

BEFORE THE
COUNTY SUPERINTENDENT OF SCHOOLS
COUNTY OF NEVADA
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2012031238

ROJEAN COSSAIRT,

Respondent.

PROPOSED DECISION

Administrative Law Judge Danette C. Brown, Office of Administrative Hearings (OAH), State of California, heard this matter in Nevada City, California, on April 13, 2012.

Heather M. Edwards, Attorney at Law, represented the Nevada County Superintendent of Schools.

Ted Lindstrom, Attorney at Law, represented Rojean Cossairt (respondent).

Oral and documentary evidence was presented and the parties offered oral closing arguments. The record was closed and the matter was submitted for decision on April 13, 2011.

FACTUAL FINDINGS

1. Holly Hermansen is the Nevada County Superintendent of Schools (Superintendent). Her actions were taken solely in her official capacity.
2. Respondent is a permanent certificated employee of Nevada County Superintendent of Schools Office (County Office).
3. The County Office provides special education services for children with disabilities and itinerant services for students in the various school districts in Nevada County. It operates its special education program at the following school sites: TKM Resource Center (TKM), infants; TKM, preschool; Hennessy School, grades kindergarten through third; Seven Hills School, grades five through eight; Union Hill School (severely handicapped and emotionally disturbed students), grades kindergarten through eight; and Gilmore School (emotionally disturbed students), grades six through eight.

4. The Superintendent is responsible for identifying and implementing reductions in particular kinds of services (PKS) for the County Office. In making PKS reductions, the County Office projected the number of students for the incoming year, took budget matters into consideration, and “weigh[ed] all of those in making a decision.” For the 2012-2013 school year, the decision was finalized in the first week of March 2012. The County Office projected the following number of special education students to be enrolled for the 2012-2013 school year:

- TKM: 11 or possible 12 students;
- Hennessy School: nine or possible 10 students;
- Seven Hills School: 10 students;
- Union Hill School (severely handicapped): 10 students;
- Union Hill School (emotionally disturbed): seven students;
- Gilmore School (emotionally disturbed): five, or possible seven students.

5. The total number of special education students projected to be enrolled for the 2012-2013 school year is approximately 52 to 58. Based on the projected enrollment and the budget, the County Office reduced 1.0 full-time equivalent (FTE) certificated positions in special education, and 1.0 FTE in community day school for expelled youth. The County Office anticipates that 12 special education eighth graders will be going on to high school, and only one or two students will be coming in to preschool. The projected decrease in enrollment will result in low class sizes. According to the Superintendent, “our budget does not allow us to run classes at low class sizes.”

6. On March 12, 2012, the Superintendent issued Order No. 2012-001 (Order), “In the Matter of the Reduction or Discontinuance of Certain Particular Kinds of Services for the 2012-13 School Year.” The Order reduced or discontinued PKS affecting 2.0 FTE.

7. The Order was based on the Superintendent’s decision that it was necessary to reduce or discontinue PKS no later than the beginning of the 2012-2013 school year. In making her decision, the Superintendent took into account all positively assured attrition (i.e., resignations or retirements, and other permanent vacancies for 2012-13) which were known to the County Office as of the date of the Order.

8. The Order states that the Superintendent found that it was necessary to reduce or discontinue the following PKS of the County Office not later than the close of the current school year:

<u>Services</u>	<u>Number of FTE Positions</u>
Special Education Teacher	1.0 FTE
Community Day School Teacher	1.0 FTE
TOTAL	<hr style="width: 100px; margin-left: auto; margin-right: 0;"/> 2.0 FTE

9. As a result of the above PKS reductions and/or eliminations, the County Office determined that it was necessary to decrease 2.0 FTE positions for certificated employees no later than the beginning of the 2012-2013 school year, in accordance with Education Code section 44955.¹

10. The Order directed the Superintendent or her designee to send appropriate notices to all employees whose services would be terminated by virtue of the County Office's action.

11. Before March 15, 2012, the Superintendent caused a letter entitled "Notice of Layoff" to be served in person on the employees affected by the PKS reductions and/or eliminations set forth in the Order. The Notice of Layoff provided notice to the respondent that her services would be reduced for the ensuing 2012-2013 school year. The Notice of Layoff set forth the reasons for the reduction in services and attached a copy of the Order.

12. Respondent timely filed a Request for Hearing to determine whether there was cause for not reemploying her for the 2012-2013 school year.

13. On April 5, 2012, Donna Fitting, Associate Superintendent (designee), signed the Accusation, and caused it to be served on respondent. Respondent, through her legal counsel, timely filed a Notice of Defense.

Development of the District's Seniority List for Special Education

14. Seniority is the relationship between the teachers within a school district. Among the teachers credentialed to provide a given service, greater seniority in the district gives a greater legal entitlement to a position. Seniority is defined as the date upon which an employee first rendered paid services in a probationary position. (§ 44845.)

15. The County Office maintains a seniority list of certificated employees. The Superintendent reviewed the list with Monty Martin, an Assistant Superintendent responsible for Special Education Services. The County Office verified the accuracy of the seniority list, which is thoroughly reviewed several times a year. The County Office reviewed personnel files to ensure that the list is accurate. The Superintendent reviewed respondent's seniority date, which is March 10, 2008. At hearing, respondent confirmed that March 10, 2008 is her seniority date. There are four special education teachers with less seniority than respondent: Rolf Keltner (Keltner), with a seniority date of September 2, 2008; Brendan Cariaga (Cariaga), with a seniority date of September 17, 2010; Angela Mihm (Mihm), with a seniority date of September 14, 2011; and Debra Benton (Benton), with a seniority date of February 28, 2012. Keltner, Cariaga, Mihm and Benton were not identified for layoff.

¹ All statutory references are to the California Education Code unless otherwise indicated.

Implementation of Layoff

16. In addition to the class projections set forth in Findings 4 and 5, The County Office used the seniority list in identifying employees affected by the PKS reductions. With the exception of the 1.0 FTE reduction for a community day school teacher, the Order called for a 1.0 FTE reduction involving a position in which a certificated employee is a special education teacher. The Order did not indicate the specific special education teacher position to be retained or eliminated. The superintendent and her staff identified respondent as the least senior person occupying 1.0 FTE position as a special education teacher.

17. When the least senior person occupying the position affected by the PKS reduction was identified, County Office staff looked at the individual's credentials to determine whether she could displace any less senior certificated employees.

18. Before March 15, 2011, Monty Martin served the Notice of Layoff identified in Finding 10, on the most junior employee affected by the PKS reduction, as set forth in further detail below.

Reduction of 1.0 FTE Special Education Teaching Position

19. Respondent (03/10/08) teaches 1.0 FTE Special Education. She holds a Clear Education Specialist Instruction credential with a moderate/severe disabilities authorization, a Level I Education Specialist Instruction credential with a moderate/severe disabilities authorization, and a Clear Multiple Subject credential with an English supplemental authorization. Respondent is a special education classroom teacher at Seven Hills School.

20. The four least senior certificated employees that are special education teachers holding various credentials/authorizations are as follows:

A. Keltner (09/02/08) teaches 1.0 FTE Speech-Special Education. He holds a Clear Clinical or Rehabilitation Services credential and a Language, Speech and Hearing authorization. Keltner is a special education speech teacher who is based at TKM.

B. Cariaga (09/17/10) teaches 1.0 FTE Adaptive Physical Education. He holds Preliminary Single Subject and Clear Adapted Physical Education Specialist credentials and a Physical Education authorization. Cariaga is a special education teacher who teaches adaptive physical education which is based at TKM.

C. Mihm (09/14/11) teaches 1.0 FTE Special Education. She holds a Level I Educational Specialist Instruction credential and an Early Childhood Special Education authorization. Mihm is a special education teacher who teaches in the infant program which is based at TKM.

D. Benton (02/28/12) teaches 1.0 FTE Special Education. She holds a Clear Multiple Subject credential, a Cross Cultural, Language and Academic Development

(CLAD) certificate, and a temporary county certificate (TCC) with a short term staff permit.² Benton is a special education teacher who teaches in the visual impairment (vision) program which is based at TKM.

21. Section 44955, subdivision (b), provides in part, that whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, 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. Subdivision (b) further states: “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.”

22. The County Office has reduced a “1.0 FTE Special Education Teacher” not later than the beginning of the 2012-2013 school year. Without more explanation, this means that the least senior special education teacher must be laid off, “except as otherwise provided by statute.”

23. Section 44955, subdivision (d)(1) permits a school district to deviate from terminating certificated employees in order of seniority (i.e., “skip” a junior certificated employee) when the school district “demonstrates a specific need for personnel to teach a specific course or course of study ... [and] the certificated employee has special training and experience necessary to teach that course or course of study ... which others with more seniority do not possess.” In order to retain a certificated employee under Section 44955, subdivision (d)(1), a district must not only establish a specific need for personnel to teach a specific course of study, but establish the certificated employee it proposes to retain “has special training and experience necessary to teach that course or course of study or to provide those services. (*Bledsoe v. Biggs Unified School District*, 170 Cal.App.4th 127, 88 Cal.Rptr.3d 13.)

Specific Need to Teach Specific Course or Course of Study

24. The Superintendent testified that Keltner, Cariaga, Mihm, and Benton were not identified for layoff because the County Office did not need to reduce services in the areas in which they teach. In other words, the County Office needed the particular services they provided in specialized programs offered by the County Office, namely, speech, adaptive physical education, infant program, and vision program. Respondent was identified for layoff because she was the least senior special education classroom teacher; the County Office contends that she is not certificated and competent to render services that junior certificate employees Keltner, Cariaga, Mihm, and Benton were retained to provide.

² Benton has a “Short Term Staff Permit (VI).” She is finishing a program in June 2012 for an Education Specialist Instruction Permit (VI).

25. The Superintendent further testified that she and Monty Martin used the County Office's Class Projections and Staffing document to balance special education classes. The document is a spreadsheet that lists the names and grades of those students assigned to schools providing special education programs and services. The document is in draft form, because "students come and go." The County Office developed this document because it needed time to plan, and time to work with the Individual Education Program (IEP) teams to determine placement for the students. Based on its class projections and staffing document, and student needs, the Superintendent determined that the services provided by Keltner, Cariaga, Mihm and Benton were to be retained, and respondent's services were to be eliminated. The Superintendent's testimony demonstrated a specific need for the specific courses of study to which Keltner, Cariaga, Mihm and Benton are currently assigned. It must next be determined whether the County Office has established the certificated employees it proposes to retain "ha[ve] special training and experience necessary to teach that course or course of study or to provide those services."

Special Training and Experience Necessary to Teach Course or Course of Study

26. As set forth in Finding 20.D., Benton is the least senior special education teacher. Respondent and Benton have similar credentials, in that they both hold special education teaching credentials and multiple subject credentials. Benton has taught in the vision program for only two months. The County Office did not provide evidence that Benton had special training and experience necessary to provide vision services, which respondent, with more seniority, does not possess. While the County Office has demonstrated a specific need for a special education teacher to provide vision services, it did not establish that Benton has special training and experience to do so. Respondent is clearly certificated to teach in the vision program, and the County Office did not establish what special training or experience, if any, would be necessary to teach in the vision program. Inasmuch as a less senior teacher has been retained to provide a service that respondent is certificated and competent to render, the layoff notice issued to respondent was improper, and the Accusation must be dismissed.

Respondent's Arguments

Order is Impermissibly Vague

27. Respondent contends that the Order is impermissibly vague because it did not indicate what kinds of special education positions would be retained or eliminated. For example, the Order does not state that a special education teacher with a moderate/severe disabilities authorization will be eliminated. Respondent contends that the Order, in essence, allows the Superintendent to "pick whomever she wants to lay off." Respondent's contention is unpersuasive, in that the courts have consistently held that school districts need not specify the specific positions to be eliminated. As set forth in *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 638 (*San Jose*), [preliminary notice recommending that school district terminate certain certified employees because of a reduction in particular kinds of services was sufficiently specific where it designated the categories of the services

to be reduced or discontinued, even though it did not specify the specific positions to be eliminated] courts have allowed school districts significant leeway in describing the particular kinds of services identified for reduction.

