

BEFORE THE
GOVERNING BOARD
OF THE
CHULA VISTA ELEMENTARY SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Layoff/Accusation
Against:

368 CERTIFICATED EMPLOYEES,

Respondents.

OAH No. 2010020611

PROPOSED DECISION

This matter came on regularly for hearing before Roy W. Hewitt, Administrative Law Judge, at Chula Vista, California on April 15, 2010.

Dean T. Adams, Esq. of Fagen, Friedman & Fulfroost LLP represented the Chula Vista Elementary School District (the district).

Fern M. Steiner, Esq. of Tosdal, Levine, Smith, Steiner & Wax represented all of the respondents except for 44 respondents who are currently teaching Dual Immersion classes in the district and who were served with "Precautionary" Layoff Notices.

Henry M. Willis, Esq. of Schwartz, Steinsapir, Dohrmann & Sommers LLP represented the 44 Dual Immersion respondents who were served with "Precautionary" Layoff Notices.

Oral and documentary evidence was received and the matter was submitted on April 15, 2010.

FACTUAL FINDINGS

1. On March 9, 2010, the Board of Education of the district (the board) adopted Resolution number 2009-10.69, determining that it would be necessary to reduce or discontinue particular kinds of services (PKS) at the end of the current school year. The board determined that the PKS that must be reduced for the 2010-2011 school year were the following full-time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
K-6 General Education Teachers	374
Associate Principals	10
Coordinators of Instructional Tech. & Media Services, and Student, Family & Community Services	2
Directors of Human Resources	2
Executive Director of Curriculum & Instruction	1
Part-Time Program Support Teachers	4
Project Specialist	1
Resource Teachers	6
Site Resource Teachers	20
Site Teacher on Special Assignment	1
Special Education:	
Coordinators	6
Director	1
Teachers, Behavioral Specialist	2
Teachers, Special Day Class- Mild/Moderate	4
Teachers, Special Day Class-Moderate/Severe	2
Program Specialists	2
Psychologists	10
Resource Specialists	5
Teachers on Special Assignment:	
Chula Vista Nature Center	1

Total FTE positions to be reduced or eliminated

455

The services listed above are PKS, which may be reduced or discontinued within the meaning of Education Code section 44955.

2. On March 10, 2010, based on the board's resolution, the Assistant Superintendent of the district, by delegation of authority from the Superintendent, recommended, with regard to the ensuing school year, that the board reduce or eliminate the specified PKS provided by the district for the 2010-2011 school year by notifying the certificated employees listed in Hearing Exhibit 1A that their services will not be required for the 2010-2011 school year.

3. The district's recommendation and the board's decision to reduce or discontinue the services listed in Finding 1, above, were neither arbitrary nor capricious; rather, the recommendation and decision were based on a projected 15.21 million dollar budget deficit. Thus, the board's decision represents a proper exercise of its discretion.

4. The reduction and discontinuation of services is related to the welfare of the district and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the board.

5. The Assistant Superintendent designated the respondents, permanent or probationary teachers employed by the district, by creating a seniority list, first selecting teachers to be laid off in the inverse of the order in which they were employed, then assigning and reassigning employment in such a manner that all employees to be retained will be retained so as to render services which their seniority and qualifications entitle them to render.

6. Prior to March 15, 2010, the 368 respondents, listed in Hearing Exhibit 1A, certificated employees affected by the layoffs, received written notices/precautionary notices notifying them that, pursuant to Education Code sections 44949 and 44955, their services "will not be required for the ensuing 2010-2011 school year."

7. On March 16, 2010, the Assistant Superintendent of the district made and filed an accusation in her official capacity.

8. Prior to March 15, 2010, the board adopted tie-breaking and skipping criteria to be used in this reduction in force matter.

9. Prior to March 15, 2010, all respondents were served with board resolution number 2009-10.69, a Notice of Recommendation that Services Will Not Be Required, a Statement to Respondent, the Accusation, a Notice of Defense, a Request for Hearing, and copies of Education Code sections 44949 and 44955, and Government Code sections 11506,

11507.5, 11507.6, 11507.7, and 11520. Additionally, the Notice of Recommendation that Services Will be Terminated advised respondents as follows:

“Pursuant to Education Code section 44949 (a copy of which is attached, together with section 44955) you may request a hearing to determine if there is cause for not reemploying you for the 2010-2011 school year. Your request for a hearing must be in writing and must be received in Human Resources, [address omitted], no later than 5:00 p.m., Thursday, March 18, 2010. If you fail to request a hearing on or before that date, your failure to do so shall constitute a waiver of your right to a hearing and your services will accordingly be terminated as indicated above and for the reasons indicated above, without a hearing; if you desire a hearing, you may use that form or another form as you desire. (Exh. 1C.)”

10. All 368 respondents listed in Hearing Exhibit 1A timely submitted their notices of defense requesting a hearing to determine if cause exists for not re-employing them for the ensuing year.

11. Each respondent who requested a hearing and filed a Notice of Defense was properly noticed of the date, time and place of the instant hearing.

12. All pre-hearing jurisdictional requirements were met.

13. Respondents are certificated permanent or probationary employees of the district.

14. The following concern was raised during the hearing: 44 Dual Immersion teachers were skipped, and more senior teachers who contend they can perform the Dual Immersion teaching functions were slated for layoff.¹

15. In connection with this concern, the evidence established that as part of the February 9, 2010 board resolution, Resolution Number 2009-10.69, the board adopted criteria to be applied to deviate from terminating certificated employees who may otherwise be terminated by order of seniority, as allowed by California Education Code section 44955, subdivision (d).² Board Resolution Number 2009-10.69 sets established the following “skipping” criterion:

¹ Out of an abundance of caution the district served 44 “skipped” Dual Immersion teachers with “Precautionary” lay off notices so that if the district’s application of the skipping criterion was erroneous, its ability to lay off the appropriate number of teachers to implement the board’s resolution would not be prejudiced.

² California Education Code section 44955, subdivision (d)(1) allows a school district the discretion to deviate from strict seniority determinations if the “district demonstrates a specific need for personnel to teach a specific course or course of study . . . and that the certificated employee [who is skipped] has special training and experience necessary to teach that course of study or to provide those services, which others with more seniority do not possess.”

“Teachers of bilingual/dual immersion classes constitute a special and specific need in this District and shall be considered for this purpose as personnel teaching a specific course or course of study, and teachers teaching bilingual/dual immersion classes have special training and experience necessary to teach bilingual/dual immersion classes for purposes of Education Code section 44955(d). (Exh. 1C.)”

Although certain bilingual respondents testified that they also possess the necessary special training and experience to teach Dual Immersion classes,³ the evidence failed to support their contention(s). Teaching in the Dual Immersion program requires training and experience above and beyond that possessed by bilingual teachers who have not taught Dual Immersion in the District during the past year. Dual Immersion is a highly specialized form of teaching that requires constant interaction with the program and its attendant training programs, conferences and seminars, to maintain proficiency in applying teaching techniques that are constantly evolving. The 44 teachers in the district who were served with “Precautionary” lay off notices are currently teaching Dual Immersion classes, and will be teaching Dual Immersion classes next year. The district and those teachers have invested a great deal of resources in the special training and experience necessary for those teachers to reach their current levels of special competency and the desire to retain those teachers is warranted. Under subdivision (d)(1), the District may skip a junior teacher being retained for specified reasons. (*Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 131.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.) In the present instance, the 44 skipped Dual Immersion teachers possess superior skills and capabilities in implementing current Dual Immersion techniques that their more senior counterparts lack. Consequently, the 44 Dual Immersion respondents were properly skipped by the district pursuant to Education Code section 44955, subdivision (d).

16. The services of no permanent employees are being terminated while any probationary employee, or any permanent employee with less seniority, is being retained to render services which such permanent employee is certificated and competent to render.

17. The district has considered, and continues to consider all positively assured attrition.

18. The layoffs will not reduce any of the district’s offerings in code mandated courses below the level required by law.

³ The fact that there is a specific need for personnel to teach Dual Immersion classes, as a “specific course or course of study,” within the meaning of Education Code section 44955, subdivision (d) was not challenged by the bilingual respondents who questioned the appropriateness of the district’s “skipping;” rather, the focus was on whether the other, more senior bilingual teachers, had the requisite special/ superior skills and capabilities required to assume teaching positions in the district’s Dual Immersion program.

LEGAL CONCLUSIONS

1. Jurisdiction for the instant proceedings exists pursuant to Education Code sections 44949 and 44955, and all notices and other requirements of those sections have been provided/met, as required.
2. The services listed in Factual Finding 1 are PKS that can be reduced or discontinued pursuant to Education Code section 44955. The board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion.
3. Based on the Factual Findings, considered in their entirety, cause exists to reduce the number of certificated employees of the District by 455 FTE positions, due to the budget crisis described in Factual Finding 3.
4. Cause to reduce or discontinue services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.
5. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.
6. The 44 respondents who teach Dual Immersion and received "Precautionary" lay off notices were properly skipped by the district and shall be dismissed from the Accusation. The Accusation shall be sustained as to the remaining respondents, and they shall be notified that their services will not be needed during the 2010-2011 school year due to reduction or discontinuance of PKS.

ADVISORY DETERMINATION

WHEREFORE, THE FOLLOWING ADVISORY DETERMINATION is hereby made:

The Accusation is sustained in part. The Accusation is dismissed as to the 44 Dual Immersion respondents, and the district shall notify the remaining respondents that their services will not be needed during the 2010-2011 school year due to lack of funds and the resulting need to reduce or discontinue PKS.

DATED: April ____, 2010

ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings