

BEFORE THE
GOVERNING BOARD OF THE
WILLOWS UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Non-
Reemployment/Reduction in Force of:

OAH No. 2009030253

SHARON BUSLER, CHRISTINA
CAMERON, KERI CONKLIN and LISA
VLACH,

Respondents.

PROPOSED DECISION

Ann Elizabeth Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 6, 2009, in Willows, California.

Matthew Juhl-Darlington, Attorney at Law, represented the Willows Unified School District.

A. Eugene Huguenin, Attorney at Law, represented respondents.

Evidence was received and the matter was submitted on April 6, 2009.

FACTUAL FINDINGS AND DISCUSSION

1. Steven Olmos, Ph.D., is the Superintendent of the Willows Unified School District (District). His actions and the actions of the District Governing Board were taken in their official capacities.

2. Respondents are permanent certificated employees of the District. On March 12, 2009, the District served on each respondent a written notice that it had been recommended that notice be given to respondents pursuant to Education Code sections 44949 and 44955 that their services would be reduced or would not be required for the 2009-2010 school year. Each written notice set forth the reasons for the recommendation and attached a copy of the District Governing Board Resolution (No. 2008-09-20) reducing the certificated staff by 19.32 full-time equivalent (FTE) positions. Respondents timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year.

3. The Superintendent made and filed Accusations against respondents. The Accusations with required accompanying documents and blank Notices of Defense were timely served on respondents. Respondents timely filed Notices of Defense to the Accusations.

4. On March 5, 2009, at a regular meeting, the District Governing Board (Board) was given notice of the Superintendent's recommendations that certificated employees holding 19.32 FTE positions be given notice that their services would be reduced or not required for the next school year and stating the reasons for that recommendation. The recommendation was made in order to reduce costs in consideration of the expected massive reduction of school funding for the 2009-2010 school year, and in anticipation of a decline in student enrollment of 10 to 15 students, in a district with less than 1,800 students.

5. On March 5, 2009, the Board determined that it was necessary to decrease programs and services and thus it was necessary to reduce teaching services affecting 19.32 FTE positions. The Board adopted Resolution No. 2008-09-20 (Resolution) providing for the reduction or elimination of multiple particular kinds of services (PKS), resulting in the 19.32 FTE reductions. The District offered an early retirement incentive which resulted in early retirement of approximately 15 teachers. Other employees affected by the elimination of the teaching positions were reassigned. Some affected teachers did not request a hearing. The PKS reductions and eliminations affecting respondents, and at issue in this hearing, are:

Class Size Reduction (CSR) Kindergarten through Grade 3	7.0 FTE
Multiple Subject Teaching Positions at Murdock Elementary School	6.0 FTE
Various Teaching Positions at Willows High School Including Math	2.0 FTE 2 periods

6. The Board Resolution provided the following:

...it will be necessary to retain the services of certificated employees in the 2009-2010 school year regardless of seniority, who possess the following qualifications/certificates:

Bilingual, Crosscultural, Language, and Academic Development (BCLAD) authorization.

7. The District maintains a Certificated Seniority List which contains employees' seniority dates (first date of paid service), status as tenured, probationary or temporary, and credentials and authorizations. Status, credential and authorization data are obtained from the District's records and employees are given the opportunity to correct errors in the seniority list.

8. The Superintendent and other District employees were responsible for implementation of the technical aspects of the layoff. 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. The District employed the BCLAD skipping criteria identified in the Resolution in making the determination to skip junior employees who held BCLAD authorizations. The District then determined whether the least senior employees held credentials in another area and therefore were entitled to “bump” other employees.

Respondents’ Seniority, Credentials and Individual Defenses to Lay Off

9. Keri Conklin has a seniority date of 8/16/04. She holds a Clear Single Subject Credential, in Math, with a CLAD (Cross Cultural and Academic Development) authorization. She is authorized to teach Mathematics in any class in the District. She is currently assigned to teach Math and Geometry at Willows High School. Her services were reduced by .33 FTE pursuant to the Board Resolution to eliminate two periods of Math at the Willows High School. The District represented at hearing that arrangements have been made to assign an additional Math class to Ms. Conklin, so that her services are reduced by .16 FTE, instead of by .33 FTE.

Ms. Conklin argues that an employee junior to her, Margaret Ansel, is being retained to perform services that Ms. Conklin is competent and certificated to render. Ms. Ansel holds a Clear Single Subject in Business, CLAD and a Clear Vocational Education Credential with a designated subject of Computer Applications. Ms. Ansel teaches Business English/Newspaper/Reading/Computer App/Software/and Algebra Lab at Willows High School. Ms. Conklin is not credentialed to teach any of the subjects Ms. Ansel is assigned to teach, with the possible exception of the Algebra lab. Ms. Conklin argues that she can bump Ms. Ansel out of the one section of algebra lab she teaches (.16 FTE).

Ms. Ansel has the same seniority date as Ms. Conklin. Thus, she is not junior to Ms. Conklin and cannot be bumped out of .16 FTE to accommodate an employee of the same seniority. There were no tie-breaking criteria established in the Resolution, but none is necessary here, as Ms. Conklin seeks to bump Ms. Ansel out of only a small portion of her assignment. The District is not required to carve out portions of a full time assignment to provide a single class to another employee, senior or not. (Cf *Murray v. Sonoma County Office of Education* (1989) 208 Cal.App.3d 456, 460.) Thus, application of tie-breaking criteria would be inappropriate.

Ms. Conklin’s argument is not persuasive. No junior employee is being retained to perform services that Ms. Conklin is competent and certificated to render.

10. Christina Cameron has a seniority date of 8/18/03. She holds a Clear Multiple Subject Credential, with a CLAD authorization, and a Single Subject credential in Spanish. She is authorized to teach in any self-contained classroom in grades K through 12, and to teach any Spanish course in the District. She is currently assigned to teach First Grade in

Murdock Elementary School. She has been reassigned to teach at Willows Continuation High School at .67 FTE for the 2009-2010 school year. Her services are reduced by .33 FTE pursuant to the Board Resolution to eliminate teaching positions as a result of Class Size Reduction (CSR) Kindergarten through Grade 3. Her defense to reduction of her services is addressed in paragraph 13.

11. Lisa Vlach has a seniority date of 9/12/03. She holds a Clear Multiple Subject Credential, with a CLAD authorization. She is authorized to teach in any self-contained classroom in grades K through 12. She is currently assigned to teach Kindergarten in Murdock Elementary School. Her services are eliminated pursuant to the Board Resolution to eliminate teaching positions as a result of Class Size Reduction (CSR) Kindergarten through Grade 3.

Ms. Vlach maintains that a senior Physical Education teacher at Willows Intermediate School (Carol DeDontney) may retire. Ms. Vlach asserts that she should be assigned the physical education position because she has taught physical education at the elementary school. She qualifies for a supplemental certificate in Physical Education, but has not applied for it. Ms. Vlach's position lacks merit. The District has taken into consideration all positively assured attrition and cannot speculate as to whether a teacher intends to retire. Moreover, Ms. Vlach does not now hold the Single Subject Physical Education credential necessary to teach physical education at Willows Intermediate School.

12. Sharon Busler has a seniority date of 9/20/04. She holds a Clear Multiple Subject Credential in General Subjects, with a CLAD authorization. She is authorized to teach in any self contained classroom in grades K through 12. She is currently assigned to teach Third Grade in Murdock Elementary School. Her services are eliminated pursuant to the Board Resolution to eliminate teaching positions as a result of Class Size Reduction (CSR) Kindergarten through Grade 3.

Ms. Busler argues that her seniority date should be 8/19/03, as she believes this was her first date of paid service with the District. She maintains that she was initially hired as a long-term substitute on this date and that she worked in that capacity for the entire school year. She replaced another teacher and performed all of his teaching duties during the 2003-2004 school year. The following year, she was hired as a probationary teacher, with a seniority date of 9/20/04. The evidence is that Ms. Busler has received seniority lists for at least the last two school years, which listed her seniority date as 9/20/04. Yet, she did not raise this claim until the day of hearing. Nevertheless, her claim for an earlier seniority date was considered.

Education Code sections 44917 and 44920 provide that any person employed for one complete school year (at least 75% of the school year) as a temporary employee, shall, if reemployed for the following school year in a position requiring certification qualification, be classified by the Governing Board as a probationary employee and the previous year's employment as a temporary employee shall be deemed one year's employment as a probationary employee for the purpose of acquiring permanent status. These sections do not

require that the District “backdate” the first date of paid service to the first date of temporary employment for purposes of determining seniority. These sections merely provide that the former temporary employee need only serve one year as a probationary employee instead of two, in order to obtain permanent status.¹ Moreover, section 44845 clearly provides that 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 status. Ms. Busler first rendered paid service in a probationary position on 9/20/04. She had the benefit of only having to serve one year in a probationary position before becoming permanent, because sections 44917 and 44920 mandated that the District “tack on” an additional year of probationary service to make her a permanent employee.

As set forth above, Ms. Busler’s argument that she should have a seniority date of 8/19/03 fails.

Skipping Teachers with BCLAD Authorizations

13. Cameron, Vlach and Busler argue that the District improperly applied BCLAD skipping criteria resulting in retention of a junior employee, Gricelda Lozano-Trujillo. The District employs two certificated teachers who hold BCLAD authorizations: Karen Colombo and Gricelda Lozano-Trujillo. Ms. Colombo has a seniority date of 8/25/99, and is senior to all of the respondents. Thus, the fact that she was skipped in the layoff process does not affect respondents. No respondent would be entitled to bump her out of her position, regardless of whether she was skipped.

Ms. Lozano-Trujillo has a seniority date of 10/09/06. She holds a Clear Multiple Subject Credential in General Subjects, with a BCLAD authorization. She is authorized to teach in any self-contained classroom in grades K through 12. She is currently assigned to teach English Language Development in Murdock Elementary School. In this position, she is responsible for coordinating instruction to English Language Learners. She coordinates the other teachers with CLADs and the bilingual classroom aides who provide instruction. She also “pulls out” groups of students from classrooms during the normal school day and provides instruction in their native language, Spanish, and she communicates with Spanish speaking parents in Spanish. She has special training in administering the assessments necessary to determine eligibility and progress of pupils in the English Language Learners program.

Superintendent Olmos recommended to the Board that teachers with BCLAD authorizations be skipped in the layoffs because 45 percent of the District students speak Spanish as their primary language. He believed that the Education Code required that the District have teachers with BCLADs to serve this population, and also believed that it was

¹ Indeed, permanent and probationary employees subject to a reduction in force pursuant to section 44955, shall, during the period of preferred right to reinstatement, have prior rights to any vacant position in which they are qualified to serve superior to those right afforded to temporary and substitute personnel who have become probationary pursuant to section 44918. (Ed Code section 44918, subdivision (e)).

necessary to retain teachers with BCLADs to meet the specialized needs of the second language learners. He acknowledged that the District employed Spanish speaking aides and teachers who were bilingual, but only two teachers in the District hold BCLAD authorizations. He maintained that English Language Development is a curriculum itself with State Standards, and is a categorically funded program under Title 1, for second language learners.

Pursuant to Education Code section 52161 et seq, Districts are required to offer bilingual learning opportunities for each pupil of limited English proficiency and may obtain categorical funding for instruction of pupils with limited English language proficiency. Section 52163 sets out the program designs a District may adopt in serving its bilingual population. The District's English Language Development program, taught by Ms. Lozano-Trujillo in Murdock Elementary School, fits the program designs of section 52163. Under this program, the District is required to conduct a census of the number of pupils with limited English proficiency, conduct diagnostic assessments in the student's primary language, and provide a component of instruction in the student's primary language.

Section 52166 requires that all teachers providing instruction in programs established pursuant to section 52163, subdivision (a) or (b), shall meet the criteria established in section 52163, subdivision (h). That section provides that the teacher hold a regular, valid California teaching credential and either a BCLAD certificate or other credential in bilingual education authorized by the California Commission on Teacher Credentialing, or a bilingual cross-cultural specialist credential and shall be fluent in the primary language of the pupils being taught.²

The District demonstrated that none of the respondents hold a BCLAD authorization. And, even though it is acknowledged that Ms. Cameron speaks Spanish, the statutes governing instruction in bilingual programs require that the teacher providing English Language Development hold a BCLAD authorization. None of respondents is qualified and competent to bump into the English Language Development position now occupied by Ms. Lozano-Trujillo.

² Further, even a District which does not provide programs pursuant to section 52163 is required to provide bilingual service to pupils with limited English proficiency. Section 52165 provides in pertinent part that in any school with 10 or more pupils of limited English proficiency, with the same primary language and in the same grade or age group, the District shall provide at least one certified bilingual cross-cultural teacher or teachers on waiver and an individualized instruction program for such pupils at the school. If the number of students of limited English proficiency in a school exceeds 45, the District shall provide two such teachers. If certified bilingual crosscultural teachers are not available, language development specialists assisted by a bilingual aide shall be made qualified to provide instruction.

The appropriateness under the Education Code of using BCLAD authorization as a wholesale skipping criteria was not addressed herein, because the only challenged “skipping,” that of Ms. Lozano-Trujillo, was appropriate for other reasons; junior respondents were not certificated (by a BCLAD authorization) to bump into her position.

LEGAL CONCLUSIONS

1. The District employees receiving notices that their services would not be required next year have all rendered valuable services to the District.

2. All notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945 were met. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide them due process. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) The description of services to be reduced, both in the Board Resolution and in the notices, adequately describe 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.)

3. The services identified in Board Resolution No. 2008-09-20 are particular kinds of services that could be reduced or discontinued under 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 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.

4. 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.)

5. Education Code section 44955, provides in pertinent part:

[¶...¶]...[¶...¶]

b) Whenever in any school year ... whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, ...or whenever the amendment of state law requires the modification of curriculum, 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.

[¶...¶]...[¶...¶]

6. Education Code section 44955 provides that when certificated employees face layoffs due to reduction or elimination of PKS, the District has an affirmative obligation to reassign senior teachers who are losing their positions into positions held by junior teachers, if the senior teacher has both the credentials and competence to occupy such positions. The intent of the Legislation is clearly to prevent Districts from laying off senior teachers while retaining junior teachers. Section 44955, subdivision (c) provides in pertinent part:

Services of such employees shall be terminated in the inverse of the order in which they were employed... 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...

7. As set forth in Factual Findings 1 through 9, and 13, and the Legal Conclusions, the District has established that no employee junior to Keri Conklin is being retained to perform services which Ms. Conklin is competent and certificated to render.

8. As set forth in Factual Findings 1 through 10, and 13, and the Legal Conclusions, the District has established that no employee junior to Christina Cameron is being retained to perform services which Ms. Cameron is competent and certificated to render.

9. As set forth in Factual Findings 1 through 11, and 13, and the Legal Conclusions, the District has established that no employee junior to Lisa Vlach is being retained to perform services which Ms. Vlach is competent and certificated to render.

10. As set forth in Factual Findings 1 through 12, and 13, and the Legal Conclusions, no employee junior to Sharon Busler is being retained to perform services which Ms. Busler is competent and certificated to render.

RECOMMENDATION

1. Notice shall be given to Keri Conklin that her services will be reduced by .16 FTE in the 2009-2010 school year, because of the reduction and discontinuance of particular kinds of services.

2. Notice shall be given to Christina Cameron that her services will be reduced by .33 FTE in the 2009-2010 school year, because of the reduction and discontinuance of particular kinds of services.

3. Notice shall be given to Lisa Vlach that her services will be eliminated (reduced by 1.00 FTE) in the 2009-2010 school year, because of the reduction and discontinuance of particular kinds of services.

4. Notice shall be given to Sharon Busler that her services will be eliminated (reduced by 1.00 FTE) in the 2009-2010 school year, because of the reduction and discontinuance of particular kinds of services.

DATED: April 14, 2009

ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings