

BEFORE THE
BOARD OF TRUSTEES OF THE
IGO-ONO PLATINA UNION ELEMENTARY SCHOOL DISTRICT

In the Matter of the Non-Reemployment of
Certificated Employee:

LYNN HARPER,

Respondent.

OAH No. 2009070067

PROPOSED DECISION

Administrative Law Judge Marilyn A. Woollard, Office of Administrative Hearings (OAH), State of California, heard this matter in Redding, California, on July 21, 2009.

Thomas E. Gauthier, Attorney at Law, of Lozano Smith, represented the Igo-Ono Platina Union Elementary School District (District). Superintendent Diane Kempley was also present on the District's behalf.

Michael N. McCallum, Attorney at Law, represented respondent Lynn Harper who was present.

Oral and documentary evidence was presented and the parties offered oral closing arguments. The record was then closed and the matter was submitted for decision on July 21, 2009.

FACTUAL FINDINGS AND DISCUSSION

1. Diane Kempley is the Superintendent of the District, pursuant to a contract between the District and the Redding School District.¹ Superintendent Kempley made and filed the Accusation in her official capacity only.
2. Respondent Lynn Harper is a permanent certificated employee of the District. During the 2008-2009 school year, respondent held 0.5 full time equivalent (FTE) position as a Title I teacher. As a Title 1 teacher, respondent provides direct

¹ In addition to her duties as Superintendent of the Redding School District, Ms. Kempley is the superintendent of four small districts, including the Igo-Ono Platina Union Elementary School District.

instruction to small groups of underperforming students in reading and language arts who are pulled out of their regular classrooms.

3. The District is considered a “necessary small school,” i.e., one with an average daily attendance of fewer than 101 pupils. (See Education Code section 42280, et seq., pertaining to funding for small school districts.)² During the 2008 – 2009 school year, approximately 83 to 85 kindergarten through eighth grade students enrolled at its two elementary schools, Igo-Ono and Platina. Superintendent Kempley estimated that approximately the same number of students will be in attendance at the District in the 2009-2010 school year.

During the 2008-2009 school year, the District employed 5.5 FTE certificated teachers. All but one FTE of the certificated staff was assigned to Igo-Ono. Respondent was the only .5 FTE teacher.

4. During the spring reduction in force, the Board passed Resolution No. 26-08-09 and determined, pursuant to Education Code sections 44949 and 44955, that it was necessary to reduce the elementary school teaching staff by 1.0 FTE. Laura Sanders was the District’s least senior, probationary teacher; she was assigned to Platina Elementary School. Ms. Sanders did not request a hearing; she was given notice of layoff for the 2009-2010 school year.

5. *Resolution No. 33-08-09:* On June 24, 2009, at a regular meeting, the District’s Board of Trustees (Board) determined that it was necessary to decrease programs and services; that it had previously adopted Resolution No. 26-08-09 to discontinue the services of certificated employees at the end of the 2008-2009 school year; that the previous reduction or elimination of certificated employees “was insufficient to address the previously unknown economic circumstances and impact of the worsening revenue projections for the District”; and thus it was necessary to further reduce particular kinds of certificated services pursuant to Education Code section 44955.5. The Board adopted Resolution No. 33-08-09 providing for the reduction or elimination of the following particular kinds of services (PKS):

1. Title I Teaching Services	.5 FTE
Total Full Time Equivalent Reduction	.5 FTE

² Education Code section 42283 provides that, for the purpose of the funding formula outlined in section 42282, a “necessary small school” is an elementary school with an average daily attendance of less than 101, exclusive of pupils attending the seventh and eighth grades of a junior high school, maintained by a school district which maintains two or more schools and to which school specified numbers of students must travel over a certain number of miles to the nearest other public elementary school or where there are unusual hardships of travel due to weather and topographical conditions. Education Code 42282 provides four different levels or “bands” of funding for necessary small schools based upon their average daily attendance (i.e., 1 to 26; 26 to 50; 51 to 75; 76 to 100).

6. Superintendent Kempley testified that the decision to further reduce the District's certificated staff was based upon various factors including a review of the Budget Act, the non-passage of propositions in May 2009, the Governor's May revise budget which further cut revenues, and further anticipated reductions. The decision to select a .5 FTE Title 1 position as the particular kind of service to be reduced was based upon a decision to use a different curriculum model similar to that employed nationwide, known as Response to Intervention (RTI). This model emphasizes "pushing in" services within the classroom, under the supervision of the classroom teacher, rather than the Title 1 pull-out method. RTI is a more effective instructional model because students who are pulled out of class for remedial services miss out on core curriculum. Under the RTI model, the classroom teacher differentiates the regular curriculum to meet all students' different educational needs within the classroom.

The District has been in the process of implementing this push in/RTI model for several years. The change benefits students who need additional instruction that has traditionally been provided by pull out Title 1. The students will no longer miss regular classroom instruction, but will have Title 1 services integrated into the core curriculum in the classroom. The District will also save money by implementing this model, because Title 1 services will be provided with the assistance of instructional aides (classified employees) under the supervision of the classroom teachers.

7. *Procedural Requirements:* On June 25, 2009, the District served on respondent a written notice that it had recommended to its Board that notice be given to her pursuant to Education Code sections 44949, 44955 and 44955.5 that her services would not be required for the 2009-2010 school year. The written notice set forth the reasons for the recommendation and noted that the Board had passed a Resolution reducing the certificated staff by .5 FTE Title 1 teaching position. Respondent timely requested in writing a hearing to determine if there was cause for not reemploying her for the ensuing school year.

The Superintendent also made and filed an Accusation against respondent. The Accusation with required accompanying documents and blank Notices of Defense was served on respondent, who filed a Notice of Defense to the Accusation.

At hearing, the parties stipulated that all procedural requirements had been met by the District and that respondent had timely filed her request for hearing and notice of defense.

Is the District required to prove "fiscal necessity" before it may effectuate a layoff under Education Code 44955.5?

8. Education Code section 44955.5, subdivision (a), provides as follows:

During the time period between five days after the enactment

of the Budget Act and August 15 of the fiscal year to which that Budget Act applies, if the governing board of a school district determines that its total revenue limit per unit of average daily attendance for the fiscal year of that Budget Act has not increased by at least 2 percent, and if in the opinion of the governing board it is therefore necessary to decrease the number of permanent employees in the district, the governing board may terminate the services of any permanent or probationary certificated employees of the district, including employees holding a position that requires an administrative or supervisory credential. The termination shall be pursuant to Sections 44951 and 44955 but, notwithstanding anything to the contrary in Sections 44951 and 44955, in accordance with a schedule of notice and hearing adopted by the governing board.³

9. At the hearing, official notice was taken of the passage of Senate Bill 1, the Budget Act of 2009, effective February 20, 2009, making “appropriations for the support of state government for the 2009-2010 fiscal year.” (Gov. Code, § 11515.)

10. District Assistant Superintendent for Business Roseann Adams persuasively testified that the amount of money available per pupil for the 2009-2010 school year has actually decreased from that available in the 2008-2009 school year. A statutory increase for the 2009-2010 school year appears in its July 1 Budget, General Limit Summary; however, once the deficit factor is applied, the total revenue limit available to the District in 2009-2010 (\$613,149) is less than that available in the 2008 -2009 fiscal year (\$657,690). The District’s deficit spending has increased from -\$95,106 in the 2008-2009 school year to -\$115,235 for the 2009-2010 school year. In Ms. Adams’ opinion, the reserve maintained by the District is “barely adequate” for a district of its size.

As established by Ms. Adams’ testimony, the District has not received an increase of at least two percent in its total revenue limit per unit of average daily attendance since the passage of the Budget Act of 2009. Respondent does not dispute this finding.

11. Resolution No. 33-08-09 reflects the Board’s opinion that it is “necessary to decrease the number of permanent employees in the district,” because it did not receive at least a two percent increase in total revenue limit per unit of average daily attendance for the 2009-2010 school year. This decision was reasonable and within the Board’s statutory authority under Education Code section 44955.5. As noted by Ms. Adams, the current amount of deficit spending by the District

³ Education Code section 44951 pertains to the release of certificated employees holding a position requiring an administrative or supervisory credential and is not applicable to this proceeding.

constitutes a substantial deficit for a small district; in her opinion, it is fiscally prudent to take steps to reduce the deficit, including by reducing certificated staff. If it does not take steps to maintain adequate reserves and reduce deficit spending, the District runs the risk of becoming “qualified” by the state for additional oversight, based upon the risk that it will not be able to meet its current or future obligations (over next two years).

12. Respondent argues that the District may not decrease its number of permanent employees under Education Code section 44955.5 unless it can also establish that it is “fiscally necessary” for the Board to do so. In her view, the summer layoff contemplated by Education section 44955.5 is designed to avert a “financial disaster.” If the District’s budget contains monies sufficient to cover the salary and benefits of the certificated employee/s it proposes to layoff, it is not authorized to proceed with a layoff under Education section 44955.5, even if it has not received an increase of at least two percent in its total revenue limit per unit of average daily attendance for the 2009-2010 fiscal year. At hearing, respondent proposed to question witnesses and to offer documents in support of this argument.⁴

13. After hearing arguments and reviewing trial briefs from both parties, the District’s relevance objections to receipt of this type of evidence were sustained. Specifically, it was determined that the District was not required to prove that but for a reduction in the amount of respondent’s salary and benefits it would be financially imperiled for the 2009-2010 school year. Education Code section 44955.5 expressly requires school districts to prove a specific item relating to their financial circumstances (i.e., the amount of increase its total revenue limit per unit of average daily attendance for the fiscal year); this burden was met by the District. No more is required.

Both Education Code section 44955 and 44955.5 require governing boards to determine that it is necessary to decrease the number of permanent employees in the district. The “necessity” language of 44955.5 is substantially identical to Education Code section 44955, and the determination of the necessity to reduce or discontinue particular kinds of services should therefore be reserved to the discretion of the District’s Board. The policy making decisions of a district governing board, an elected legislative body, should not be subject to arguments as to the wisdom of their enactment, the necessity of the resolution, the selection of services, or questions as to the board’s motivation. (*California Teacher’s Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1529; *Horwath v. Local Agency Formation Comm. of San Mateo County* (1983) 143 Cal.App.3d 177, 182.) The board’s action need only be reasonable under the circumstances. (*Campbell Elementary Teachers Assn. v. Abbott* (1978) 76

⁴ The parties stipulated that respondent’s gross salary was \$24,389 per year. Respondent noted that the District’s 2009- 2010 budget included her salary as well as that of Ms. Sanders. The District noted that this budget was prepared prior to its passage of Resolution 33-08-09, and that it has the discretion to change its budget in response to worsening financial conditions.

Cal.App.3d 796.) As set forth in Findings 10 and 11, the Board's determination that it is necessary to decrease the number of its permanent employees by an additional .5 FTE certificated layoff under Education Code section 44955.5 is reasonable and well within its established discretion.⁵

Did the District appropriately select respondent for layoff over a less senior employee?

14. Education Code section 44955, subdivision (b), provides in pertinent part:

Whenever in any school year . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, . . . , and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. *Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.* [italics added.]

15. Respondent is a permanent certificated employee with 13 years of seniority with the District; her seniority date is September 30, 1995. Respondent holds a multiple subject credential. Respondent has held a .5 FTE Title 1 position consistently since the 2000-2001 school year.⁶ Respondent argues that, for the 2009-2010 school year, she should be allowed to bump into .5 of the 1.0 FTE position held by a less senior teacher, Leonard Ehn. Respondent testified that, during the 2008-2009 school year, she taught Mr. Ehn's fifth grade math classes. Respondent also testified that she is willing to work full time.

⁵ Following this evidentiary ruling, in support of her interpretation of Education Code section 44955.5, respondent made an offer of proof that its documents and witness would establish that the District had access to other money, either in its budget or from federal stimulus funds, sufficient to pay for her salary. Respondent proposed to call Tammy Cole, a representative from the California Teachers' Association, for this purpose and offered several exhibits which were excluded.

⁶ In the late 1990s, respondent worked full time in a classroom size reduction program at the elementary school. In approximately 1998, she was laid off and then rehired as a Title 1 teacher on a .6 FTE.

16. It is undisputed that Leonard Ehn is less senior than respondent. Mr. Ehn is a permanent certificated employee with four years of seniority with the District; his seniority date is August 19, 2004. He holds a multiple subject teaching credential. Mr. Ehn is, and has always been, a full time (1.0) FTE teacher. He teaches fourth through sixth grades at Igo-Ono. Since the layoff of Ms. Sanders, he is the least senior teacher in the District.

17. The District did not contend that respondent is not certificated and competent to perform the services provided by Mr. Ehn. Instead, Superintendent Kempley testified that the District determined not to reduce .5 of Mr. Ehn's position because "we need full time teachers for those children." During the 2008-2009 school year, respondent did not have students permanently assigned to her; she saw students pulled out from their core classes in small groups as needed.

18. Superintendent Kempley agreed that both respondent and Mr. Ehn have the same credential authorizing them to teach in self-contained classrooms. Having respondent bump into .5 of Mr. Ehn's position and team teach with him "is a problem." Superintendent Kempley expressed her opinion that job sharing is not in the best interests of the District's students. In her opinion, job sharing is not the best teaching method because children need to identify one individual as their teacher. Coordination of disciplinary techniques and how to cover the entire curriculum is essential. If the team teachers are compatible, job sharing can work; if they are not, students can become confused. Superintendent Kempley agreed that there is no District policy against job sharing. In selecting respondent for layoff, the District did not consider whether it was possible for respondent and Mr. Ehn to team teach for the 2009-2010 school year.

19. The opinion of Superintendent Kempley regarding job sharing in this case is entitled to great weight. Superintendent Kempley has significant training and experience in education: she holds a lifetime multiple subject credential, masters and doctoral degrees; has 18 years of experience as an elementary education teacher; and has over 20 years experience in educational administration. Superintendent Kempley's experience both as a teacher and as an administrator has been predominately with the elementary school population.

20. The District is not required to split a full-time teaching position to allow respondent the opportunity to bump into a part-time portion of that position, even though that position is held by a less senior certificated employee. (*Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal. App. 4th 334, 343.) The court in *Hildebrandt* noted that school districts have wide discretion in determining which particular kinds of services will be eliminated in a layoff, including by providing a service in a different manner. Similarly, district have broad discretion to define positions and may define a "service" in terms of the hours required to perform it, so that a part-time service is not necessarily the same service as a full-time service. A school district may also determine that an assignment "can be equally effectively be

shared by two or more part-time employees.” (*Ibid.*) *Hildebrandt* held that, where a district makes this determination in a manner that “is reasonable and made in good faith,” it is not precluded by Education Code section 44955 nor any other provision of the Education Code from doing so. In this case, Superintendent Kempley’s opinion testimony established that the District made this choice reasonably and in good faith.

21. The District’s governing board determined that its total revenue limit per unit of average daily attendance for the fiscal year of the Budget Act has not increased by at least two percent and that, in its opinion, it is therefore necessary to decrease the number of permanent employees in the district. All procedural requirements were satisfied. The District’s reductions and discontinuances of particular kinds of services relate solely to the welfare of its schools and pupils.

22. Except as stated above, no more junior employees are being retained to render services that respondent is certificated and competent to perform.

23. Any other assertions raised by respondent at hearing which are not addressed above are found to be without merit and are rejected.⁷

LEGAL CONCLUSIONS

1. As set forth in Factual Findings 5 through 7, all notice and jurisdictional requirements set forth in Education Code sections 44949, 44955 and 44955.5 were met. The timely notices sent to respondent indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide her due process. (*San Jose Teachers Association v. Allen* (1983) 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 notice, 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.)

2. 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 the

⁷ Respondent testified that, in addition to her .5 FTE as a Title 1 teacher, from 2001 until April 2006, she worked as the home school director under an agreement with the District. Respondent was paid on an hourly basis to work after school with from one to four students who needed home school services. The District argued that respondent was providing services under an incidental services contract. The District has not provided home school services since 2006-2007, and none of its certificated employees are assigned to provide home school services. Insufficient evidence was provided to address respondent’s argument that this time should be added to her seniority for the purposes of rehire rights.

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.)

3. The services identified in Resolution No. 33-08-09 (Finding 5) are particular kinds of services that may be reduced or discontinued under Education Code sections 44949, 44955 and 44955.5. The Board's decision to reduce or discontinue the identified .5 FTE service 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.

4. As set forth in the Factual Findings and Legal Conclusions as a whole, with the exceptions noted, the District has established that no employee junior to respondent is being retained to perform the services which respondent is competent and certificated to render. (*Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal. App. 4th 334, 343.)

RECOMMENDATION

The District may give notice to respondent Lynn Harper that it will not require her services for the 2009-2010 school year.

DATED: July 28, 2009

MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings