

BEFORE THE
BOARD OF TRUSTEES OF THE
DEL NORTE UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

BARBARA ALLEN, ELIZABETH ASBILL,
ELLIOT BOWLES, ERIC EPPERSON,
ANDREW FITCH, ROBERT HADFIELD,
ANDREW HOOPER, SCOTT LINDSAY,
JACOB WILLIAMS, and
JOYANN WILLIAMS,

Respondents.

OAH No. 2009030375

PROPOSED DECISION

On April 20, 2009, in Crescent City, Del Norte County, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter.

Elizabeth B. Mori, Attorney, 70 Washington Street, Suite 205, Oakland, California 94607-3795, represented Janice Moorehead, Superintendent, Del Norte County Unified School District.

Paul Hagen, Attorney at Law, of Bragg, Perlman, Russ, Stunich & Eads LLP, 1036 Fifth Street, Suite E, Eureka, California 95502-1248, represented Respondents in this matter. However, Respondents Elizabeth Asbill and Elliot Bowles did not attend the proceeding of this matter; but, each remained a respondent in this matter.

The record was held open so as to afford an opportunity to the respondents to supplement the record with written memorandum regarding the relevance to proposed evidence offered by a representative of the California Teachers' Association and the local teachers' union president, and the record was held open to enable the Superintendent to file a reply memorandum, if necessary, to the arguments made by the respondents. On April 29, 2009, OAH received a document titled "Respondents' Administrative Hearing Brief," which was marked as exhibit "B," and received as argument. On April 30, 2009, OAH received the "District's Reply Brief," which was marked as exhibit "12," and was designated as argument.

On April 30, 2009, the parties were deemed to have submitted the matter and the record closed.

Ruling on Respondents' Motion to Admit Evidence by Union Officials

Government Code section 11513, subdivision (b), provides, in pertinent part: "Each party shall have these rights: to call and examine witnesses, to introduce exhibits . . ." Subdivision (c) of Government Code section 11513 establishes that "The hearing need not be conducted according to technical rules relating to evidence and witnesses Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions."

Education Code section 44949, subdivision (c)(3), sets out, in important part: "The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are *related to the welfare of the schools and the pupils thereof*" (Emphasis added.)

The union officials were called by the respondents to act as expert witnesses to render opinions that their respective experience, training and education enable such witnesses to make based upon their review or analysis of District records, financial data, and cadre of services offered by certificated employees in various categories (temporary, probationary or tenured) to the pupils of the District. Because the District Board or District Superintendent may have used such information in initiating and carrying out the proposed reduction or elimination of services, the respondents, through their expert evidence, should not be precluded from commenting upon such evidence during the course of the administrative adjudication proceedings.

Based on the foregoing, it is determined that the evidence offered through the testimony of Messrs. Randall Perry and Michael Mealue is relevant to the issue of the proposed reduction or elimination of particular kinds of services of the District for the ensuing school year.

FACTUAL FINDINGS

1. On March 23, 2009, in her official capacity, Jan Moorehead, Superintendent for the Del Norte County Unified School District made and filed the respective Accusations regarding Respondents Barbara Allen, Elizabeth Asbill, Elliot Bowles, Eric Epperson, Andrew Fitch, Robert Hadfield, Andrew Hooper, Scott Lindsay, Jacob Williams, and Joyann Williams.

2. Respondents are certificated employees of the Del Norte County Unified School District, who contest the instant proposed teacher lay-off action.

Respondents Allen, Asbill, Hooper, and Lindsey are probationary teachers with the District. And Respondents Boyles, Epperson, Fitch, Hadfield, Jacob Williams and Joyann Williams are permanent (tenured) teachers with the District.

3. On March 6, 2009, the District's Governing Board adopted Resolution No. 08-09-30.

The resolution recites that, pursuant to Education Code sections 44949 and 44955, it has become necessary for the District to reduce and/or to eliminate, as of the end of the 2008-2009 school year, particular kinds of services in the form of 6.8 full time equivalent (FTE) certificated positions as follows:

1.0 FTE	Elementary teacher position;
1.0 FTE	School Counselor position;
1.0 FTE	Elementary Music position;
1.0 FTE	Physical Education teacher position;
0.2 FTE	PE/Health Education teacher position.
1.0 FTE	English teacher position
0.4 FTE	Independent Studies teacher position
0.2 FTE	Student Activities teacher position
0.2 FTE	High School Athletics Director position
0.2 FTE	Science/Floriculture teacher position
0.6 FTE	Science/Earth and Physical teacher position

4. On March 11, 2009, the Superintendent presented the District Board of Trustees a recommendation that the District give notice that particular kinds of services (PKS), then offered through the District, be reduced or eliminated by the District for the ensuing school year (2009-2010). The recommendation, which included an attachment, set out the names of certificated employees, including respondents, as the holders of positions that corresponded with the services that would be reduced or eliminated for the ensuing school year, and informed the District's Board that notice had been given to each employee who was to be affected by the proposed reduction or elimination of services.

5. The District's Superintendent's written preliminary notice, dated March 9, 2009, to each respondent stated legally sufficient reasons of the District's Board's intent to eliminate the course as taught by respondents. (The Superintendent caused the initial layoff notice to be personally served upon each respondent between March 9, 2009, and March 11, 2009.)

6 Respondents each timely requested in writing a hearing to determine whether or not cause exists for not reemploying each respondent for the ensuing school year.

7. District's Superintendent timely served upon each respondent the Accusation, dated March 23, 2009, and related documents. Each respondent filed timely a notice of defense.

8. All pre-hearing jurisdictional requirements were met.

9. At the hearing of this matter, the District rescinded the layoff notices and withdrew the resultant accusations as filed against Respondents Robert Hadfield and Eric Epperson. By its rescission of the layoff notice and its withdrawal of the accusations, the District will retain the services of Mr. Hadfield and Mr. Epperson.

Respondents' Contentions

10. Respondents contend that the District's proposed elimination or reduction of services is not justified because there is an adequate reserve of financial resources so that the District is unable to demonstrate a rational basis or cause for the layoff action. Respondents aver that an assumption that the District may have an impaired economic predicament for the ensuing school year the proposed layoff is improper especially when the District does not indicate that there is a good faith estimate of declining enrollment, or that the District has formulated an articulated plan for the change of offering services in the District. Further Respondents argue that Advanced or Accelerated Learning classes, which have been provided through the services of temporary teachers who are to be released for the ensuing school year, can be provided through Respondents who are subject to the prospective layoff action. And Respondent Joyann Williams contends that the District has such a great number of students who must receive instruction in science that the Earth and Physical Science position that she teaches cannot not be eliminated.

11. Respondent Joyann Williams has a first date of paid service to the District as August 29, 2006. She holds a clear single-subject credential in agriculture and a clear specialist instruction credential in Agriculture. Also she possesses an ELL (English language learner) authorization. For the current school year, Respondent Williams occupies a 1.0 FTE position at the high school, which consists of 60 percent instruction in science, 20 percent instruction in Floriculture and 20 percent instruction in Agriculture. With regard to the science portion of her assignment, Respondent Williams teaches an Earth and Physical Science course.

However, Mr. Richard Holley, the District's Director of Human Resources, offered evidence to refute the contention of Respondent Joyann Williams that the Agriculture credential as held by the subject Respondent does not specifically vest her with the credential to teach middle school science or high school science. Rather Mr. Holley credibly established that clear specialist instruction credential in Agriculture¹, which is held by Ms.

¹ The CTC provides an authorization code detail description as follows:

This credential authorizes the holder to teach agriculture in grades twelve and below, including preschool, and in classes organized primarily for adults. It also authorizes the holder to develop and coordinate curriculum, develop programs, and deliver staff development for agriculture education programs coordinated by school districts or county offices of education.

Williams, does not in itself authorize Respondent Williams to teach science at the high school level. Currently, Respondent Williams teaches the science classes at the high school level under an authorization issued pursuant to Education Code section 44258.3, which is deemed an “Ed Code waiver.” Absent the Ed Code waiver, Respondent Williams does not hold a credential that enables her to teach any science subject, such as Earth and Physical science, biology or physics.

Respondent Williams provided no competent evidence that the District has retained any teacher junior to her for which Ms. Williams possesses a credential and is currently competent to teach. Nor did Respondent Williams establish that the Superintendent committed a procedural error in the initiation of the layoff action that adversely affects her teaching position with the District.

Respondents’ Witnesses on Financial Matters Pertaining to the Proposed Lay-Off Action

12. Mr. Randall Perry, a Field Staff Representative of the California Teachers’ Association (Union Representative Perry), was called by Respondent to offer evidence regarding the financial condition of the District. However, the evidence offered by him was not persuasive or reliable.

Union Representative Perry acknowledged that the information that supports the summary (Respondent’s exhibit A) of the District’s financial and related data did not suggest actual savings the District could realize by way of effecting certain personnel actions. Rather he advanced that the data he used in formulating his opinion was an estimate of a general nature that might flow from the release, resignation and retirement of a number of certificated employees. In addition the document prepared by Union Representative Perry did not establish whether any of the positions filled by temporary teachers, who were subject to release, would need to be filled during the ensuing school year because such information is not available because the Superintendent has not made assignments for teaching positions for the 2009-2010 school year. And Union Representative Perry’s assertions regarding attrition, in the way of resignations and retirements of certificated employees since the date for dispatch of the preliminary notices, have no persuasive bearing on the Board’s discretion to perfect final lay-off action against respondents subject to this matter.

The overall fiscal analysis by the Union Representative Perry was not reliable or trustworthy. The unreliable analysis was founded upon information transmitted to the union from the sources, data or summaries of financial records that were shown to be finalized documents that are business records of the District. Further, the data offered by Union Representative Perry was not reliable as no evidence shows that he has expertise as a school administrator or as an expert in accounting, business management or financial analysis. Union Representative Perry did not show that he has ever been involved in the actual production of a budget for a school district.

The evidence offered through Union Representative Perry has no bearing on the Governing Board’s ability to issue final lay off notices to affected respondents involved in

this proceeding. The testimonial evidence by Union Representative Perry was not persuasive in the assertion made on behalf of Respondents that the District's proposed layoff action was not necessary.

13. Mr. Michael J. Mealue, Chapter President of the local labor union for teachers in the District, offered evidence at the hearing of this matter. On behalf of respondents, Mr. Mealue advanced that he has analyzed various instructional programs offered in the District. Mr. Mealue asserted that the District has discharged temporary teachers who provide instruction in four Accelerated Learning classes of the District. And he proclaimed that currently two teachers, who hold Special Education credentials, hold positions in the Accelerated Learning instructional program, yet the District has an existing advertisement for the hiring of three Special Education teacher positions for the coming school year. Further, the local union chapter president contended that any certificated employee has the ability to teach an Accelerated Learning classes. Mr. Mealue propounded that reassignment of the Special Education teacher now teaching in the Accelerated Learning program would enable the District to provide, at least, two respondents with assignment in the Accelerated Learning program.

But Mr. Mealue did not identify that the District plans to retain any teacher junior to respondents for which the respondents possesses a credential and are currently competent to teach. And Mr. Mealue's views were grounded in speculation and supposition because, among other things, the District has neither made assignments for the ensuing year nor determined the scope of the Accelerated Learning program.

Also as to the Advanced or Accelerated Learning program, Mr. Holley established that there are no junior teachers, as measured against the respective first date of paid service of respondents, who will be retained to teach any portion of that set of courses for the ensuing school year.

The opinions expressed by Mr. Mealue were grounded on speculation as he offered insufficient evidence that he possesses specific, personal knowledge of the District's records the pertinent to cost savings that might be realized by the District pursuing the course of action that he suggested that the Superintendent embrace.

Acts by the District's Superintendent

14. Ms. Janice C. Moorehouse, the Superintendent for the District (the Superintendent), came to the hearing of this matter to provide credible and persuasive evidence.

The Superintendent established that the senior management team, called "the Cabinet," under her direction determined that the prospective elimination of particular kinds of services for the 2009-2010 school years will best serve the objectives and mission of the District, as well as the welfare of the students served by the District. Without focusing upon any pending financial plight for the District, the Superintendent noted that an array of factors

that affect the District serve as an underpinning for the necessity of the prospective reduction or elimination of particular kinds of services now offered by the District.

The Superintendent in her official capacity was reasonable in her exercise of discretion in executing the procedures associated with lay-offs required by the subject resolution. The Superintendent was neither arbitrary, capricious nor fraudulent in carrying out the directive of the Board's Resolution 08-09-30.

The only mandated service, which is being reduced, is Physical Education; however, the District has sufficient teaching resources to meet the state requirements for the ensuing year. The District's contemplated use of a combination of the multiple-subject elementary credentials teachers and the remaining single-subject physical education secondary teachers will enable the District to provide the mandated number of minutes of physical education instruction for benefit of the District's students.

Ultimate Findings

15. No competent and credible evidence establishes that as a result of the proposed elimination of the full time equivalent positions respectively held by respondents, the District will retain any teacher who is junior to respondents to perform services for which respondents have been certificated or found to be competent to teach in such FTE positions for the next school year.

16. The decision of the District's Superintendent to eliminate or discontinue a total of 6.8 FTE positions as specified in Resolution 08-09-30, including the positions held by each respondent, was neither arbitrary nor capricious. Rather, the Superintendent's determination was within the proper exercise of the discretion bestowed by law upon the District.

17. The District's proposed elimination or discontinuation of the subject full time equivalent positions, including the positions respectively held by respondents, for the ensuing school year, is related to the welfare of the District and its overall student population.

18. The Board determined that it will be necessary, due to the elimination of particular kinds of services, to decrease the number of teachers before the beginning of the next academic year. The Superintendent lawfully directed the notification to respondents of the elimination of the certificated positions held by each respondent.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955.

2. The District provided all notices and other requirements of Education Code sections 44949 and 44955. This conclusion of law is made by reason of the matters set forth in Factual Findings 1 and 8.

3. Evidence Code section 664 establishes a presumption that the action or official duties of a public entity, such as the District and its governing board, have been regularly performed. Respondents offer no evidence to rebut the presumption that the District has properly performed actions related to the procedures that seek the non reemployment of respondents.

4. Judgments entered by a tribunal on the stipulation of the parties have the same effect as acts tried on the merits. (*John Siebel Associates v. Keele* (1986) 188 Cal.App.3d 560, 565.) The District stipulates to withdraw the Accusation against the certificated employee named in Factual Finding 9. The stipulation is binding on the parties.

5. Pursuant to Education Code sections 44949 and 44955 cause exists to give respondents notice of the discontinuation of full-time equivalent positions in the particular kinds of services rendered by respondents, by reason of the matters set out in Factual Findings 14 to 16, inclusive, and 18.

6. The discontinuation of the subject particular kinds of service provided by each respondent relates solely to the welfare of the District and its students within the meaning of Education Code sections 44949 and 44955, by reason of the matters in Factual Finding 17.

ORDER

1. The Accusations served on Respondents Barbara Allen, Elizabeth Asbill, Elliot Bowles, Andrew Fitch, Andrew Hooper, Scott Lindsay, Jacob Williams, and Joyann Williams are sustained, except that the Accusations are dismissed as to Respondents Robert Hadfield and Eric Epperson.

2. Final notice may be given to Respondents Barbara Allen, Elizabeth Asbill, Elliot Bowles, Andrew Fitch, Andrew Hooper, Scott Lindsay, Jacob Williams, and Joyann Williams., that their respective services will not be required for the 2009-2010 school year because of the reduction or discontinuance of the particular kinds of services by the Del Norte Unified School District.

DATED: May 4, 2009

PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings