

BEFORE THE
GOVERNING BOARD OF THE
ELK GROVE UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

OAH No. 2009010506

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE ELK GROVE UNIFIED
SCHOOL DISTRICT,

Respondents.

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, in Elk Grove, California, on April 20 and 21, 2009.

Karen M. Rezendes and Leah Won, Attorneys at Law, represented the Elk Grove Unified School District (District).

A. Eugene Huguenin, Jr., and Margaret Geddes, Attorneys at Law, represented certain of the respondents.

Evidence was received on April 20 and 21, 2009. The record was left open to allow the parties to submit updated information. On April 23, 2009, the District submitted a Response Pursuant to the Order of the Administrative Law Judge Regarding Post Hearing Documentation (Response). Attached to the Response were the following: (1) a list of all respondents remaining in this matter; (2) a list of all certificated employees whose layoff notices have been rescinded; (3) a list of all certificated employees whose precautionary notices of layoff have been rescinded; (4) an updated list showing the particular kinds of services (sometimes referred to herein as PKS) and full-time equivalent (FTE) positions being reduced or discontinued, together with a summary data sheet; and (5) a list reflecting changes to employee status and/or seniority. The Response, together with all its attachments, was marked as Exhibit 29 and admitted into evidence. The record was closed and the matter was submitted for decision on April 23, 2009.

FACTUAL FINDINGS

1. On March 3, 2009, the Governing Board of the District adopted Resolution No. 58, entitled “Resolution of Intention to Dismiss Certificated Employees,” by which it determined that it was necessary to reduce or discontinue certain particular kinds of services and programs at the close of the 2008-2009 school year, as recommended by the Superintendent. In Resolution No. 58, the Governing Board directed the Superintendent to send appropriate notices to all employees whose services will be terminated by virtue of the reductions and discontinuances. The reductions and discontinuances are based solely upon the severe budget cuts that the District anticipates in these difficult economic times, and are not related to the skills, abilities or work performance of the affected teachers.

2. After the Governing Board adopted Resolution No. 58, some of the reductions and discontinuances of particular kinds of services were rescinded. The particular kinds of services and programs being reduced or discontinued at the end of the 2008-2009 school year are as follows:

Vice Principal K-8	0.50 FTE
High School Counselor	4 FTE
Middle School Counselor	5 FTE
Elementary School Counselor	0.90 FTE
EMHI Counselor	1 FTE
Elementary School Teacher	24 FTE
Instructional Coach	3 FTE
School Psychologist	1 FTE
English Teacher	4 FTE
Social Studies Teacher	4 FTE
Life Science Teacher	4 FTE
Music Teacher	1 FTE
Physical Education Teacher	4 FTE
Academic Intervention Teacher (High Priority Grant)	10 FTE
Elementary Prevention & Intervention Specialist	1 FTE
Foster Youth Program Specialist	1 FTE
Total	68.4 FTE

3. On March 3, 2009, the Governing Board also adopted the following additional resolutions: (1) Resolution No. 59 – Resolution to Determine Tie-Breaking Criteria for 2009-2010; (2) Resolution No. 60 – Resolution of Release and Reassignment of Certificated Administrator(s); (3) Resolution No. 61 – Resolution to Determine Criteria for Deviation from Terminating a Certificated Employee in Order of Seniority (“Skipping” Criteria); and (4) Resolution No. 62 – Resolution for Release and Non-reelection of Certificated Long-term Substitute and Temporary Employees.

4. Prior to March 15, 2009, Xavier De La Torre, Ed.D., the Associate Superintendent for Human Resources, gave written Notices of Layoff to certain certificated personnel of the District, notifying them that, pursuant to Education Code sections 44949 and 44955, he had recommended to the Governing Board that they be given notice that their services would be terminated at the end of the current school year.¹

5. Attached hereto as Attachment A is a list of all respondents remaining in this matter. Respondents are currently certificated employees of the District. Each of these respondents was properly and timely served with a Notice of Layoff and timely requested a hearing. Each was also properly and timely served with an Accusation, Statement to Respondent, form Notice of Defense, Notice of Hearing, and relevant statutes, and filed or had filed on their behalf a timely Notice of Defense.

6. Prior to the close of the hearing, the District rescinded some of the Notices of Layoff that it had previously served. Attached hereto as Attachment B is a list of the certificated employees whose Notices of Layoff have been rescinded. As a result of the rescissions, these certificated personnel are no longer respondents in this matter.

7. Precautionary Notices of Layoff: Before March 15, 2009, Dr. De La Torre issued Precautionary Notices of Layoff to certain certificated employees who, pursuant to Education Code section 44909, are currently either serving in categorically funded positions or filling in behind other certificated employees who have been assigned to categorically funded positions. In the Precautionary Notices of Layoff, the District asserted that these certificated employees were temporary teachers, but were being provided with notice in the event that they were deemed to have layoff rights. Respondents' counsel filed a brief and a reply brief, which contended that these certificated employees should be classified as probationary or permanent teachers. The District filed a response brief arguing that these teachers are temporary employees. Before the close of the hearing, the District rescinded all the Precautionary Notices of Layoff that it had served upon these teachers.² Attached hereto as Attachment C is a list of the certificated employees whose Precautionary Notices of Layoff have been rescinded. As a result of the rescissions, these employees are no longer respondents in this matter. Consequently, there is no reason to address in this proposed decision any of the issues raised by the parties in their briefs as to the status of these certificated employees.

8. Seniority List: The District maintains a Certificated Seniority List that contains the name, position, site, FTE, seniority date, credential, credential subject, English language authorization, and tenure status of each probationary and permanent certificated employee. On December 4, 2008, January 14, 2009, and February 17, 2009, Dr. De La Torre sent emails to all District Employees. Attached to the emails were an Internal Communiqué

¹ It was not disputed that Dr. De La Torre was duly delegated and authorized by the Superintendent of the District to issue these notices.

² The District's rescission of the Precautionary Notices of Layoff has no effect upon any temporary release letters that the District may have served upon these certificated employees.

and a Request to Change Seniority List Employment Information form. The communiqué explained how the 2008-2009 Certificated Seniority List could be accessed on the District's internal intranet, requested that employees review the list to verify its accuracy, and advised employees to utilize the form to request any changes. The communiqué also explained that the Certificated Seniority List did not include the names of temporary certificated employees, and asked that any such employees who believed that they were not properly classified as temporary use the form to request a change. In addition, the communiqué sent with the December 4, 2008 email encouraged principals to print out two hard copies of the Certificated Seniority List and make them available to faculty in a secure area; and the communiqué sent with the February 17, 2009 email included the names, telephone numbers and email addresses of District staff who could be contacted directly to review and verify any additional information. The District received a significant number of responses from employees to Dr. De La Torre's emails. The District's personnel analysts reviewed all the information that was submitted, and the Certificated Seniority List was corrected and updated upon verification of that information.

Up to and during the hearing, the District continued to receive, review and verify information relating to certificated employees' seniority dates, credentials, and status, and to update the Certificated Seniority List as appropriate. Attached hereto as Attachment D is a list of certificated employees whose status and/or seniority date have been changed. At the hearing, the District confirmed that it would continue to receive and review any additional information relating to seniority dates, credentials and status that certificated employees or their counsel may submit.

Other than the changes that the District voluntarily made to the 2008-2009 Certificated Seniority List, there was no evidence presented at the hearing to establish that further changes to that list should be ordered in this proposed decision.

9. Positively Assured Attrition: Steve Vaczovsky is the District's Director for Certificated Personnel. Under Mr. Vaczovsky's supervision, the District maintains lists of certificated personnel who have informed the District that they will be resigning or retiring, and their effective dates of resignation or retirement. In determining which certificated employees should received layoff notices, the District took into consideration resignations, retirements and any other positively assured attrition about which it had received notice before March 12, 2009. At the hearing, the District's counsel provided assurances that the District will continue to take into consideration all additional positively assured attrition about which it receives information up to the beginning of the 2009-2010 school year. There was no evidence presented at the hearing to indicate that the District has failed to properly take into consideration any positively assured attrition in this matter.

10. Skipping: Education Code section 44955, subdivision (d), permits a school district to deviate from terminating certificated employees in order of seniority (i.e., "skip") "for either of the following reasons: [¶] (1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a

school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess. [¶] (2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.” Pursuant to Resolution No. 61, the Governing Board determined that the needs of the District and the students would be best served by establishing the following skipping criteria: (1) individuals fully credentialed to serve in special education assignments; and (2) individuals fully credentialed to serve in secondary mathematics assignments. There was no evidence presented at hearing to show that the skipping criteria established by the Governing Board were unreasonable or inappropriate, or that the District applied the skipping criteria improperly.

11. Bumping: In deciding who should be laid off for each particular kind of service being reduced, the District developed a Bumping Chart to determine whether certificated employees identified for reduction had credentials that would allow them to “bump” more junior employees. There was no evidence presented at the hearing to show that the District has retained any junior certificated employees to perform services that more senior respondents are credentialed and competent to perform.

12. Tie-Breaking: Under the direction of Mr. Vaczovsky, the District developed a Methodology for Tie-Breaking to apply the tie-breaking criteria established by the Governing Board in Resolution No. 59. The tie-breaking criteria were applied for those certificated employees who were identified for layoff and who had the same seniority dates. In applying the tie-breaking criteria, the District first reviewed whether the identified employees had multiple and single subject credentials, degrees beyond the BA/BS level, and English language authorization, and awarded points as set forth in Resolution No. 59 as appropriate. For employees who were still tied after such points were awarded, Mr. Vaczovsky conducted a lottery, which Tom Gardner, the President of the Elk Grove Education Association, observed. From the information obtained after the application of the tie-breaking criteria and the lottery, Mr. Vaczovsky developed a Tie Breaking Chart. There was no evidence offered at the hearing challenging the Governing Board’s tie-breaking criteria, or disputing the District’s application of these criteria and conduct of the lottery, as reflected on the Tie Breaking Chart.

13. There was no evidence that the District proposes to eliminate any services that are mandated by state or federal laws or regulations.

14. Any other assertions put forth by respondents at the hearing and not addressed above are found to be without merit and are rejected.

15. No more junior employees are being retained to render services that more senior respondents are certificated and competent to perform.

16. The District's reductions and discontinuances of particular kinds of services relate solely to the welfare of the District's schools and pupils.

LEGAL CONCLUSIONS

1. The District complied with all notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955.

2. The services identified in Resolution No. 58 are particular kinds of services that may be reduced or discontinued under Education Code section 44955. The Governing 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.

3. Cause exists to reduce certificated employees of the District due to the reduction or discontinuance of particular kinds of services. The District properly identified the certificated employees to be laid off as directed by the Governing Board.

4. No more junior certificated employee is scheduled to be retained to perform services that a more senior respondent is certificated and competent to render.

5. Cause exists to give notice to respondents that their services will be reduced or will not be required for the 2009-2010 school year because of the reduction and discontinuance of particular kinds of services.

RECOMMENDATION

1. Cause exists for the reduction of 68.4 full-time equivalent certificated positions at the end of the 2008-2009 school year.

2. Notice may be given to respondents that their services will be reduced or will not be required for the 2009-2010 school year. Notice shall be given in inverse order of seniority.

DATED: April 29, 2009

KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings