

BEFORE THE
GOVERNING BOARD OF THE
ORLAND UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusations Against :

RYAN BATEMAN
TERESA DAVIS
TIBERIU MARINESCU
MATTHEW SCHUMANN,

OAH No. 2011031445

Respondents.

AMENDED PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Orland, California, on April 28, 2011.

Matt Juhl-Darlington, Attorney at Law, Matt Juhl-Darlington & Associates, represented the Orland Unified School District.

Lesley Beth Curtis, Attorney at Law, Langenkamp, Curtis & Price, represented all of the respondents.¹

Evidence was received, the hearing was closed, and the matter was submitted for decision on April 28, 2011. On May 5, 2011, the Administrative Law Judge issued the Proposed Decision in the matter.

On May 11, 2011, respondent Teresa Davis filed with the Office of Administrative Hearings an application for correction of a mistake or clerical error pursuant to Government Code section 11518.5. No response was submitted by District at the time that the Amended Proposed Decision was issued.

The Administrative Law Judge, having reviewed the documents submitted in support of the application and notes relating to testimony in the matter, concluded that the application for relief had merit and the Proposed Decision should be amended.²

¹ Dennis Patrick's notice of non-reemployment was rescinded by the District at the administrative hearing.

FACTUAL FINDINGS

1. Chris von Kleist, Superintendent of the Orland Unified School District (District), State of California, filed the Accusation in his official capacity as a public officer.

2. On March 9, 2011, the Governing Board (Board) of the District adopted Resolution No. 07-10/11, that reduced and/or discontinued particular kinds of certificated services (PKS) no later than the beginning of the 2011-2012 school year in the amount of 6.5 full-time equivalent (FTE) certificated employees. The specific reductions were as follows:

K-8 Multiple Subject Teaching Position	1.0 FTE
C.K. Price 7th Grade English/Social Studies Teaching Position	1.0 FTE
C.K. Price 6th/7th Grade Math Teaching Position	1.0 FTE
Orland High School ELD/Special Assignment Teaching Position	1.0 FTE
Physical Education Teaching Position	1.0 FTE
OUSD School Counseling Position	1.0 FTE
OUSD School Psychology Position	.50 FTE

3. Board Resolution 07-10/11 recited that with respect to employees who first rendered paid service to the District on the same day, “the order of termination will be based solely on the needs of the District and the students thereof.” The District used a lottery system exclusively to break ties. The manner in which the process was developed and the ramifications for respondents are discussed below.

4. The Board further determined that it shall be necessary by reason of the reduction and/or discontinuance of services to decrease the number of permanent and/or probationary certificated employees at the beginning of the 2011-2012 school year, and directed the Superintendent or his designee to proceed accordingly by notifying the appropriate employees to implement the Board’s determination.

5. On or before March 15, 2011, the District served the affected certificated employees including respondents, with written notice, pursuant to Education Code sections 44949 and 44955, that their services would not be required for the next school year (Notice). Each Notice set forth the reasons for the recommendation. The Notice attached and incorporated by reference Resolution No. 07-10/11, which listed the services to be reduced or discontinued, resulting in a proposed reduction in the certificated staff by 6.5 FTE positions.

6. Requests for Hearing were timely filed by all respondents to determine if there is cause for not reemploying them for the next school year.

² It may be that with the Governing Board’s action on the Proposed Decision scheduled for May 11, 2011, the application pursuant to Government Code section 11518.5 must now be made to that “agency.” The Amended Proposed Decision is issued based on the lack of any information relating to the Governing Board’s action.

7. The Superintendent made and filed Accusations against each of the certificated employees who requested a hearing. The Accusations with required accompanying documents and blank Notices of Defense (Accusation packet) were timely served on the respondents.

8. Each respondent is presently a certificated permanent or probationary employee of the District.

9. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955.

Services to be Reduced or Eliminated

10. The District provides educational services to approximately 2,200 students from kindergarten through high school. The District operates a K-2 school, a 3-5 school, a 6-8 intermediate school known as C.K. Price, and Orland High School. District also operates two community based schools and an alternative high school. The District is experiencing a decline in student enrollment which has resulted in loss of revenue, and District expects a decline in enrollment next school year. The District is facing a budget deficit of between \$2.6 million and \$4.6 million depending on the amount that the state reduces support for schools next year. Federal subsidies (AAAR) fund approximately 2.5 FTE this year and will not be available next school year. To accomplish the necessary budget reductions, the District must reduce services for the next school year.

11. Respondents raised questions about the genuineness of several of the proposed PKS eliminations and reductions. These are addressed separately below.

C.K. Price 7th Grade English/Social Studies Teaching Position

12. District proposes a reduction of 1.0 FTE teaching position in its intermediate school C.K. Price for these subjects. Jeanine Wackerman is the least senior intermediate school English and social studies teacher, but based on the application of the tie-breaking criteria she is able to bump Ryan Bateman, a high school physical education teacher. With the departure of Ms. Wackerman, the intermediate school will only have one other English/Social Studies teacher for an estimated 168 7th graders enrolled next year. The Assistant Superintendent acknowledged in testimony that one teacher cannot teach the two subjects to 168 students. The Superintendent, in his testimony, conceded that this was not reasonable. The Principal of the intermediate school said that he would make it work if ordered to do so, but in tentative schedules he prepared for next year reflecting a “worst case scenario,” the class assignments reflect more than one 7th grade English and Social Studies teacher. These District administrators suggested that they are considering a number of ideas to meet student needs. Apart from very general concepts involving restructuring, shared teaching and greater class sizes, the one specific solution offered was “moving up” K-8 teachers with multiple subject credentials to “fill in” for single subject credentialed

intermediate school teachers.³ Ms. Wackerman is a single subject credentialed teacher. The Superintendent explained that the teachers' union had justifiably complained in the past about the disparate effect of layoffs on more senior multiple subject teachers, and he noted the District's greater flexibility in assigning multiple subject credential holders. Superintendent also discussed the possible reconfiguration of the intermediate school because of increased inter-district transfers by students out of the District seeking a conventional 7th and 8th grade middle school environment.⁴ Teachers' union officers testified that Superintendent told them, in response to concerns about adequate staffing based on the Board Resolution, that there would not be a 1.0 FTE cut in English and social studies in the 7th grade. In summary, District does not actually contemplate the PKS reduction recited in Board Resolution 07-10-11. Rather, the plan is for one or more teachers holding multiple subject credentials to displace Ms. Wackerman. As discussed more fully in the Legal Conclusions, this does not constitute an actual reduction in PKS providing legal cause for notice to respondent Bateman.

C.K. Price 6th/7th Grade Math Teaching Position

13. District proposes a 1.0 FTE reduction in this area. Jody Madrigal is the least senior C.K. Price 6th and 7th grade math teacher. She holds a multiple subject credential, as well as a single subject credential in foundational math (through Algebra II in a departmentalized setting). Ms. Madrigal will bump high school math teacher respondent Matthew Schuman and the tie-breaker criteria are not an issue. The reduction of one 6th and 7th grade math teacher at C.K. Price will leave a single math instructor to teach approximately 320 students. The Assistant Superintendent testified that one teacher cannot teach so many students. The Superintendent suggested that this need could also be covered by moving up a multiple subject credential holder from the lower grades, and offered the same rationale for this alternative as described in Factual Finding 12. This was also not an actual reduction in PKS justifying notice to respondent Schumann.

Orland High School ELD/Special Assignment Teaching Position

14. District proposes to eliminate 1.0 FTE of English Language Development and a special assignment involving District's application for Western Association of Schools and Colleges (WASC) accreditation. This position is occupied by respondent Tiberiu Marinescu who holds a single subject Spanish credential. The position has been funded with federal money which will not be available next year. The service designation for the PKS reduction came from the language of the contract by which respondent Marinescu was employed this

³ District correctly noted that multiple subject credentialed teachers with the requisite college credits may teach in a departmentalized setting with Board authorization pursuant to Education Code section 44256, subdivision (b).

⁴ The evidence did not make clear how the replacement of single subject credentialed teachers with those holding multiple subject credentials would facilitate such a change, but apparently the Superintendent believed this to be the case.

school year. District administrators explained that if there is a need to provide the additional ELD support next year, ELD Coordinator Amy Fish, who now provides two periods of instruction to students to pass the California High School Exit Examination (CAHSEE) for part of her assignment, could forgo such work and “take back” the two ELD classes which were given to respondent Marinescu this year. This change would merely substitute one ELD teacher for another in the two ELD classes and does not constitute a true PKS reduction. There was no evidence that any other certificated employee will work on the WASC accreditation project with the reduction. Respondent Marinescu challenges this part of the reduction as affecting work not properly identified as a “particular kind of service.” This is discussed more fully in the Legal Conclusions.

Physical Education Teaching Position

15. District proposes to reduce physical education services by 1.0 FTE, although the position is not more particularly identified, including the school site or grade level to be reduced. Jason Bramson was served with a preliminary notice, which District apparently attributed to the physical education PKS reduction. Mr. Bramson did not submit a hearing request, so he was not served with an Accusation and did not participate in the administrative hearing. Mr. Bramson holds a single subject credential in physical education and he was not hired by the District as a teacher. He is a District administrator, currently serving as a Principal in the alternative education program and Vice-Principal of Orland High School. Although not clearly established by the evidence, it appears that District intends to move Mr. Bramson to a physical education position somewhere in the District. District administrators conceded that Mr. Bramson is less senior than Jeanine Wackerman and respondent Bateman for purposes of bumping into a physical education position. The evidence presented by both sides on this “issue” was muddled at best. Respondents challenged the District’s ability to provide state-mandated physical education to middle and high school students with the proposed reduction of 1.0 FTE of physical education. Respondents contend that the proposed reduction leaves one physical education teacher, but this ignores Ms. Wackerman’s assumption of respondent Bateman’s position which results in no net loss of a physical education position, at least at Orland High School. The evidence also established that in response to the teacher union’s expression of concern about cuts to the physical education program, the Superintendent responded that the program would not be cut by one position. In summary, none of the respondents was noticed based on this reduction of PKS and without more information about the nature of the reduction, it is impossible to determine if any alleged improprieties prejudiced respondents.

Tie-Breaking Criteria

16. In the spring of 2009, the District contemplated lay-offs for the first time and began to compile the District’s first seniority list. District recognized that it needed to establish tie breaking criteria for teachers who rendered first paid service on the same date. The Superintendent entered into negotiations with the teachers’ union and identified various criteria used by other school districts, including a lottery. The parties agreed to use a lottery exclusively to break ties, rather than adopt criteria based on the relative experience and

qualifications of the teachers involved. The drawing of lots was scheduled for February 6, 2009. The District only provided clerical support, including preparation of envelopes with the names of affected teachers with the same date and numbers to be drawn from the envelopes. The affected teachers or proxies drew the numbers, and the administration's support person recorded the order of seniority.

17. The only respondents adversely affected by the application of the tie breaking lottery criterion were Jason Bateman and Teresa Davis. The 2009 lottery was the basis upon which Jeanine Wackerman achieved seniority over respondents Bateman and Davis, each having been employed on August 8, 2007. Respondent Davis was placed below five other certificated employees on the seniority list with an August 8, 2007 hire date, and her single subject credentials in English and social studies would have permitted her to bump into Ms. Wackerman's position had respondent Davis achieved a higher seniority ranking in the lottery. Respondent Schumann was placed first among those with an August 6, 2008 hire date. Respondent Marinescu was placed third among the same group, but there is no one in his hire group providing a service which he is credentialed and competent to provide.⁵

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

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 Association 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. 44955, subdivision (b), reads:

(b) Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following

⁵ Special education and resource teachers were not considered as they were skipped by District and no respondent has the credentials to provide special education or resource teaching services.

year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, 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.

In computing a decline in average daily attendance for purposes of this section for a newly formed or reorganized school district, each school of the district shall be deemed to have been a school of the newly formed or reorganized district for both of the two previous school years.

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement. (Emphasis added.)

4. A district may not dismiss an employee pursuant to section 44955 and yet continue the identical kind of service and position held by the terminated employee. (*Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal. App.3d 796,812.) If there is no difference in the method or manner of providing a particular service, a school district may not justify the substitution of personnel by claiming a reduction in services. (*Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal. App.3d 831, 843-844.) [health services were not reduced by virtue of replacing certificated nurses with other employees].) In PKS cases the determination of the amount by which a service is to be

reduced is ordinarily the determination of the number of positions to be eliminated. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal. App. 3d 627, 637.) A school board may reduce services by determining that preferred 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.) Thus, had District truly contemplated fewer teachers providing 7th grade English and social studies instruction and 6th and 7th grade math instruction, these reductions in PKS would have warranted notice of termination to respondents in a corresponding number of FTE. However, as the Factual Findings reflect, the District understood that with one less teacher for each category, it will be impossible to teach the courses to the number of students District expects to enroll next year. The District's solution is to use teachers possessing multiple subject credentials to fill in for the laid-off teachers. As the cases recited make clear, this is not a legitimate basis for dismissing certificated employees. Therefore, the notices of termination served upon respondents Bateman and Schumann must be rescinded.

5. Respondent Marinescu's situation is similar when it comes to the portion of his position attributable to his ELD services. According to the evidence, he inherited the two ELD intervention classes from Amy Fish, the high school ELD coordinator, when he was hired to also facilitate the District's WASC application. Ms. Fish then began teaching two classes relating to preparation for the California high school exit examination. According to the evidence, Ms. Fish is to take back the two classes upon respondent Marinescu's termination. This results in the identical level of ELD instruction by replacing respondent Marinescu in his two ELD intervention classes, which is not a true PKS reduction. The WASC portion of respondent Marinescu's services is another matter. Respondents argue, without specific legal authority, that this part of the job is not a "particular kind of service." The phrase is not defined in Education Code section 44955, subdivision (b). Neither the Education Code nor legislative history defines "reduction of a particular kind of service." (*Burgess v. Board of Education* (1974) 41 Cal.App.3d 57.) *Campbell Elementary Teachers Assn., Inc. v. Abbott, supra*, 76 Cal. App.3d at p. 811, found the following to be particular kinds of services which could be eliminated: reading specialists, consultants, nurses, counselors, instrumental music teachers, master teachers, traveling librarians, learning assistance teachers, psychologists, speech therapists and title I specialists. District used the description of services, including the WASC certification work, in respondent Marinescu's employment contract to define the reduction in this area. Given the broad categories of services approved by the courts for reduction, absent any case decision or limiting statutory definition, the WASC portion of respondent Marinescu's position should be considered a "service" which may be reduced or eliminated in accordance with Education Code section 44955.

6. District's use of a lottery as the exclusive tie-breaking criterion was improper. As highlighted above, Education Code section 44955, subdivision (b), provides that as between employees with the same seniority date, "the governing board shall determine the order of termination solely on the basis of the needs of the district and the students thereof." At one time, the statute specifically included language allowing a lottery to determine relative seniority. That language was replaced with the current language. (*Moreland*

Teachers Assn. v. Kurze (1980) 109 Cal.App.3d 648, 656; *Alexander v. Bd. of Trustees of Delano Joint High School District* (1983) 139 Cal.App.3d 567, 573.) It is permissible to use a lottery as a final tie-breaker after applying other objective criteria based on the needs of District and its students, but this was not done here. Resolution No. 07-10/11 called for application of a lottery in the first instance. The result in applying a lottery was that relative seniority ranking was not based upon the needs of District and its students.

7. The fact that the teachers' union consented to the use of a lottery does not change the conclusion. Education Code section 44924 renders null and void any contract or agreement, express or implied, made by an employee to waive the benefits of Chapter 4 of the Education Code dealing with employment of certificated employees (Chapter 4 includes section 44955). The California Supreme Court decided in *Board of Education v. Round Valley Teachers Ass.* (1996) 13 Cal. 4th 1260, that collective bargaining provisions which conflict with the Education Code are preempted and therefore void. (*Id.* at p. 288) This holding is based in part on Government Code section 3540 relating to collective bargaining between teacher unions and school districts which reads, in part: "This chapter shall not supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure....". Therefore, inasmuch as the teachers' union and District could not supersede the language of Education Code section 44955 relating to the standards for tie-breaking criteria by way of a collective bargaining agreement, an informal agreement to do so is also invalid.

8. District argued that the case of *Duax v. Kern Community College District* (1987) 196 Cal. App. 3d 555 (*Duax*) supports its discretion to choose a lottery as the method best suited to the needs of District and its students. *Duax* involved the lay-off of community college instructors and a challenge to the Board of Trustee's adoption of a standard of competency to determine if a senior employee was "competent" to perform services being performed by a junior employee. The court determined that the Board's adoption of a standard requiring one year of teaching in the subject area in the last ten did not constitute an abuse of discretion. The court noted that the determination whether an employee was competent to hold a position involves the exercise of the Board's discretion, but that competence standards must relate to the special skills or qualifications of a teacher. Here, the Legislature has included the boundaries within which District may exercise its discretion in establishing tie breaking criteria. Such criteria must be based "solely on the basis of the needs of the district and the students thereof." The Factual Findings relating to the creation of the lottery as the sole criterion for tie-breaking demonstrate that neither the Superintendent nor the Board established the criterion base on the perceived needs of the District and the students. Rather, options were presented to the teachers' union and the union chose the lottery. In essence, there was no exercise of the Board's discretion and the adoption of the lottery violated the strictures of Education Code section 44955 and was therefore invalid.

ORDER

1. The Accusation against Teberiu Marinescu is sustained to the extent that it affects the portion of his position attributable to the WASC application and District may issue final notice of termination of that portion only. The notice relating to the ELD portion of respondent Marinescu's position is rescinded.

2. The Accusations against Ryan Bateman, Teresa Davis and Matthew Schumann are dismissed and the notices of termination are rescinded.

Dated: May 12, 2011

KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings