recommendations 1 and 2, notice may be given to respondents that their services will be reduced or will not be required for the 2009-2010 school year. Notice shall be given in inverse order of seniority.

DATED: May 21, 2009

KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings