

BEFORE THE
GOVERNING BOARD OF THE
DRY CREEK ELEMENTARY SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE DRY CREEK
ELEMENTARY SCHOOL DISTRICT,

Respondents.

OAH No. 2009020521

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge (ALJ), State of California, Office of Administrative Hearings, in Roseville, California, on April 17, 2009.

Robert E. Thurbon, Attorney at Law, represented the Dry Creek Elementary School District (District).

Michael N. McCallum, Attorney at Law, represented respondents.

Evidence was received, the record was initially closed, and the matter was initially submitted for decision on April 17, 2009. On April 23, 2009, the record was reopened to address whether the Governing Board had properly authorized the Superintendent to proceed with the proposed reduction of certificated employees. On April 23, 2009, the District submitted the Minutes of the Board of Trustees' Meeting – Special Session on February 26, 2009, which were added to Exhibit C and admitted into evidence. On April 24, 2009, respondents submitted a letter in which they confirmed that they did not intend to submit a brief to present any additional legal arguments regarding whether the Governing Board was required to adopt a resolution to authorize the reduction of certificated employees. The April 24, 2009 letter was marked as Exhibit 5 and admitted into the record. The record was closed and the matter was submitted for decision on April 24, 2009.

FACTUAL FINDINGS

1. On February 23, 2009, Mark Geyer, Superintendent of the District, issued a “Notice to the Governing Board of the Recommendation to Reduce/Discontinue Particular Kinds of Services and to Layoff Certificated Employee(s)” (Notice). In the Notice, the Superintendent determined that it was necessary to reduce or eliminate the following particular kinds of services (sometimes referred to below as PKS):

District Office Director	1.0 FTE
Assistant Principal	1.5 FTE
Assistant Principal – reduce all positions by 5 days per year	
Teacher - Elementary	22.0 FTE
Teacher - Middle School	8.0 FTE
Teacher – 4/5 Science	.5 FTE
Teacher – Reading Resource/English Language Learner	3.8 FTE
School Counselor	2.0 FTE
Psychologist	1.5 FTE
Psychologist – reduce all positions by 10 days per year	
Total:	40.3 FTE

The Superintendent recommended to the Governing Board that 40.3 full-time equivalent (FTE) certificated employees not be reemployed by the District for the 2009-2010 school year, and that the affected employees receive notice under Education Code sections 44949 and 44955 that their services for the 2009-2010 school year would not be required. The reason that the Superintendent gave for his recommendation was the “lack of funds primarily based upon the budget crisis of the State of California and the financial constraints resulting from revenue being insufficient to maintain the current levels of programs.”

2. On February 26, 2009, as reflected in the Board of Trustees’ Minutes – Special Session, the Governing Board approved the Superintendent’s recommendations to reduce or discontinue particular kinds of services and to lay off certificated employees.¹

¹ The Governing Board did not adopt a resolution authorizing the Superintendent to proceed with the recommended layoff. The District persuasively argued that, given the language of Education Code section 44949, subdivision (a), the Superintendent’s recommendation and the Governing Board’s approval, as set forth in the February 26, 2009

3. On February 26, 2009, the Governing Board adopted Resolution No. 2009-7, entitled “Resolution of the Board of Education Adopting Seniority List” (Seniority List Resolution), and Resolution No. 2009-8, entitled “Resolution of the Board of Education Adopting Criteria for Order of Seniority for Those Employees with the Same Date of First Paid Probationary Service” (Tie-Breaking Resolution). In the Seniority List Resolution, the Governing Board adopted the Seniority List prepared by the Superintendent’s office setting forth the seniority dates of the District’s certificated employees. In the Tie-Breaking Resolution, the Governing Board adopted the following resolution:

[T]o meet the requirements of California Education Code Section 44955, the following criteria will be applied in the priority order indicated to determine which certificated employees meet the particular needs of the District in the event that all certificated employees with the same date of hire are not terminated. These criteria meet the particular needs of the District at the present time:

1. Special authorizations to provide critical services in order of priority to the District as follows:

- A. Special education certification
- B. Authorization/Certification to teach English Language Learners (CLAD or equivalent)
- C. No Child Left Behind (NCLB) Compliant

The District reserves the right based on specific service needs at the time of layoff to retain employees with special authorizations and/or training, education or experience to provide critical services.

2. Number of years of teaching experience as probationary/tenured teacher:

- A. Years of teaching experience in the Dry Creek Joint Elementary School District
- B. Years of teaching experience in California K-12 school districts

3. Number of post bachelor units and advanced degrees.

4. Use of the last four digits of the persons [sic] social security number with the highest number being the most senior of those with the same date.

minutes, were sufficient to authorize the layoff. Education Code section 44949, subdivision (a), in relevant part, provides:

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.

In the event that after application of the above criteria, employees are still equally situated, then seniority will be determined by lot.

4. Prior to March 15, 2009, the Superintendent gave written Notices of Recommended Layoff to certain certificated employees of the District, notifying them that, pursuant to Education Code section 44955, he had recommended to the Governing Board that they be laid off at the end of the current school year and not be reemployed for the 2009-2010 school year. Prior to the hearing, the Superintendent rescinded some of the Notices of Recommended Layoff that he had sent.

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

6. Colleen Slattery is the Director of Personnel Services for the District. She prepared the Seniority List adopted by the Governing Board by the Seniority List Resolution. (Finding 3.) She also determined which certificated employees of the District should be laid off. According to Ms. Slattery, to make this determination, she started with the most junior employee at the bottom of Seniority List and went up, skipping employees who: (1) will not be returning to the District for the 2009-2010 school year; (2) had been given notices of non-re-election; or (3) held a special education, speech and language, adapted physical education, physical education, or music credential, until she had identified enough employees to achieve the total number of FTE reductions that the Superintendent had recommended to the Governing Board.

7. Respondents raised a number of challenges to the manner in which the District identified certificated employees for layoff.

8. **Selection of Certificated Employees for Layoff:** First, respondents asserted that, because the District has decided to reduce particular kinds of services, when determining which certificated employees to lay off, in addition to the factors Ms. Slattery considered (Finding 6), the District should also have identified the most junior employees currently occupying positions that are designated for reduction, and determined whether any of those employees possess credentials and competencies that would allow them to bump more junior employees occupying positions not designated for reduction. Respondents argued that, because the District identified certificated employees for layoff based only upon their seniority and the District's skipping determinations, and did not also consider the particular kinds of services the identified employees are providing or their bumping rights, the entire layoff should be declared invalid.

Respondent's challenges to the manner by which the District identified certificated employees for layoff in this case were persuasive. Respondents did not, however, establish that the entire layoff should be declared invalid. Instead, only those respondents who occupy positions that have not been designated for reduction need to be determined and their layoff status addressed. The only respondent who was identified as occupying such a position was Nicole Brackett. The issues relating to Ms. Brackett are set forth in Findings 9 through 11 below.

9. **Ms. Brackett's Seniority Date:** Ms. Brackett holds a Multiple Subject teaching credential with a CLAD,² and a Supplementary Authorization in Geosciences. The Seniority List identifies her seniority date (i.e., first date of paid probationary service with the District) as August 6, 2007.³ The Seniority List also identifies Ms. Brackett as a "Teacher 4/5" and a "Support/Title One" teacher. The Seniority List does not state how much time Ms. Brackett spends in each of these positions. At the hearing, Ms. Brackett estimated that she spends approximately 70 percent of her workday teaching fourth and fifth grade science, and 30 percent of her workday as a Support/Title One teacher, providing teaching support in the fourth and fifth grades as requested by the teaching team.

Ms. Brackett raised two challenges to her proposed layoff. First, she argued that her seniority date should not be August 6, 2007, as set forth on the Seniority List, but, instead, July 31, 2007. According to Ms. Brackett, on July 31 and August 1, 2007, she attended GLAD training.⁴ This training was important to prepare her to teach students who do not speak English as a primary language. Ms. Brackett was not paid to attend this training. According to Ms. Brackett, she was not "really required" to attend the training; her principal told her about the training and set up the time for her to attend, and she "gladly" accepted. Because Ms. Brackett was not ordered to take the GLAD training and was not paid for the time she spent in the training, she did not establish that her seniority date should be changed to July 31, 2007.

10. **.5 FTE Reduction of 4/5 Science Teacher:** Ms. Brackett also asserted that, because the Governing Board approved a .5 FTE reduction of a 4/5 Science teacher and did not approve a reduction of a Support/Title One teacher, she could be laid off only to the extent of the .5 FTE reduction of her 4/5 Science teaching position, unless a more senior respondent could bump into her remaining .5 FTE. Ms. Brackett's argument was persuasive.

² A "CLAD" is a Crosscultural, Language, and Academic Development certificate, which authorizes instruction to English Learners.

³ Education Code section 44845 provides: "Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position."

⁴ "GLAD" stands for Guided Language Acquisition and Design.

The District asserted that Ms. Brackett should be fully laid off because a more senior teacher could perform her Support/Title One duties. The District did not, however, identify which more senior teacher would be performing those duties, and conceded that it did not conduct a bumping analysis to determine whether any of the other respondents were more senior to Ms. Brackett and were credentialed and competent to perform her Support/Title One duties. Because the District did not approve the reduction of Ms. Brackett's Support/Title One position or any more than .5 FTE of her 4/5 Science teacher position, the District must retain .5 FTE of Ms. Brackett's full-time position. Because that .5 FTE was not reduced, the District should have conducted a bumping analysis to review whether any of the other respondents were more senior to Ms. Brackett and were credentialed and competent to perform the duties of that retained .5 FTE.

11. Respondent Linda Smith has the same August 6, 2007 seniority date as Ms. Brackett. At the hearing, the parties stipulated that, if the tie-breaking criteria set forth in the Tie-Breaking Resolution (Finding 3) were applied to break a tie between Ms. Smith and Ms. Brackett, Ms. Smith would be deemed to be more senior, because Ms. Smith had 10 years of teaching experience before she started teaching for the District, while Ms. Brackett had no prior teaching experience. From a review of the Seniority List, there appear to be other respondents who might also be deemed to be more senior to Ms. Brackett, but their seniority dates, credentials and competencies were not addressed at the hearing. Because the District did not reduce .5 FTE of Ms. Brackett's current position, it must determine who is the most senior respondent who is credentialed and competent to fill that .5 FTE position for the 2009-2010 school year in order to bump Ms. Brackett from that .5 FTE.

12. **Identification of Middle School Teachers for Layoff:** The Governing Board approved the reduction of eight Middle School teachers.⁵ In determining which Middle School teachers should be laid off, the District skipped middle school teachers with music and physical education credentials. Respondents argued that, because the District approved the reduction of eight FTE Middle School teachers without identifying any particular subjects, the District could not skip teachers with music and physical education credentials.⁶ Respondents' argument was persuasive.

The District argued that it could skip music and physical education teachers because: (1) the Governing Board did not identify physical education and music for reduction; (2) the District has decided not to reduce a physical education and music teacher at the Middle School level; (3) the District's block schedule separates music and physical education from other core subjects; and (4) the Governing Board's Tie-Breaking Resolution grants the District "the right based on specific service needs at the time of layoff to retain employees with special authorizations and/or training, education or experience to provide critical services." None of these arguments was persuasive.

⁵ Respondents did not object that the reduction of "Middle School" teachers was too broad a description to constitute a particular kind of service. Consequently, this issue is not addressed in this proposed decision.

⁶ Respondents did not object to the District's skipping teachers who held special education, speech and language or adapted physical education credentials. Consequently, this skipping is not addressed in this proposed decision.

While the Governing Board may not have specifically approved physical education or music for reduction, it also did not identify any other particular Middle School subjects for reduction or adopt any skipping criteria. By failing to specify any particular Middle School subjects for reduction or adopt skipping criteria, the Governing Board subjected all Middle School subjects to reduction.

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.” The District conceded that it did not need to retain a physical education teacher and a music teacher at the Middle School level in order to comply with state or federal mandates. The District did not present sufficient evidence to demonstrate a specific need to retain a physical education teacher and a music teacher at the Middle School level in order to support a deviation from seniority order.

The fact that the District’s block schedule separates physical education and music from core subjects is irrelevant. The language set forth in the Tie-Breaking Resolution is also irrelevant, since this issue does not present a tie-breaking situation. In any event, Ms. Slattery testified that physical education and music were no more critical to the District than the core Middle School subjects being reduced.

In sum, because the Superintendent and Governing Board did not specify any particular Middle School subjects for reduction or establish skipping criteria that would allow the District to skip physical education and music, given the broad language of the PKS reduction recommended by the Superintendent and approved by the Governing Board, the District could not skip music and physical education teachers when determining which Middle School teachers to lay off. (See *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567.)

13. The evidence presented at the hearing identified two Middle School teachers who were skipped improperly - Valerie Verboncouer, a Middle School music teacher, and Laura Benjamin, a Middle School physical education teacher. When teachers are improperly skipped, a school district must rescind a corresponding number of preliminary layoff notices served on the most senior laid off teachers who are credentialed and competent to teach the particular kind of service being reduced. (*Alexander, supra*, 139 Cal.App.3d at p. 576.) Consequently, the District must determine the two most senior respondents who are credentialed and competent to teach at the Middle School level and rescind their Notices of Recommended Layoff.

14. **Psychologists – 10 Days Per Year Reduction.** The Governing Board approved the Superintendent’s recommendation that the school year for all psychologists be reduced by 10 days per year, from about 195 days per year to about 185 days per year, the number of days that school is generally open for instruction. Respondents argued that the District could not legally implement this type of reduction. Respondents’ argument was not persuasive.

In *Black v. Board of Trustees* (1996) 46 Cal.App.4th 493, the Second District Court of Appeal found that a school district’s reduction of teachers’ work hours by 5.7 to 17.6 percent did not constitute a termination of employment under Education Code sections 44949 and 44955, because the teachers still remained fully employed. As the court explained:

[A]s the statutory language makes clear, section 44955 applies only to terminations of employment - where it becomes necessary “to decrease the number of permanent employees in the district.” (§ 44955, subd. (b); see fn. 3, ante [quoting statute].) In this case, [46 Cal.App.4th 499] the District did not reduce the number of teachers; it reduced the number of work hours. A reduction in work hours by 5.7 to 17.6 percent does not fall within the statute’s reach. Moreover, section 44955 expressly provides that the remedy for its violation is to deem the aggrieved employee “reemployed for the ensuing school year.” (§ 44955, subd. (c); see fn. 3, ante [quoting statute].) Here, plaintiffs were clearly “reemployed” for the pertinent school year; the reduction in their hours did not render them “unemployed.” Given that the remedy established by section 44955 cannot cure the District’s alleged wrongful conduct, it follows that the reduction in hours did not violate the statute in the first place. (*Id.* at pp. 498-499.)

The court’s reasoning in *Black* applies in this case. While the District is reducing the number of days all psychologists will work in the 2009-2010 school year by about 5.1 percent, the psychologists not otherwise laid off by the District will remain fully employed. Because a 10-day reduction in the number of total days worked does not constitute a termination of services as that term is used in Education Code sections 44949 and 44955, the Governing Board did not violate these sections by approving this reduction.

15. **Psychologist – 1.5 FTE Reduction.** The Superintendent has recommended reducing the District’s psychologist staff by 1.5 FTE. Respondents argued that the District will not be able to provide mandatory services if it both reduces psychologists by 1.5 FTE and cuts the remaining psychologists’ work year by 10 days. Respondents’ argument was not persuasive.

Danna Ingwerson has been employed as a psychologist by the District for eight years. She testified that the District is required to provide mandated assessments when special education services are requested or changed for a student. She estimated the number of assessments she conducts annually and the number of hours, on average, she spends on each assessment, and extrapolated her results to all the psychologists in the District. Based upon her estimates and extrapolations, she opined that the District will not be able to perform all the legally mandated special education assessments if some psychologists are laid off and the remaining psychologists' work year is reduced, as recommended by the Superintendent and approved by the Governing Board.

Ms. Ingwerson's analysis was not sufficiently specific, detailed and supported by factual evidence to establish that the District will be unable to provide mandated assessments if the proposed cuts are made. As the District persuasively argued, there is no set amount of time that a psychologist is required to spend conducting an assessment, and the amount of time that each psychologist spends on an assessment may vary by psychologist and the assessed student's learning disability or condition. Moreover, the District's enrollment is currently declining. In sum, the evidence did not establish that the District will not be able to provide all mandated psychological assessments if the recommended cuts to psychologists' services are made.

16. **Seniority Date Issues Relating to Specific Teachers.**

- a. Amy Davis: The Seniority List identifies Ms. Davis's seniority date as August 6, 2007. Ms. Davis argued that her seniority date should be changed to July 31, 2007, for the same reasons that Ms. Brackett asserted: she attended GLAD training beginning on that date. Because Ms. Davis was not ordered to take the GLAD training and was not paid for the time she spent in the training, she did not establish that her seniority date should be changed to July 31, 2007.
- b. Alison Guernsey: The Seniority List identifies Ms. Guernsey's first date of paid service with the District as August 8, 2008. According to Ms. Guernsey, two to three weeks before August 8, 2008, she was "required" by the District's Human Resources Department to come to an orientation session. During this session, she filled out employment paperwork as part of accepting her position with the District. She was not paid for this time. Ms. Guernsey did not provide sufficient evidence to establish that the time she spent filling out employment paperwork was a mandated orientation session that was part of her regular teaching assignment. Consequently, she did not establish that her seniority date should be changed.
- c. Colleen Sullivan: The District stipulated that the seniority date for Ms. Sullivan should be changed from August 8, 2008, to August 21, 2007. This change does not affect Ms. Sullivan's layoff status.

17. It was not established that the District proposes to eliminate any services mandated by state or federal laws or regulations below mandated levels.

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

19. Other than as set forth in Findings 11 and 13, no more junior employees are being retained to render services that more senior respondents are certificated and competent to perform.

20. 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. As set forth in Finding 11, because the Superintendent did not recommend and the Governing Board did not approve the reduction of .5 FTE of Ms. Brackett's current position, the District must determine whether there are any respondents more senior than Ms. Brackett who are credentialed and competent to fill that .5 FTE position, and permit the most senior of such respondents to bump into that .5 FTE for the 2009-2010 school year.

3. As set forth in Finding 13, because the District improperly skipped two Middle School teachers, the District must determine the two most senior respondents who are credentialed and competent to teach at the Middle School level and rescind their Notices of Recommended Layoff.

4. The services identified by the Superintendent and approved by the Governing Board 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.

5. Cause exists to reduce certificated employees of the District due to the reduction or discontinuance of particular kinds of services. Except as set forth in Findings 11 and 13 and Legal Conclusions 2 and 3, the District properly identified the certificated employees to be laid off as recommended by the Superintendent and approved by the Governing Board.

6. Except as set forth in Findings 11 and 13 and Legal Conclusions 2 and 3, no more junior certificated employee is scheduled to be retained to perform services that a more senior respondent is certificated and competent to render.

7. Except as set forth in Findings 11 and 13 and Legal Conclusions 2 and 3, 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 40.3 full-time equivalent certificated positions at the end of the 2008-2009 school year.

2. The District shall determine whether there are any respondents more senior to Ms. Brackett who are credentialed and competent to fill the .5 FTE position currently occupied by Nicole Brackett that is not being reduced, and permit the most senior such respondent to bump into that .5 FTE for the 2009-2010 school year.

3. The District shall determine the two most senior respondents who are credentialed and competent to serve at the Middle School level and rescind their Notices of Recommended Layoff.

4. Except as provided in Recommendations 2 and 3, 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: May 4, 2009

KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings