

BEFORE THE
GOVERNING BOARD OF THE
EMPIRE UNION SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction or
Elimination of Particular Kinds of Services
and the Employment Status of:

CERTAIN CERTIFICATED EMPLOYEES
OF THE EMPIRE UNION SCHOOL
DISTRICT,

OAH No. 2009040898

Respondents.

PROPOSED DECISION

On May 5, 2009, in Modesto, California, Ann Elizabeth Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Roman J. Munoz, Attorney at Law, represented the Empire Union School District (District).

Ernest A. Tuttle IV, Attorney at Law, represented all 31 respondents, identified in Attachment A, a copy of which is attached hereto and incorporated herein by reference.

Evidence was received. The record remained open for filing of trial briefs on May 8, 2009. On May 8, 2009, trial briefs were received and were marked for identification as District's Exhibit 10 and Respondent's Exhibit A. The matter was submitted and the record was closed on May 8, 2009.¹

¹ On April 26 and 27, 2009, and prior to commencement of the hearing, the parties entered into a "Stipulation To Waive Certificated Layoff Statutory Deadlines." At hearing, the parties agreed to the following deadlines: trial briefs are due by close of business (cob) May 8, 2009; the Proposed Decision shall be served on the District (Dr. Gonzales) by cob May 12, 2009; the District shall serve the Proposed Decision on Mr. Tuttle on behalf of all respondents by cob May 15, 2009; and Final Notices shall be served by cob May 29, 2009.

FACTUAL FINDINGS

1. On or before March 10, 2009, Michael Gonzales, Assistant Superintendent of Human Resources of the District, sent a written recommendation to the Board of Trustees of the District (Board) for the reduction or discontinuation of particular kinds of services (PKS), in order to reduce expenses for the 2009-2010 school year. The District is faced with the anticipated loss of state and federal funding of 2.1 million dollars for the 2009-2010 school year, as well as an anticipated decline in enrollment. Accordingly, the District expects to experience a budget shortfall. Dr. Gonzales recommended the elimination of 36 full-time equivalent (FTE) certificated positions.

2. On March 10, 2009, the Board adopted Resolution # 189-031009, authorizing the reduction or elimination of PKS. The Resolution authorized and directed the Superintendent to give notice to an equivalent number of certificated employees of the District that their services would not be required for the upcoming school year in order to effectuate the reduction.

3. The Resolution authorized the elimination of the following education services now offered in the District:

- Reduction of the K-6 Self Contained Teaching program, resulting in the elimination of 26 FTE certificated teacher services.

- Reduction of the K-8 Departmentalized Teaching Program, resulting in the elimination of 9 FTE certificated teacher services as follows:

- 1.0 FTE English/Language Arts
- 1.0 FTE Social Studies
- 1.0 FTE Math
- 1.0 FTE Science
- 2.0 FTE Physical Education
- 1.0 FTE Music
- 2.0 FTE Counselor

- Reduction of the K-8 Resource Specialist Program, resulting in the elimination of 1 FTE certificated teacher services.

4. On March 10, 2009, the Board also adopted Resolution #190-031009, entitled "...Criteria For Order Of Certificated Layoff And Reemployment Following Layoff For Employees With Equal Seniority" (tie breaking criteria). The Resolution states in pertinent part:

...In order to implement this reduction in force, it may be

necessary to apply tie-breaker criteria to distinguish among permanent or probationary employees who first rendered paid service to the District on the same date. Pursuant to Education Code §44955 (b), the Governing Board has determined that the order of termination as between employees who first rendered paid service to the District on the same date shall be established on the basis of the following criteria in order to meet the needs of the District and students thereof.

The Governing Board has determined that the same criteria shall be applicable to determine the order of reappointment of permanent and probationary employees who first rendered paid service to the District on the same date pursuant to Education Code sections 44956 and 44957...

The Superintendent/designee shall determine the order of termination or reappointment solely on the basis of the needs of the District and the students considering one or more of the following criteria:

- Specialist credentials, such as special education, reading certificate, BCLAD, National Board Certification.
- Credentials that authorize instruction in two or more desired areas.
- Years of experience in a similar position as a fully credentialed teacher in the California public school system prior to the date of first paid service in Empire Union School District
- Possession of a professional clear, preliminary, lifetime, or other full credential in a hard to staff subject area such as math or science.
- Post-graduate degree in the area of service or potential areas of service.
- Assuming that the preceding criteria do not resolve all ties between employees having the same seniority date, then seniority will be determined by a flip of the coin.

The Superintendent/designee has the discretion to determine which criteria are most relevant to serve the needs of the District and students in each tie-breaker situation.

5. On March 10, 2009, the Board also adopted Resolution #191-031009 establishing “competency criteria” for determining whether a teacher affected by the reduction or elimination of services could displace (bump) a junior teacher. The resolution provides in pertinent part:

...competence to provide a particular kind of service is defined as:

(1) Holding a preliminary, professional clear, lifetime or other full credential in the content area which the employee intends to displace another employee and:

(2) Has successfully taught one complete school year in the content area within the past ten school years.

6. The District maintains a seniority list with the names of certificated employees, their first date of paid service to the District, their assignments and their credentials. The Superintendent considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees. The most junior employees providing the services identified in the Resolution were identified, and where necessary, tie-breaking criteria were applied to those with the same seniority date to determine the order of layoff. The credentials of those subject to layoff were reviewed to determine whether those subject to layoff could bump into a position held by a junior teacher. The Superintendent applied the District’s competency criteria in determining whether senior certificated employees could bump into positions held by junior employees.

7. On March 11, 2009, the Superintendent caused to be served on all affected employees, including all respondents, written preliminary notices of the recommendation to the Board that respondents’ services would not be required for the ensuing school year due to a reduction or discontinuation of PKS (preliminary notices). The preliminary notices set forth the reasons for the recommendation, as required by Education Code sections 44949 and 44955. The preliminary notices provided respondents with information and deadlines for requesting a hearing and included blank Request for Hearing forms. Thirty one employees filed timely Requests for Hearing. The District timely served an Accusation and a blank Notice of Defense on each certificated employee who timely filed a Request for a Hearing with the District. All respondents in this action timely filed a Notice of Defense to the Accusation.

8. All respondents in this action are classified as permanent or probationary certificated employees, with the exception of Tyler Buer, who is a intern. Mr. Buer’s status with respect to the layoff proceeding is discussed below. Mr. Buer, David Kamp and Anthony Monjure challenge the legality of the layoff process. Their arguments are as follows.

9. TYLER BUER

Mr. Buer was hired by the District on August 20, 2007 to teach music at the Empire Elementary School and the Teel Middle School. He holds an Internship Credential- Single Subject Music with a CLAD certification. Mr. Buer is an intern and was served with a “precautionary” preliminary notice and Accusation, in the event it was determined that he was entitled to the protections of Education Code sections 44948 and 44949.²

Mr. Buer maintains that he is entitled to the protections of section 44955 and 44958, including rights to accrue seniority, challenge a layoff, bump junior teachers and reinstatement by seniority. The District maintains that pursuant to sections 44464 and 44466, holders of the internship credential are not entitled to the protections of sections 44949, 44955 and 44958.

Mr. Buer’s arguments lack merit. Mr. Buer does not dispute that he holds a “university intern” credential, pursuant to sections 44451 et seq, (Teacher Education Internship Act of 1967 (Act)). Section 44464 provides that “the rights provided by section 44948 and section 44949 shall not be afforded to interns.” The Act also expressly provides that “an intern shall not acquire tenure while serving on an internship credential.” (*section* 44468) Mr. Buer maintains that his rights under 44955 are not explicitly affected by these provisions. However section 44955 provides that notice of termination of services due to a PKS reduction must be made in the manner prescribed in section 44949. Section 44949 sets out the due process procedures afforded to certificated employees the District intends to layoff pursuant to a PKS reduction under 44955. Even if the Education Code did require a university intern’s services to be reduced or eliminated pursuant to section 44955, section 44464 precludes affording the intern a hearing under section 44949 to challenge that action.

Mr. Buer maintains that the holding in *Bakersfield Elementary Teachers Association vs. Bakersfield School District* (2007) 145 Cal. App. 4th 1260, mandates that he be classified as a probationary employee and be afforded the rights of probationary employees as provided in the Education Code, including the right to accrue seniority and the rights to notice and hearing in event of a workforce reduction. *Bakersfield* is not applicable here. *Bakersfield* did not address the issue of the rights of university interns under Education Code sections 44464 or 44468. Moreover, the Education Code expressly excludes employees working under an internship credential from the right to accrue seniority and the right to notice and hearing in the event of a work force reduction and the right to reinstatement by seniority. *Bakersfield* does not confer a right on university interns that the Education Code expressly withholds.

² All statutory references are to the California Education Code unless otherwise indicated.

Accordingly, Mr. Buer may not challenge the PKS reduction or the elimination of his services for the ensuing school year. Nor does he have reinstatement rights pursuant to section 44956, because he is not a permanent employee whose services have been terminated as provided in section 44955.

10. *ANTHONY MONJURE*

Anthony Monjure has a seniority date of August 26, 2002. He holds a professional clear Multiple Subjects Credential and a CLAD certification. He is a permanent employee, assigned to teach fifth grade at Hughes Elementary School. Mr. Monjure's services were eliminated as a result of the PKS reduction the K-6 Self Contained Teaching program, resulting in the elimination of 26 FTE certificated teacher services.

Mr. Monjour also holds a Clear Single Subjects Credential in Health Sciences and a Clear Single Subjects Credential in Physical Education. The District demonstrated that it does not offer Health Sciences as a course, and thus there are no Health Sciences positions for Mr. Monjour to bump into. Mr. Monjour does not maintain that there are junior certificated employees teaching physical education, whom he can bump for their positions.

Mr. Monjour wishes to have his Physical Education credential and his Health Sciences credential acknowledged so that he receives additional points in the application of tie breaking criteria to the cohort of certificated employees with their first data paid service of August 26, 2002. Mr. Monjour's score after application of the tie-breaking criteria did not include points for possession of either credential. A higher score would not "save" him from layoff, but will affect his seniority for purposes of reinstatement.

The second tie-breaking criteria for same date of seniority allows points to be awarded for "Credentials that authorize instruction in two or more desired areas." The District maintains that the Single Subject Health Sciences Credential does not authorize instruction in a "desired area" because the District does not offer classes that can be taught within Health Sciences Credential. Accordingly, Mr. Monjour was not awarded tie-breaking points for holding this credential. The District properly declined to award Mr. Monjour points for holding this credential.

The District maintains that it did not give Mr. Monjour credit for his Physical Education credential because Mr. Monjour had not filed this credential with the District by March 11, 2009, the date the preliminary notices were served on the affected teachers. The District has a protocol for updating its seniority list. As each certificated employee filed additional credentials with the District, the District entered the credential data into its computerized seniority list. Mr. Monjour's Physical Education credential was not on file at the time the Resolution was made to reduce services or at the time the seniority list was reviewed for purposes of identifying those

subject to layoff. Mr. Monjour's Physical Education credential was still not on file at the District at the time preliminary notices were mailed to affected certificated employees. There is some evidence that the County Office of Education notified the District on March 13, 2009 that Mr. Monjour had obtained a Single Subject credential in Physical Education. Nevertheless, by this time, tie-breaking criteria had already been applied to Mr. Monjour's cohort, and since his credential was not on file, he did not receive credit for it.

It is the responsibility of certificated teachers to file their credentials with the California Commission on Teacher Credentialing, the County Office of Education and the District. (*Campbell Elementary Teachers Association Inc. v. Abbott (1978) 76 Cal. App. 3d 796.*) Here, there would be substantial prejudice to the District and to other certificated employees if the tie-breaking criteria were re-applied and relative seniority re-established, because of Mr. Monjour's failure to follow through with his responsibilities.

Although, the order of seniority for purposes of reinstatement has already been established through application of the tie-breaking criteria, one group of employees is still "tied" and pending a "coin toss." Mr. Monjour is one of these employees. He maintains that, in the event his seniority is not recalculated based on receiving points for his credentials, he should at least be taken out of the "coin toss group" and given seniority over this group.

The District now has Mr. Monjour's Physical Education credential on file. The District is within its rights to disregard that credential in calculating his seniority, even in the upcoming coin toss. However, there is no prejudice to the District or to the other employees with whom Mr. Monjour is currently tied if the District were to grant Mr. Monjour seniority over only the employees remaining in the pending coin toss. The District is not required by law to take this remedial action, but may do so without prejudicing the other employees remaining in the pending coin toss.³

11. *DAVID KAMP*

David Kamp is a permanent employee with a seniority date of August 28, 2000. He holds a Multiple Subject credential and a Single Subject credential in English as well as a CLAD authorization and a supplemental authorization in Social Science. He is assigned to teach 6th grade at Teel Middle School. Mr. Kamp's services were eliminated as a result of the PKS reduction of K-6 Self Contained Teaching Program, resulting in the elimination of 26 F.T.E. certificated teacher services.

³ If the District does decide to grant Mr. Monjour seniority over the employees remaining in the pending coin toss, the District must first determine whether any of these employees has obtained additional credentials, and accordingly scored additional points on the tie-breaking, since the preliminary notice was filed.

It is undisputed that Mr. Kamp has seniority over at least one junior teacher, Javier Villanueva, seniority date August 17, 2006, who is assigned to teach seventh and eighth grade English in the 2009-2010 school year and that Mr. Kamp is certificated to teach English. The District maintains that in order for Mr. Kamp to bump a junior teacher out of an English assignment he must meet the “competency criteria” established by the Board in Resolution #191-031009. The District maintains that Mr. Kamp does not meet the criteria in that he has not successfully taught one complete school year in the content area [English] within the past ten school years.

The District maintains that it is necessary for a teacher to have taught in a subject content area within the last ten years, because of the implementation of standards based instruction. The District maintains that persons with an older credential and no teaching experience in the subject area have not demonstrated that they can teach to the standards. The District further maintains that new hires, who have not yet taught under their credential, can be assigned to teach in an assignment without one year of prior teaching in that assignment because the new hires have been “exposed” to the standards in their education and training.

Although Mr. Kamp holds a Single Subject credential in English, he has not taught English in a departmentalized setting. He has taught multiple core subjects to self contained sixth grade classes under his Multiple Subject credential since he was credentialed in 2000. He teaches Language Arts and Literature in two blocks as well as math and sciences in two blocks. He argues that he has taught the content area of English and Language Arts in those self contained classrooms for the past nine years. Not only has he taught English and Language Arts to his sixth grade classes for nine years, but he undergoes training every year with the seventh and eighth grade teachers, in teaching to the state standards in both English and Language Arts. He has been a literacy coach as well. He is NCLB compliant in both his credentials.

Under these circumstances, application of the Resolution competency criteria to prevent Mr. Kamp from bumping into an English class would be arbitrary and capricious. While a governing board has some latitude in determining what factors contribute to competency for provision of a particular service, those factors must be reasonable. There must be a rational relationship between the competency criteria and a particular service. (*Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, 565.) Competency criteria must be clearly related to skills and qualifications to teach. (*Id.* at pp. 566-567.) Mr. Kamp has the appropriate credential to teach English and has taught English consistently over nine years. His teaching experience is current and there is no reason to believe that he cannot teach English to the State Standards. The District may not declare him incompetent merely because he has not taught a departmentalized English class for a year in the previous ten years. To do so would defeat the very clear intent of the Education Code, to prevent the termination of senior employees while employees with less seniority are

retained to render services which the senior employee is certificated and competent to render.⁴

12. *Other Arguments*

Except as otherwise set forth in this Proposed Decision, any and all remaining defenses asserted in this matter are determined not to be established by sufficient evidence or law.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of those sections have been met.

2. The anticipation of receiving less money from the state for the next school year is an appropriate basis for a reduction in services under Education Code section 44955. As stated in *San Jose Teachers Assn v. Allen* (1983) 144 Cal.App.3d 627, 638-639, the reduction of particular kinds of services on the basis of financial considerations is authorized under that section, and, “in fact, when adverse financial circumstances dictate a reduction in certificated staff, section 44955 is the only statutory authority available to school districts to effectuate that reduction.” The District must be solvent to provide educational services, and cost savings are necessary to resolve its financial crisis. The Board’s decisions were a proper exercise of its discretion.

3. A District may reduce services within the meaning of section 44955, subdivision (b), “either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may ‘reduce services’ by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.” (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

4. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore were sufficiently detailed to provide them due

⁴ Education Code section 44955, subdivision (b), provides in pertinent part: “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.”

Education Code section 44955, subdivision (c), provides in pertinent part: “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 entitled them to render.”

process. (*San Jose Teachers Association v. Allen, supra*, 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) The description of services to be reduced, both in the Board Resolution and in the notices, adequately describe particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838; See also, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

5. The services identified in the Governing Board Resolution are particular kinds of services that can be reduced under Education Code section 44955. The Governing Board's decision to reduce the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

6. The reduction of the particular kinds of services and the resultant reduction in 36.00 FTE certificated positions were made for the welfare of the District and the pupils. The decision was made because of factors affecting the District budget for the ensuing school year, including the state budget crisis with the resultant possible loss of revenue from the state.

7. By reason of the matters set forth in Factual Finding 11, Mr. Kamp may bump into 1.00 FTE seventh and eight grade English being taught in the 2009-2010 school year.

8. By reason of the matters set forth in Factual Finding 10, the District does not have a duty to reapply tie breaking criteria to Anthony Monjure and recalculate the seniority of those with the same seniority date as he.

9. By reason of the matters set forth in Factual Finding 9, Mr. Buer may not challenge the PKS reduction or the elimination of his services for the ensuing school year. Nor does he have reinstatement rights pursuant to section 44956, as a permanent employee whose services have been terminated as provided in section 44955.

10. With the exception of the finding in Legal Conclusion 7, in respect to Mr. Kamp, no junior employee is being retained to render services that a senior employee is certificated and competent to render.

RECOMMENDATIONS

1. The Empire Union School District's action to reduce or eliminate 36.00 FTE of particular kinds of services for the 2009-2010 school year is **AFFIRMED**.

2. The Accusation is **SUSTAINED** in respect to all respondents except David Kamp.

3. The Accusation against David Kamp is **DISMISSED**.

4. Tyler Bauer is not a proper party to this proceeding and the District is not required to give preliminary or final notice to him that his services shall not be required for the 2009-2010 school year.

5. Final notice may be given to respondents, with the exception of David Kamp, that their services will not be required for the 2009-2010 school year. Notice shall be given in inverse order of seniority.

Dated: May 12, 2009

ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT A
TEACHER LAYOFF HEARING/EMPIRE UNION SCHOOL DISTRICT
OAH CASE NO. 2009040898

LIST OF RESPONDENTS/TEACHERS IN ALPHABETICAL ORDER:

TIFFANY ALVES
JANI BUER
TYLER BUER
CLAUDIA CAMARENA
MIKE CARDOZA
MALIA COLOMBO
NANCY GUERRA-COLE
CHRISTINE HARVEY
LUKE HIBBARD
RYA HIBBARD
DAVID KAMP
KIMBERLY KIDD
BETH KING
AMERASHIA LAYTON
LISA LEMA
KAREN LYNCH
STACIE MACIAS
RUTH MANN
ANTHONY MONJURE
MONIQUE NEWTON
SALVADOR PADILLA
MONIQUE PRECIADO
PAMELA RENTZ
ELIAS RUIZ
JILL SIMAS
TIM SMART
GIANNA SMITH
ANGELICA STANFIELD
JERALYN TATUM
ROBERTA TORVEND
MATTHEW WEINHEIMER