

BEFORE THE
GOVERNING BOARD OF THE
MANHATTAN BEACH UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against:

Certain Certificated Employees of the
Manhattan Beach Unified School District,

Respondents.

OAH No. 2013030935

PROPOSED DECISION

David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 1, 2013, in Manhattan Beach, California. Howard A. Friedman and Tatiana Small, Attorneys at Law, represented Manhattan Beach Unified School District (District). Lawrence B. Trygstad, Attorney at Law, represented respondents Aaron Braskin, Don Braunecker*, Edward Frigola, Kathryn Kinnier, Joanne Michael*, Courtney Rice*, Cheryl Vanick* and Danielle Weiss*. (* denotes this respondent was present at the hearing.)

Respondent Nancy Rosenberg was not represented by counsel and failed to appear at the hearing.

Evidence was received by stipulation, testimony and documents. The record was closed and the matter was submitted for decision on May 1, 2013.

FACTUAL FINDINGS

1. Michael D. Matthews, Ed.D., Superintendent for the District, made and filed the Accusation in his official capacity.
2. Respondents in this proceeding are certificated employees of the District.
3. On March 11, 2013, the District provided written notice to respondents pursuant to Education Code¹ sections 44949 and 44955 that their services would not

¹ All statutory citations are to the Education Code, unless indicated otherwise.

be required for the 2013-2014 school year. Each written notice set forth the reasons for the District’s decision and noted that 24.6 full time equivalent (FTE) positions would be reduced or discontinued.

4. On April 9, 2013, the District filed and thereafter served the Accusation and related documents on respondents. The District waived the requirement for respondents to file a Notice of Defense. All prehearing jurisdictional requirements were met.

5. Respondent Nancy Rosenberg received proper notice of the hearing. By virtue of her failing to appear at the hearing, her default is noted and the District may proceed on its notice that her services are not required for the 2013-2014 school year.

6. The District serves approximately 6,700 students and has one high school, one middle school, five elementary schools, a preschool program, and an adult education program that is co-run with the school district in Redondo Beach. The current budget for the District includes deficit spending, and the District anticipates that there may be further reductions in state budgeting for next year, the most recent estimate of which is a \$5 million reduction.

7. On March 8, 2013, the Governing Board (Board) of the District adopted Resolution 2013-9 (Resolution) reducing or discontinuing the following particular kinds of services (PKS) for the 2013-2014 school year, and determined that such action was related to the welfare of the schools and the pupils thereof:

<u>Certificated Services</u>	<u>Number of Full-Time Equivalent Positions (FTE)</u>
Elementary Teachers	8.0
Social Science, Secondary	2.0
English, Secondary	2.0
Math, Secondary	1.0
Physical Education, Secondary	1.0
Counselors, Secondary	1.0
Athletic Director, Secondary	1.0
Spanish, Secondary	1.0
Music, Elementary	1.0
French, Elementary	1.5
Computer Concepts and Applications, Secondary	0.4
<u>Elementary Support Teachers, Reading</u>	<u>3.7</u>
 Total Full Time Equivalent Reduction	 24.6

8. On February 28, 2013, the Board adopted Resolution 2013-4 (Tie-break Resolution), which established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service to the District on the same day. The Resolution also provided that the order of employee termination shall be based on the needs of the District and its students in accordance with the nature and type of credentials and authorizations of the certificated employees.

9. The services set forth in Factual Finding 7 are particular kinds of services which may be reduced or discontinued within the meaning of section 44955.

10. The Board took action to reduce the services set forth in Factual Finding 7 because of uncertainty surrounding future State funding. The decision to reduce services was not related to the capabilities and dedication of the individuals whose services are proposed to be reduced or eliminated. The decision to reduce the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

11. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments, and credential and certifications.

12. The District used the seniority list to develop a proposed layoff list of the least senior employees currently assigned in the various services being reduced. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority.

13. The District properly considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of layoff notices to be delivered to employees by March 15, 2013.

14. Respondents raise several challenges. The relevant facts are:

(a) Cheryl Vanick (Vanick) has a Clear Multiple Subject credential and is a permanent employee with a seniority date of October 8, 2001. Her seniority number is 135. Her assignment the past year was in a 0.40 FTE position as an Elementary Support Teacher, Reading. Vanick was laid off from her position due to the reduction in the Resolution of 3.7 FTE positions of Elementary Support Teacher, Reading. Vanick has more seniority than two elementary school teachers who are being retained: Daniella Olson (seniority date September 6, 2005, seniority number 204), and Anne Vanderpool (seniority date August 29, 2006, seniority number 221). Vanick contends she should be retained for either of their positions.

(b) Olson and Vanderpool each presently work in a job share position of 0.50 FTE. Under the collective bargaining agreement with the District, Article 11,

section 11.20, two employees can split a job share assignment if they submit a proposal including listed subjects, and agree to listed requirements. The decision whether to grant the proposal is discretionary with the District; however, “A job share request shall not be denied for any arbitrary or capricious reason(s).” (Exhibit 9, section 11.20.2.) The District may also terminate a job share arrangement. The District has been notified by one of the two job share teachers (Olson or Vanderpool) that she intends to return to her full time position next year.

(c) Don Braunecker (Braunecker) has a Clear Single Subject: Physical Education credential and is a permanent employee with a seniority date of September 9, 1999. His seniority number is 88. His assignment the past year was in a 1.0 FTE position as a middle school physical education teacher. Braunecker was laid off from his position due to the reduction in the Resolution of 1.0 FTE positions of Physical Education, Secondary. Braunecker contends that he can fill a position in the District’s Southern California Regional Occupational Center program (SCROC) or can fill the position of Denise Anderson (Anderson).

(d) There will be no SCROC program in the District next year. Anderson is a retired District employee with a physical education credential. The past year she worked occasionally as a substitute teacher and as a monitor for high school students who obtain grades and credit for their participation in team sports, referred to as Independent Study for Physical Education. This work as a monitor is under an oral contract under which Anderson is paid a stipend of \$38 per hour, and includes attending team practices and competitions to confirm the students’ presence, conferring with coaches, assisting in physical fitness testing, and providing grades so that other administrators can enter them in the District’s grading system. In this position she was paid \$3,662.80 for the last school year which, divided by \$38/hour, would represent 96.39 hours of work. Her job was described as a consultant. There was no evidence of her first date of paid service with the District.

(e) A list of employees who are retiring or resigning (Exhibit B) includes an elementary school teacher. Respondents contend that this position can be filled by Danielle Weiss (D. Weiss), who holds a Clear Multiple Subject Credential and is a probationary 2 employee with a seniority date of October 28, 2011, seniority number 296. Her assignment the past year was in a 1.0 FTE position as an Elementary Teacher. D. Weiss was the last Elementary Teacher laid off due to the reduction in the Resolution of 8.0 FTE positions of Elementary Teachers.

(f) Respondents contend that a non-respondent, Jessica Weiss (J. Weiss) was improperly characterized by the District as a temporary employee and that, in fact, she should be characterized as a probationary employee. J. Weiss started the 2012 school year as a day-to-day substitute due to another’s teacher’s unavailability for an unknown duration. After 21 days, effective October 8, 2012, J. Weiss became a long-term substitute. When the District became aware that the original teacher would not return for the year, it offered J. Weiss a temporary contract. The pay rate

under the temporary contract was higher than her pay as a long-term substitute. The offer was made, and the contract signed, on February 8, 2013. (Exhibit C.) However, the District offered J. Weiss the pay raise retroactive to February 1, 2013. This amounted to pay at the higher rate for an extra four days.

15. For the reasons set forth in more detail in the Legal Conclusions, there is insufficient evidence and/or legal basis for each of these contentions and, therefore, they are not accepted.

LEGAL CONCLUSIONS AND DISCUSSION

1. The timing of layoff notices is covered in section 44949, subdivision (a), which states in pertinent part:

“No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor.”

Relevant procedures are described in section 44949, subdivision (c)(3), which states in pertinent part:

“The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. . . . Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors.”

2. The law setting forth the legal basis for layoffs is found in section 44955 which provides, in pertinent part:

“(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

“(b) Whenever . . . 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.

“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. . . .

“(c) [S]ervices of such employees shall be terminated in the reverse order in which they were employed, as determined by the board in accordance with Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

“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 entitle them to render. . . .”

3. Sections 44949 and 44955 establish jurisdiction for this proceeding. The notice and jurisdictional requirements in sections 44949 and 44945 were met. (Factual Findings 1 through 4.)

4. A school 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.)

5. The District must be solvent to provide educational services, and cost savings are necessary to resolve projected District budget reductions, to insure that its schools provide, and students receive, required instruction in an effective and efficient manner. Such financial circumstances can dictate a reduction in certificated staff, and “section 44955 is the only statutory authority available to school districts to effectuate that reduction.” (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 639.) The Board’s decision to reduce services in light of its budget does address the welfare of students, and was a proper exercise of the Board’s discretion. Respondents did not establish that the proposed reductions in services would violate any statutory or regulatory requirement governing the District.

6. Boards of education hold significant discretion in determining the need to reduce or discontinue particular kinds of services, which is not open to second-guessing in this proceeding. (*Rutherford v. Board of Trustees, supra*, 64 Cal.App.3d 167.) Such policy-making decisions are not subject to arguments as to the wisdom of their enactment, their necessity, or the motivations for the decisions. (*California Teachers Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1529.) Such decisions and action must be reasonable under the circumstances, with the understanding that “such a standard may permit a difference of opinion.” (*Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.)

Numerous cases stand for the proposition that the process of implementing layoffs is a very flexible one and that school districts retain great flexibility in carrying out the process. (See, for example, *Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796.)

7. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or “bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.)

8. Respondents contend that Vanick can take the place of, or bump, Olson or Vanderpool. For several reasons, this contention is not accepted. The job share positions held by Olson and Vanderpool are each 0.50 FTE, while Vanick’s currently holds a 0.40 FTE position. Vanick cannot force the District to accept her 0.40 FTE position for a position currently covered by a teacher with a 0.50 FTE position. Further, Olson and Vanderpool’s 0.50 FTE positions are under a job share proposal accepted by the District, which cannot be forced to offer one of the positions to a teacher who was not part of the job share proposal and did not agree to the job share requirements under the collective bargaining agreement. Also, the District is aware that one of the job share participants intends to return to full time teaching next year, therefore it is unlikely that these two 0.50 positions will exist for the next school year. As determined in *Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334, a part-time permanent teacher who does not seek to be employed full-time may not exercise bumping rights over a less senior full-time teacher if the school district, reasonably and in good faith, does not wish to split the full-time position into part-time positions. As applied here: Vanick cannot force the District to accept her more senior 0.40 FTE position in lieu of either Olson’s or Vanderpool’s less senior 0.50 FTE positions; Vanick’s FTE amount is less; she has no right to a portion of the job share held by Olson and Vanderpool; the job share is not likely to exist next year; and the District cannot forcibly create a job share.

9. Anderson does not hold a position in which she is supplying services to the District, as those terms are used in section 44955. Her job was described as that of a consultant, and she works for an hourly stipend under an oral contract that can be terminated at any time. There was no evidence of Anderson’s first date of paid

service to the District so that, even if her job as a monitor was considered as a position and a service, it cannot be determined that Braunecker has greater seniority. Therefore, Braunecker cannot bump Anderson.

10. The contention that J. Weiss must be treated as a probationary employee is not within the jurisdiction of these proceedings. J. Weiss is not a respondent. Any claim she has been improperly categorized by the District can be pursued in superior court. On the merits, the employment contract clearly states that J. Weiss was a temporary employee, in compliance with section 44916. There is no reason to apply the “default” classification of probationary status under section 44915 and as described in *Stockton Teachers Association v. Stockton Unified School District* (2012) 204 Cal.App.4th 446. The District has complied with Education Code requirements, and the question of whether its offer to J. Weiss is as a probationary or temporary contract is within its discretion. (*Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911.) This is not changed by the District also exercising its discretion to give J. Weiss a four-day retroactive pay raise.

11. There was no evidence to establish that the District has not properly accounted for attrition in carrying out the layoff process. The District properly identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued.

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12. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

13. The services set forth in Factual Finding 7 are particular kinds of services which may be reduced or discontinued within the meaning of 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. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949.

ORDER

The District may give notice to respondents Aaron Braskin, Don Braunecker, Edward Frigola, Kathryn Kinnier, Joanne Michael, Courtney Rice, Nancy Rosenberg, Cheryl Vanick and Danielle Weiss that their services will not be required for the 2013-2014 school year.

Dated: May 2, 2013

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings