

BEFORE THE
GOVERNING BOARD OF THE
TRAVIS UNIFIED SCHOOL DISTRICT

In the Matter of the Non-Reemployment of
51.6 Full Time Equivalent Certificated
Employees

OAH No. 2009020656

PROPOSED DECISION

This matter was heard before Cheryl R. Tompkin, Administrative Law Judge, State of California, Office of Administrative Hearings, on April 23, 2009, in Fairfield, California.

Lawrence M. Schoenke, Attorney at Law, Miller Brown & Dannis, 71 Stevenson Street, Nineteenth Floor, San Francisco, California, represented the Travis Unified School District.

Costa Kerestenzis, Attorney at Law, Beeson, Taylor & Bodine, 520 Capitola Mall, Suite 300, Sacramento, California 95814, represented respondents.

The matter was submitted for decision on April 23, 2009.

FACTUAL FINDINGS

1. Kate Wren Galvak made and filed the Accusations against respondents, those individuals listed on Exhibit A hereto, in her official capacity as the Superintendent (Superintendent) of the Travis Unified School District (District). District has five elementary schools, a middle school, a comprehensive high school, an alternative education high school and a community day school, which collectively serve approximately 5,200 students.

2. Respondents are all certificated employees of District.

3. On March 3, 2009, the Governing Board of District adopted Resolution No. 2008-09-37, reducing or eliminating the following particular kinds of services for the 2009-2010 school year and directing the Superintendent or her designee to send appropriate notice to employees whose positions might be lost by virtue of this action:

PARTICULAR KINDS OF SERVICES	NUMBER OF FULL-TIME EQUIVALENT (F.T.E.) POSITIONS
1. Grades K-3 Class Size Reduction (Multiple Subjects)	31.0
2. Elementary P.E. Teachers	6.0
3. Elementary Music Teachers	5.0
4. Middle School P.E. Teacher	1.0
5. Program Specialist (Special Education)	1.0
6. Speech and Language Therapist (Special Education)	1.0
7. Resource Specialists (Special Education)	2.5
8. Child Welfare & Attendance Officer	0.5
9. Psychologist (Special Education)	0.5
10. Categorical Programs	
Title I (0.5 F.T.E.)	
Title I (0.5 F.T.E.)	3.1
BTSA/Language Learner Coordinator (1.0 FTE)	
Counselor (1.0 F.T.E.)	
TOTAL FULL TIME EQUIVALENTS	51.6

4. On or about March 10, 2009, the Superintendent gave written notice to respondents that, pursuant to Education Code sections 44949 and 44955, it was being recommended that their services be reduced or eliminated for the ensuing 2009-2010 school year. The written notice set forth the reasons for the recommendation.

5. Respondents each filed a timely request for a hearing and a timely notice of defense to the accusation which followed. All prehearing jurisdictional requirements have been met.

6. District currently employs 6 F.T.E. elementary school physical education teachers. The March 3, 2009, Board resolution authorizes release of all 6 F.T.E. elementary school physical education teachers. Several of the elementary school physical education teachers are more senior than certain high school physical education teachers and are bumping into the high school physical education positions. At least three of the elementary school physical education teachers possess both a single subject physical education credential and a multiple subject credential, which would permit those teachers to bump into an elementary classroom.

7. Respondent Juanito Guzman holds a Clear Single Subject credential in Physical Education. District currently employs Guzman as a 1.0 F.T.E. physical education teacher at Vanden High School. District has assigned Guzman a seniority date of August 27, 1997. Guzman is a permanent employee.

Respondent Norman DePonte, Jr. holds a Clear Single Subject credential in Physical Education. District currently employs DePonte as a 1.0 F.T.E. physical education teacher at Vanden High School. District has assigned DePonte a seniority date of August 22, 2001. DePonte is a permanent employee.

Respondent Kijuana Daw holds a Clear Single Subject credential in Physical Education. District currently employs Daw as a 1.0 F.T.E. physical education teacher at Vanden High School. District has assigned Daw a seniority date of August 24, 2005. Daw is a permanent employee.

Respondent Kevin Ratterman holds a Clear Single Subject credential in Physical Education and a Clear Multiple Subject credential. District currently employs Ratterman as a 1.0 F.T.E. physical education teacher at Foxboro Elementary School. District has assigned Ratterman a seniority date of August 29, 1990. Ratterman is a permanent employee.

Respondent Matthew Soughers holds a Clear Single Subject credential in Physical Education and a Clear Multiple Subject credential. District currently employs Soughers as a 1.0 F.T.E. physical education teacher at Travis Elementary School. District has assigned Soughers a seniority date of August 30, 1995. Soughers is a permanent employee.

Respondent Valerie Weber holds a Clear Single Subject credential in Physical Education and a Clear Multiple Subject credential. District currently employs Weber as a 1.0 F.T.E. physical education teacher at Cambridge Elementary School. District has assigned Weber a seniority date of August 28, 1996. Weber is a permanent employee.

Ratterman, Soughers and Weber were subject to layoff as a result of the reduction in services of elementary physical education teachers. They bumped into the high school physical education positions held by Guzman, DePonte and Daw. They also could have bumped into an elementary classroom since each possesses a Clear Multiple Subject credential.

8. Respondent Guzman contends District should have bumped respondent Weber into an elementary classroom because the most senior person with a Multiple Subject credential who is being laid off from an elementary school classroom was hired in 2002. This would have permitted Guzman, who has a seniority date prior to 2002, to retain his position, and would have resulted in the lay off of an employee with less seniority than Guzman. Guzman argues such a result is mandated by Education Code section 44955

because the purpose of that statute is to preserve the employment of the most senior teachers.¹

District maintains it has discretion in making assignments. It asserts it decided to assign physical education teachers to physical education classes based on the needs of the District; such assignments permit it to retain more teachers holding Multiple Subject credentials.

It is well established that assignment of teachers to classes for which they are certified is within the discretion of the governing board. That prerogative must simply be exercised for the best interest of the students. (*Centinela Valley Secondary Teachers Assn. v. Centinela Valley Union High School Dist.* (1974) 37 Cal.App.3d 35, 40; *Matthews v. Bd. of Education* (1962) 198 Cal.App.2d 748, 754.) The evidence established that District properly exercised its discretion in this case.

9. Respondents Guzman, DePonte and Daw have all taught high school health education classes. Guzman taught health education during the 2000-2001 school year. DePonte taught health education during the 1991-1992 school year. Daw taught health education during the 2006-2007 school year and was offered the opportunity to teach it again this year, but declined. Guzman, DePonte and Daw contend they should be permitted to bump into Health Science classes that will be taught by employees with less seniority than each respondent possesses.

On March 27, 1989, the California Commission on Teacher Credentialing issued a directive in which it stated that the holder of a Single Subject Teaching Credential in Physical Education initially issued on or after January 1, 1981, “should [not] be assigned to teach a course in health science or health education unless assigned on an appropriate supplementary authorization or under another provision of the Education Code or Title 5 regulations.” As previously noted, Guzman, DePonte and Daw each hold a Single Subject Teaching Credential in Physical Education. None hold one of the specified supplementary authorizations and none fall within any other provision of the Education Code or Title 5 regulations. Therefore Guzman, DePonte and Daw are not qualified to teach a course in health science or health education. The District relied on the California Commission on Teacher Credentialing directive in denying respondents’ claims for reassignment to a health science position. Its actions were reasonable notwithstanding the fact District had previously allowed respondents to teach health education courses.²

¹ Section 44955, subdivision (c), requires that the services of employees noticed for layoff “be terminated in the inverse of the order in which they were employed” and that the governing board of a school district “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.”

² District was not sure why respondents Guzman, DePonte and Daw had been permitted to teach health education without an appropriate authorization, but believed it may have been pursuant to a waiver.

10. Board Resolution No. 2008-09-37 contains the following provision:

District may deviate from terminating certificated employees in order of seniority, based on a specific need for personnel who possess special training, experience, or competency, or a combination thereof, necessary to teach specific courses or courses of study or to provide specific services, which others with more seniority do not possess. It will be necessary to retain the service of certificated employees in the 2009-2010 school year regardless of seniority, who possess qualifications needed for the following programs:

Alternative Education Programs, including Travis Community Day School, Travis Education Center, and Independent Study: Experience teaching in the District's alternative education program for at least 1 year within the last 5 years.

Respondent John O'Leary holds a Clear Multiple Subject credential with a special authorization in Physical Education. District currently employs O'Leary as a 1.0 F.T.E. physical education teacher at Foxboro Elementary School. District has assigned O'Leary a seniority date of September 7, 2004. O'Leary is a permanent employee. O'Leary testified that during the 1998-1999 school year, while employed by Mount Diablo Unified School District, he was a special day class teacher for grades one through five. O'Leary further testified that he would consent to teach in the Alternative Education Program at District in lieu of layoff, but that he has not been asked. O'Leary has never taught in an alternative education program at District.

11. District concedes that either a multiple subject credential or a single subject credential would permit an employee to teach in the Alternative Education Program. But it points out that under the competency standard established by the Governing Board, an employee cannot bump into Alternative Education Program unless he has had at least one year of experience in the program within the last five years. O'Leary does not satisfy the competency criteria.

O'Leary contends District has failed to prove that experience in the Alternative Education Program within the last five years is a criteria that should disqualify him. Generally speaking, a senior employee whose position is eliminated has the right to "bump" into a position held by a junior employee if the senior employee is credentialed and competent to perform the duties of the junior employee's position. (Ed. Code, § 44955.) In this case District has determined that it needs would best be met by a teacher with at least one year's experience teaching in its Alternative Education Program, and it has established this requirement as a competency criterion. O'Leary has never taught in an alternative education program at District. Although he taught a special day class in another school

district, that was ten years ago. District was reasonable in concluding that respondent O'Leary is not competent to bump into a position in the Alternative Education Program.

12. As part of its action in reducing services for the 2009-2010 school year, District will reduce staffing in its special education program. The planned reductions are based on a study by the Fiscal Crisis Management and Assistance Team (FCMAT), an independent and external state agency that helps California's local education agencies identify, prevent and resolve financial challenges. FCMAT conducted an independent review of District's special education program. It determined that there was overstaffing in District's program and made recommendations regarding staffing reductions. District decided to reduce or eliminate a 1.0 F.T.E. Special Education Program Specialist position, a 1.0 F.T.E. Special Education Speech and Language Therapist position, 2.5 F.T.E. Special Education Resource Specialist positions, 0.5 F.T.E. of a Child Welfare & Attendance Officer position and 0.5 F.T.E. of a Special Education Psychologist position. In deciding what services to reduce or eliminate, District considered the FCMAT recommendations, the special education population it serves and mandated services it is required to provide. Its goal was to ensure that it would be able to provide all mandated services and not exceed class size maximums even with reduced services. Based on its assessment, District is confident it will be able to provide all mandated special education services at the required levels.

13. Respondent Gayle Sweda holds an Education Specialist Instruction Level 1 credential. District currently employs Sweda as a 1.0 F.T.E. Special Day Class teacher at Travis Elementary School. District has assigned Sweda a seniority date of February 11, 2008. Sweda is a probationary employee. She holds one of the special education positions that is being eliminated. Sweda currently has a caseload of 12 students, including a "guest" student who spends part of her time in Sweda's special day class. There are no other special day classes at Cambridge Elementary School.

Respondent Christina Heckman holds an Intern Education Specialist Instruction Moderate/Severe credential. District currently employs Heckman as a 1.0 F.T.E. SKIL teacher at Travis Elementary School. District has assigned Heckman a seniority date of September 25, 2008. Heckman is a probationary employee. She holds one of the special education positions that is being eliminated. Heckman provides instruction to seven students, all of whom have autism.

Respondent Christina Peterson holds a Clear Multiple Subject credential. District currently employs Peterson as a 0.6 F.T.E. Title I Coordinator at Travis Elementary School. District has assigned Peterson a seniority date of August 21, 2007. Peterson holds the 0.6 F.T.E. Title 1 position that is being eliminated. Peterson frequently works with resource specialist teachers, Title 1 students and guest students. She currently has one IEP student and five Title 1 students.

14. Respondents contend District has failed to establish that it will be able to provide all mandated special education services if the proposed reductions are implemented.

They seem to suggest that the services provided by Heckman, Sweda and Peterson may not be provided if special education services are reduced. Respondents concern is noted but found to be unpersuasive. The evidence established that District's determination that it can comply with all statutory mandates with a reduced special education staff was not arbitrary, but rather was based upon reasonable considerations. While it is clear that the special education staff that remains at District will likely be working harder due to the reductions in the special education program, it was not established that the reductions will prevent the District from providing mandated services. Moreover, it must be presumed that District will perform its official duties and comply with legislative mandates. If District finds it difficult to provide mandatory services next year, it has the option of changing the manner or method of offering the service. (*Campbell v. Abbot* (1978) 76 Cal.App.3d 796; *Gallup v. Loma School Dist.* (1996) 41 Cal.App.4th 1571.)

15. Respondent Barbara Cringle holds a Life Clinical Rehabilitative Language Speech and Hearing credential. District currently employs Cringle as a 1.0 F.T.E. Speech Therapist at Golden West Middle School. District has assigned Cringle a seniority date of August 20, 2003. Cringle is a permanent employee. She holds the special education speech and language therapist position that is being eliminated.

District will layoff one of its seven speech therapists. It will continue to use the services of a non-District employee who provides speech therapy. The non-District employee is employed by the Solano County Office of Education, which pays the employee's salary. District receives the employee's service pursuant to a longstanding (20 plus years) Special Education Local Plan Area (SELPA) plan, which is a multi-agency contractual obligation outside District. District acknowledges that it would receive more governmental funding if it declined SELPA funds and employed the speech therapist directly. However, it would be a cumbersome and time consuming process that could not have been completed in time for the layoff.

Respondents contend District had a duty to reassign certificated employees in a manner that would ensure retention of the maximum number of its employees, which would include refusing services paid for by an outside source in order to seek direct funding for the services of a District employee. Even if true (and respondents cite no legal authority setting forth such a requirement), the evidence established that obtaining an alternate direct funding source could not have been accomplished in time to affect the subject layoff. District acted reasonably in noticing Cringle for layoff and continuing to accept the services of the non-District employee.

Stipulations

16. Respondent Lizabeth Roman holds a Clear Single Subject Science credential with an authorization in Chemistry. District currently employs Roman as a 1.0 F.T.E. Science/Health teacher at Vanden High School. District has assigned Roman a seniority date of August 23, 2006. Roman is a permanent employee.

Respondent Cindy Morris holds a Clear Single Subject Physical Education credential with an authorization in Biological Sciences and a Multiple Subject credential. District currently employs Morris as a 1.0 F.T.E. Fifth Grade Teacher at Scandia Elementary School. District has assigned Morris a seniority date of October 20, 2003. Roman is a permanent employee. District concedes that Morris is senior to Roman and that 0.4 F.T.E. of the health science course taught by Roman would be available to Morris or reassignment.

17. At hearing the parties stipulated to the following changes in seniority dates:

Certificated Employee	Old Seniority Date	New Seniority Date
Shannon Nobili	January 8, 2007	August 22, 2006
Dwayne Adams	November 24, 2003	October 24, 2003
Elise Cariaga	August 25, 2004	July 26, 2004
Gail Sweda	January 14, 2008	January 12, 2008
Carrie Pennington	August 19, 2008	August 18, 2008

Even with such adjustments, however, there is no evidence that a less senior employee is being retained to provide services which respondents are credentialed and competent to provide.

18. Any other contentions made by respondents at the hearing that were not discussed above are found to be without merit.

19. The evidence established that the District will be reducing services for the ensuing school year.

20. No certificated employee junior to any respondent is being retained to perform services which any respondent is certificated and competent to render.

21. The reduction or discontinuance of services is related to the welfare of the District and its pupils.

LEGAL CONCLUSIONS

1. Each of the services set forth in Finding 3 is a kind which may be reduced or discontinued in accordance with applicable statutes and case law. (See Ed. Code § 44955; *Campbell v. Abbott* (1978) 76 Cal.App.3d 796; *Degener v. Governing Bd.* (1977) 67 Cal.App.3d 689.) The decision to reduce or discontinue the services is neither arbitrary nor capricious but rather a proper exercise of the District's discretion.

2. Cause exists for termination of 51.6 full-time equivalent positions as a result of the reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

ORDER

Notice may be given respondents that, to the extent shown in the layoff notices sent them, their services will not be required for the 2009-2010 school year.

DATED: _____

CHERYL R. TOMPKIN
Administrative Law Judge
Office of Administrative Hearings