28. In the present case, “special education teacher” is a category of teaching which is sufficiently specific under *San Jose*. The services identified in the Order are particular kinds of services that the Superintendent and County Office can reduce or discontinue under Education Code section 44955. The Superintendent and County Office’s decision to reduce or discontinue the identified services was not arbitrary or capricious, but was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of Nevada County’s schools and pupils within the meaning of Section 44949.

County Office is Allowing Teacher to Teach Moderate/Severe Students without Appropriate Credential

29. Respondent also contends that the County Office will be allowing a special education teacher, Patricia Lang (Lang) (06/10/02 seniority date), to teach special education students with moderate to severe disabilities.³ Lang holds an Education Specialist Instruction Credential, but does not hold an authorization to teach moderate/severely disabled students. The County Office is allowing Lang to obtain a moderate/severe authorization by the 2012-2013 school year. Respondent asserts that she can easily teach those students. The Superintendent conceded that “the law is that a student with moderate to severe disabilities should be taught by a moderate to severe credentialed teacher.” The Superintendent confirmed that Lang does not have a moderate/severe authorization, but is in the process of obtaining it. Respondent asserts that she, too, should be given the opportunity to obtain a “higher credential” in the interest of fairness.

30. Section 44955, subdivision (c), in relevant part, provides that a school district “shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which she does not have a teaching credential... the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.”

31. It is clear that the County Office may reassign teachers as needed provided that they are competent and credentialed to render the applicable services.⁴ Here, Lang is in

³ Holders of an Education Specialist Instruction Credential, Moderate/Severe Disabilities are authorized to teach children with moderate or severe disabilities in which the primary disability is “mental retardation” as defined in subsection 300.7(b)(5) of Title 24, Code of Federal Regulations, Subpart A. (The Administrator’s Assignment Manual (2007), Section F, Special Education.)

⁴ The County Office’s job description for a Severely Handicapped/Moderate to Severe Special Education Teacher includes the following education/experience requirements: 1) a

the process of obtaining her “moderate to severe” authorization, which she may receive prior to the 2012-2013 school year. If she does not, then the County Office should make another assignment/reassignment of Lang. The actions of the County Office do not constitute an abuse of discretion.

32. All other arguments of the parties not specifically addressed herein were considered and are rejected.

Welfare of the District and Its Students

33. The Superintendent correctly identified the certificated employee providing the particular kinds of services that the County Office directed be reduced or discontinued. Except as otherwise noted, no junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render. The reduction or discontinuation of services relates solely to the welfare of the County Office’s schools and pupils, within the meaning of Education Code section 44949.

LEGAL CONCLUSIONS

1. As set forth in the Findings, all notice and jurisdictional requirements set forth in sections 44944 and 44945 were met. The notice sent to respondent indicated the statutory basis for the reduction of services and, therefore, was sufficiently detailed to provide her due 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 describes 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 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 Order No. 2012-001 are particular kinds of services that may be reduced or discontinued under sections 44949 and 44955. The County Office’s

current valid California teaching credential; 2) a valid credential in Severely Handicapped; 3) experience with Specialized Health Care desired; and 4) a current valid California Driver’s License. It should be noted that the job description does not include requiring a valid credential/authorization in Moderate to Severe Disabilities, which respondent holds.

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 County Office's schools and pupils within the meaning of section 44949.

4. As set forth in Finding 26, the County Office did not establish cause to issue a Notice of Layoff to respondent pursuant to sections 44949 and 44955, in that a less senior certificated employee was retained to provide a service that respondent is certificated and competent to render. Therefore, the County Office shall rescind the Notice of Layoff and dismiss the Accusation against respondent.

RECOMMENDATION

Pursuant to Legal Conclusion 4, the Accusation is dismissed. The County Office shall rescind the Notice of Layoff issued to respondent Rojean Cossairt, and Ms. Cossairt shall be retained for her full 1.0 FTE position for the 2012-2013 school year.

Dated: May 1, 2012

DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings