

BEFORE THE
GOVERNING BOARD OF
OROVILLE UNION HIGH SCHOOL DISTRICT
COUNTY OF BUTTE, STATE OF CALIFORNIA

In the Matter of the District Statement of
Reduction in Force of:

OAH No. 2014030560

RYAN ALDRICH
DIANA CASTILLO
KEELY FRAZIER
AMY GRUNDY
LINDSAY HIMMELSPACH
EVA HORVATH
LIBRADO LASCANO
WONG LEE
TOM LEWIS
BRAD LUND
ERNEST MULLINS
JUSTIN PEEK
SHANNON SHARP
RYAN SPEAS
JULIE TOOKER
ALISHA WELIVER

Respondents.

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, Office of Administrative Hearings, State of California, on April 2, 2014, in Oroville, California.

Diana D. Halpenny, Attorney at Law, Kronick, Moskovitz, Tiedemann & Girard, represented the Oroville Union High School District.

Andrea Price, Attorney at Law, Langenkamp, Curtis & Price, represented all respondents, except for Ryan Aldrich.

There was no appearance by, or on behalf of, Ryan Aldrich.

Testimony and documentary evidence were received, and oral closing arguments were made. On April 4, 2014, the District submitted Points and Authorities Regarding P.E. Issue, which was marked as Exhibit 16 for identification. The record was closed, and the matter was submitted for decision on April 4, 2014.

FACTUAL FINDINGS

1. Corey Willenberg, Ed.D. is the Superintendent of Oroville Union High School District (District). The District serves approximately 2,300 students. It has two comprehensive high schools¹ with approximately 1,100 students in each school in grades 9 through 12; one continuation high school;² and a community day school.³ Prospect High School is a targeted-assisted Title I school,⁴ which serves students in grades 10 through 12 who are behind in credits, did not perform well in a comprehensive high school, or are pregnant teens or teen parents. Oroville Union High Community Day School is also a targeted-assisted Title I school, and serves students who have been expelled into the program, or placed there by juvenile court probation, or the School Attendance Review Board.

2. The actions of Superintendent Willenberg, and those of the District's staff and Governing Board (Board), were taken solely in their official capacities.

3. The District is facing a budget shortfall for the 2014-2015 school year occasioned by a decrease in economic impact aid and a shifting of funds away from many Title I sections. The District has also projected declining enrollment of approximately 90 students. Consequently, the District believes it is necessary to reduce a corresponding number of certificated positions to address this budget shortfall.

4. On March 5, 2014, the Board adopted Resolution No. 11-13/14, reducing or eliminating particular kinds of services (PKS) of the District, and affecting 20.0 Full Time Equivalent (FTE) certificated positions.

¹ The District's comprehensive high schools are Las Plumas High School and Oroville High School.

² The District's continuation high school is Prospect High School.

³ The District's community day school is Oroville Union High Community Day School.

⁴ At targeted-assisted schools Title I funds can only be used for at-risk groups such as special education, English language learners or students from low socioeconomic backgrounds.

5. The Resolution states that it will be necessary to reduce the following PKS of the District, and to decrease a corresponding number of certificated employees in the District no later than the beginning of the 2014-2015 school year:

| SERVICE | FTE |
|---|-------------|
| English/Reading Teachers (24 sections) | 4.8 |
| Math Teachers (15 sections) | 3.0 |
| Social Science Teachers (10 sections) | 2.0 |
| Spanish Teachers (8 sections) | 1.4 |
| Art Teacher (1 section) | 0.2 |
| Special Education Teachers (8 sections) | 1.6 |
| Biology Teachers (10 sections) | 2.0 |
| Chemistry Teachers (2 sections) | 0.4 |
| Physics Teacher (1 section) | 0.2 |
| Physical Education Teachers (10 sections) | 2.0 |
| Credit Recovery Teachers (4 sections) | 0.8 |
| Intervention Teachers (3 sections) | 0.6 |
| Assistant Principal | 1.0 |
| Total | 20.0 |

6. The services set forth in the PKS Resolution are “particular kinds of services” that may be reduced or discontinued within the meaning of Education Code section 44955. There was no evidence that the Board’s decision to reduce or discontinue the identified services was arbitrary or capricious. The reduction or elimination of the services set forth in the PKS Resolution constituted a proper exercise of the Board’s discretion, within the meaning of section 44955.

7. As a result of the above PKS reductions and/or eliminations, the Board determined that it was necessary to decrease 20.0 FTE positions for certificated employees in the District at the close of the 2013-2014 school year, in accordance with Education Code section 44955.

On March 12, 2014, Superintendent Willenberg gave the Board written notice of his recommendation that notice be given to respondents that their services would not be required for the ensuing school year, and the reasons therefor.

8. On March 13, 2014, Superintendent Willenberg timely served a letter entitled "Preliminary Notice of Layoff" (Preliminary Notice) on each of the permanent and probationary certificated employees affected by the PKS reductions and/or eliminations set forth in the Resolution. The Preliminary Notice advised that it had been recommended to the Board that the recipient be given preliminary written notice that his/her services might not be required for the 2014-2015 school year, due to reductions in PKS.

9. All the respondents in this action timely filed a Request for Hearing to determine whether there was cause for not reemploying them for the 2014-2015 school year.

10. On March 24, 2014, Superintendent Willenberg made and filed the District's Statement of Reduction in Force, and caused it to be served on respondents. With the exception of Ryan Aldrich, all respondents timely filed a Notice of Participation requesting a hearing in this matter.

11. All respondents are certificated permanent or probationary employees of the District.

12. Jurisdiction for the subject proceedings exists pursuant to Education Code sections 44949 and 44955.

Implementation of Layoff Procedure

13. In anticipation of the PKS reduction, Superintendent Willenberg and his staff began updating the District's seniority list. On January 14, 2014, Deana Fallen, Senior Personnel Technician, sent a notice to all certificated teachers to confirm the accuracy of their seniority dates and credentials on file with the District, and provide them with an opportunity to correct such information on or before February 3, 2014.

14. Ms. Fallen identified the individuals serving in the positions affected by the PKS reductions. District staff used the updated seniority list to identify vacant positions and to identify the least senior persons occupying the positions affected by the PKS reductions. District staff took into account known attrition and existing vacancies.

15. When the least senior persons occupying the positions affected by the PKS reductions were identified, Ms. Fallen looked at each individual's credentials to determine whether he or she could displace any less senior certificated employees.

On March 13, 2014, District staff served the Preliminary Notices identified in Factual Finding 8, on the most junior employees affected by the PKS reduction.

Rescission

16. Respondent Diana Castillo is a Spanish teacher at Oroville High School. The District rescinded the Preliminary Notice of Layoff previously served on Ms. Castillo.

Waiver of Right to Hearing

17. Respondent Ryan Aldrich failed to file a notice of participation in this case. He did not appear at hearing. Accordingly, Mr. Aldrich waived his right to a hearing in this case. (Ed. Code, § 44949, subd. (c)(1).)

Competency Criteria

18. In Resolution No. 11-13/14, the Board defined “competency” for the purposes of Education Code sections 44955 as:

[T]he more senior employee must possess the appropriate subject area credential or authorization to render the service provided by the junior employee and be “competent” as defined below:

1. The employee must be “highly competent” where required by No Child Left Behind; and
2. If the employee is bumping within or into the continuation high school or community day school program, the employee must possess the subject authorization for the particular assignment, be NCLB qualified and consent to be assigned to the program.

Individual Challenges

19. Respondents Amy Grundy and Lindsay Himmelspach are physical education teachers assigned to Las Plumas High School. Ms. Grundy’s District seniority date is February 2, 2006, and Ms. Himmelspach’s District seniority date is October 19, 2006. As junior employees, they both received preliminary layoff notices for the physical education teacher (2.0 FTE) reductions. They both hold clear single subject physical education credentials. They have identified another physical education teacher, Richard Giovannoni, who is being retained by the District to teach .60 FTE physical education. Mr. Giovannoni is currently assigned to teach physical education at Oroville High School and is also an athletic director. Respondents

concede that Mr. Giovannoni is senior to them. His District seniority date is August 15, 2005.⁵

Mr. Giovannoni does not hold a physical education teaching credential. He holds a Clear Education Specialist credential, with a Mild/Moderate authorization. The District exercised its discretion under Education Code section 44263 to authorize Mr. Giovannoni to teach physical education at Oroville High School this school year. Section 44263 allows the holder of a teaching credential to serve, by resolution of the governing board and with the consent of the teacher, in a departmentalized class if the teacher has completed 18 semester units of coursework, or nine semester units of upper division or graduate course work, in the subject to be taught. Such authorization may be granted by the governing board on an annual basis. Here, the Board authorized Mr. Giovannoni to teach physical education by resolution (No. 1-13/14) dated September 4, 2013. There is no indication whether the Board will approve of Mr. Giovannoni doing so again for the 2014-2015 school year.

20. Respondents contend that absent continued Board authorization, Mr. Giovannoni is not competent to teach physical education next school year, and as the next most junior physical education teachers, one of them should be assigned to teach his physical education classes. Respondents note that *The Administrator's Assignment Manual* has indicated that authorizations such as section 44263 “recognize that there may be situations of a temporary nature in which a teacher with the appropriate credential is not available.” And that uncertainty remains as to whether the Board will exercise its discretion to approve Mr. Giovannoni again next year to teach physical education.

21. The District noted that respondents are junior to Mr. Giovannoni and that he is currently competent to provide physical education instruction. As well, there are other employees, senior to respondents, to whom the district may reassign his .60 FTE physical education. The assignment of teachers to classes for which a teacher is certificated is entirely within the discretion of the governing board. (*Centinela Valley Secondary Teachers Assn. v. Centinela Valley Union High School District* (1974) 37 Cal.App.3d 35, 40; *California Teachers Association v. Governing Board of Central Union High School District* (1983) 141 Cal.App.3d 606, 614.) Education Code section 44263 was not intended to limit the authority of the governing board to assign teachers who meet certain specified criteria and who so consent to teach courses outside the teacher's credential authorization. (See 61 Ops.Cal.Atty.Gen. 353, 362-363 (1978).)

⁵ Mr. Giovannoni is retained for just three physical education sections. Only Ms. Grundy would benefit from this argument, and even at that, would only prevail as to .40 FTE, since Ryan Speas is more senior and is subject to a .20 FTE reduction. Ms. Grundy would still be laid off .60 FTE, and Ms. Himmelspach would still be laid off 1.0 FTE.

22. Respondents may certainly assert that they are certificated and competent to bump into a junior employee's position under Education Code section 44955, subdivision (b). However, they cannot assert under this section that a *senior* employee may not be certificated and competent to provide physical education instruction in the ensuing school year, and that therefore they should be allowed to "bump" into his position.

Application of the District's competency criteria is properly applied to those senior teachers being reassigned, or who are bumping into new positions. However, such criteria cannot fairly be applied to certificated employees who have already been authorized by a governing board under section 44263 to render service in positions in which they are otherwise not credentialed. It is also noted that should Mr. Giovannoni not be authorized to teach physical education, the District remains bound to make assignments and reassignments in such manner that respondent employees "shall be retained to render any service which their seniority and qualifications entitle them to render." (Ed. Code, § 44955, subd. (c).)

Adaptive Physical Education

23. Respondents Amy Grundy and Lindsay Himmelspach further contend that their layoff would result in the District having no teachers holding credentials to provide adaptive physical education instruction.⁶ This is not the case. The District identified at least one other teacher, Robert Schmautz, who holds an adapted physical education credential. It is noted that to the extent that Ms. Himmelspach currently provides adaptive physical education instruction, she does so pursuant to an authorization that expires on June 6, 2014.

For all the above reasons, the objections raised by respondents Amy Grundy and Lindsay Himmelspach are overruled.

Additional Matters – Application of Tie Breaking Criteria

24. The District applied tie-breaking criteria to respondents Shannon Sharp and Julie Tooker, both having an August 15, 2005 seniority date. Ms. Fallen explained that she mistakenly gave Julie Tooker one point under the Education category for holding a B.A. degree. The parties stipulated that Ms. Tooker's total score should be adjusted to 20, down from 21.

⁶ This credential authorizes the holder to provide instruction and services to individuals with exceptional needs who are precluded from participation in the activities of either the general physical education program or a specially designed physical education program in a special class, in grades twelve and below, including preschool, and in classes organized primarily for adults.

Welfare of the District and Its Students

25. The Superintendent's designee correctly identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

26. Any other assertions raised by the parties at hearing which are not addressed above are found to be without merit.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of sections 44949 and 44955 were met.

2. A 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.) The burden is on the District to demonstrate that the reduction or elimination of the particular kinds of services is reasonable and that the District carefully considered its needs before laying off any certificated employee. (*Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 807-808.)

3. The services identified in PKS Resolution No. 11-13/14 are particular kinds of services that may be reduced or discontinued pursuant to sections 44949 and 44955. The description of services to be reduced, both in the Board's Resolution and in the notices, adequately described 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.)

4. Legal cause exists to reduce or eliminate 20.0 FTE of particular kinds of services offered by the District as set forth in detail in the Factual Findings. 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 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.

5. Cause exists for the reduction of the particular kinds of services and for the reduction of full-time equivalent certificated positions at the end of the 2013-2014

school year pursuant to Education Code sections 44949 and 44955. No employee with less seniority than any respondent is being retained to render a service which any respondent is certificated and competent to render. Except as set forth above, the District's Governing Board may give final notice to remaining respondents whose preliminary notices have not been rescinded before May 15, 2014, that their services will not be required for the ensuing school year, 2014-2015.

RECOMMENDATION

Cause exists for the reduction of 20.0 full-time equivalent certificated positions at the end of the 2013-2014 school year. After making the adjustments set forth in the Factual Findings and Legal Conclusions, notice shall be given to remaining respondents that their services will be reduced or will not be required for the ensuing school year, 2014-2015, because of the reduction and discontinuance of particular kinds of services. Notice shall be given in inverse order of seniority.

DATED: April 10, 2014

JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings