

BEFORE THE
GOVERNING BOARD
LODI UNIFIED SCHOOL DISTRICT
COUNTY OF SACRAMENTO
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE LODI UNIFIED
SCHOOL DISTRICT,

Respondent.

OAH No. 2009030550

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California heard this matter in Stockton, California at McNair High School, a Lodi Unified School District school site, on April 22 and 23, 2009, and at the District Office on April 24, 2009.

Mike McKilligan, Assistant Superintendent, Personnel, and Ellen S. Welt, Ed.D, Director of Certificated Personnel appeared as representatives of the Lodi Unified School District (District), all of whom were represented by Paul R. Gant, Attorney at Law, and Justin J. Simpson, Attorney at Law, of Kingsley, Bogard, Thompson, L.L.P., Attorneys at Law.

Thomas J. Driscoll, Jr., Attorney at Law, and Kim Driscoll, Paralegal, of Driscoll and Associates, represented certificated teacher respondents as named in Attachment C to the stipulations (below).

There were two unrepresented respondents identified who receiving preliminary notices of layoff. These respondents, Michelle Abinsay and Mary Jo Andrada, are members of a separate bargaining group of non-teachers including school nurses and psychologists. Neither unrepresented respondent appeared.

The matter was submitted based on the extensive written stipulations with attachments, as set forth below, late in the evening of April 24, 2009.

FACTUAL FINDINGS

1. All respondents are and at all times relevant to this Decision were certificated or professional employees of the District.

2. On or just before February 17, 2009, in accordance with Education Code section 44949 and 44955, the Superintendent notified the Governing Board of the District (Board) in writing of the Superintendent's recommendation that certain particular kinds of services would have to be reduced or eliminated for the upcoming school year. The Superintendent's recommendation specified the particular kinds of services to be reduced or eliminated, as set forth below. The Superintendent also notified the Board that a corresponding number of certificated employees of the District, in this instance and at this point in time, 397.66 full time equivalents (FTE), later reduced to 224.74 FTE, would have to be laid off to effectuate the reduction or elimination of the particular kinds of services. The Superintendent notified the Board that respondents had been identified as persons to whom notice should be given that their services would not be required for the ensuing school year. The recommendation that respondents' services for the District would not be required for the upcoming school year was not related to their skills, abilities or competencies as teachers.

REDUCTIONS/ELIMINATIONS OF PARTICULAR KINDS OF SERVICES

3. The Board adopted Resolution 2009-07 on February 27, 2007. The Board resolved to follow the Superintendent's recommendation to reduce 397.66 FTE particular kinds of services. The Resolution authorized and directed the Superintendent or her designee to give notice to an equivalent number of certificated employees of the District that their services would not be required for the upcoming school year in order to effectuate the reduction. The Resolution authorized the elimination of the following services now offered in the District:

PARTICULAR KINDS OF SERVICES (PKS) TO BE REDUCED OR ELIMINATED AT CLOSE OF 2008/2009 SCHOOL YEAR¹

Service	Grade Level	Full Time Equivalent
Elementary Education	K-6	293.92 ²
High School Assistant Principals	9-12	1.00
Middle School Vice Principals	6-8	0.50
Elementary Vice Principals	K-6	7.00

¹ Copied verbatim from the Resolution.

² Changed and reduced on March 3, 2009, by Amended Resolution 2009-07 on March 3, 2009. (below).

Service	Grade Level	Full Time Equivalent
Curriculum Coordinators	K-12	6.00
Counselors	K-12	19.16
Program Specialists	K-12	0.60
Psychologists	K-12	1.09
Nurses	K-12	2.95
Instructional Coaches	K-12	10.00
Special Education: RSP	K-12	2.80
Special Education: Behaviorist	K-12	1.00
English	7-12	28.05
Foreign Language: Spanish	7-12	4.00
Foreign Language: German	7-12	0.60
Foreign Language: French	7-12	1.20
Math	7-12	12.51
Physical Education	K-12	8.51
Science: Life	7-12	4.34
Science: Physical	7-12	1.40
Science: Earth	7-12	2.20
Social Studies/Social Science	7-12	10.80
Home Economics	7-12	1.20
Business (includes Work Experience)	7-12	3.60
Industrial Arts: Engineering	9-12	0.20
Industrial Arts: Woodshop	9-12	1.00
Industrial Arts: Drafting	9-12	0.60
Industrial Arts: Auto	9-12	0.20
Career Tech Lab	K-12	1.00

Service	Grade Level	Full Time Equivalent
Art	K-12	2.20
Music	K-12	11.03
Librarian	9-12	4.00
District Total		390.66 ³

Additional PKS to be reduced – added by Board of Education 02/17/09

Service	Grade Level	Full Time Equivalent
Assistant Superintendent, Secondary Ed.	District	1.00
Director, Educational Services	District	1.00
Director, Elementary Education	District	1.00
Director, Certificated Personnel	District	1.00
Administrative Director, Student Services/SELPA	District	1.00
Vice Principal, Intervention Programs	K-12	1.00
Vice Principal, Lincoln Technical Academy	9-12	1.00
TOTAL		7.00

4. The Governing Board adopted an Amendment to Resolution 2009-07 at a special meeting of the Governing Board on March 3, 2009. The Amendment changed the proposed elimination/reduction of PKS Elementary Education from 239.92 to 67.00 FTE. This change had the effect of reducing the overall FTE to be reduced or eliminated from 397.66 FTE to 224.74 FTE, to be reduced or eliminated at the end of school year 2008-2009, effective for the upcoming school year, 2009-2010. In all other respects, the original Resolution was confirmed.

³ Changed/reduced by Amended Resolution (below)

PROBATIONARY NONREELECTIONS

5. In separate proceedings and by separate notice, the Superintendent gave two probationary teachers notice of nonreelection, advising them that their services would not be required in the upcoming school year. “Probationary employees may be nonreelected without any showing of cause, without any statement of reasons and without any right of appeal or administrative redress.”⁴ “A school district may choose not to reelect a probationary employee ‘without providing cause or other procedural protections to the terminated employee.’”⁵

6. The Governing Board also adopted Resolution 2009-08 (Tie Breaker Resolution) on February 17, 2009, regarding the adoption of criteria for breaking ties in the event two or more certificated employees have the same first date of paid service. The criteria were applied on or before March 27, 2009. A lottery was held on March 27, 2009 to break remaining ties after the other criteria set forth in the Resolution were applied.

7. The Superintendent caused each of the respondents listed in Attachment C to the Stipulations (below) to be served with a written Notice of Intention to Dismiss (preliminary notice) on March 6, 2009. The written preliminary notices advised respondents that their services would not be required for the upcoming school year. The preliminary notice set forth the reasons for the recommendation.

PRECAUTIONARY NOTICES TO TEMPORARY TEACHERS

8. In an abundance of caution, the District served a number of employees teaching under temporary contracts a preliminary notice of layoff. These notices were “precautionary,” in that the District was concerned that if any of these teachers were found to have rights to status or seniority as a result of the layoff proceedings, and thus have a potential right to reemployment and to be considered in assigning and reassigning positions in the upcoming school year, that these employees had received notice that would include them in these proceedings, allowing them to be laid off, if appropriate, and to avoid having them be deemed reemployed for the following school year for failure to give them timely notice of layoff.

WAIVER FOR FAILURE TO TIMELY FILE A REQUEST FOR A HEARING

9. All respondents represented by counsel except those set forth below timely filed Requests for Hearing in response to receipt of preliminary notice of layoff, as set forth in Attachment C to the Stipulation.

⁴ Education Code section 44948.3, *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, 917, citing *Bellflower Education Association v. Bellflower Unified School District* (1991) 228 Cal.App. 3d 805, 808

⁵ *Kavanaugh, supra*, at p. 918, fn. 4, citing *Board of Education v. Round Valley Teacher’s Association* (1996) 13 Cal.4th 269, 281.

9a. However, the following respondents failed to timely file a Request for Hearing to determine if there was cause for not reemploying them for the ensuing year:

Noora Al Baroudi, Daniel Allum, Erin Andrews, Melba Batallar, Josh Bates, Alycia Bell, Michael Bliss, Kimberly Bodily, Vicki Boyd, John Campbell, Adriana Casillas, Stephanie Clayworth, Louise Cole, Rebecca Coronado, Deborah Dais, Patricia Davis, Gnim Dith, Nancy Dobler, Margaret Drace, Russell Evans, Nicole Foster, Roger Fujita, George Goerzen, Carla Hale, Stephanie Hettervik, Anna Hetzner, Brooke Hummel, Tiffany Hurtado, Jennifer Jasper, Robin Knutson, Joe Kooyman, Stephen Langs, Carolyn Larson, Pearl Light, Murray McCaughna, Michael Merritt, Mildres Mitchell, Erin Montoya, Jane Morgan, Kimberlee Muller, Hamadah Nassar, Quoc Nguyen, Erin Olson, Bai Patino, Lan Phan, Roseanne Powers, Edna Price, Denise Quiapo, Jacquelyn Rostomily, Sarah Schumacher, Kenneth Seibel, Anna Sheehan, Cliff Shirk, Jacquelyne Stalnaker, Sherri Taylor, Dorothy Thompson, Josette Tjalsma, Hong Truong, Robin Vanderhamm, Ken Vanderlans, Cory Wafer, Courtney Wallage, Orlinza Washington, Deborah Whittaker, Janice Weiderrich, Gerald Wozniak, David Yinger and Jennifer Young.

9b. Each of these respondents was timely served a preliminary notice of layoff. These preliminary notices of layoff contained instructions that if the recipient of such a notice wanted a hearing, the recipient must timely file with the District a Request for a Hearing. The instructions advise the recipient that failure to timely file a Request for a Hearing will be deemed a waiver of the recipient's right to a hearing. Since these enumerated respondents failed to timely file a Request for a Hearing in response to receipt of a preliminary notice, these respondents waived any right to a hearing.⁶

UNREPRESENTED RESPONDENTS

10. Unrepresented respondents Michele Abinsay and Mary Jo Andrada also failed to timely file Requests for Hearing with the District. These unrepresented respondents waived their right to an evidentiary hearing.

ACCUSATIONS

11. Mike McKilligan, Ed.D. (Assistant Superintendent) made and filed the Accusations in his official capacity as Assistant Superintendent-Personnel, Lodi Unified School District (District).

⁶ Government Code sections 11505 and 11520.

DEFAULT FOR FAILURE TO FILE NOTICES OF DEFENSE

12. The District timely served Accusations on each respondent who timely filed their Requests for a Hearing with the District. Respondents Sharon Chavez, Perry Neves, and Robert Woodward failed to timely file a Notice of Defense to the Accusation. Failure to timely file a Notice of Defense to an Accusation constitutes a waiver of the right to have a hearing on the allegations.⁷ The matter proceeded as a default with respect to these three respondents.

REQUESTS FOR HEARING

13. All respondents who timely filed a Request for a Hearing in response to receiving a preliminary notice of layoff were timely served an Accusation. These respondents are reflected in Attachment C to the Stipulation (below). All prehearing jurisdictional requirements were met with respect to the remaining respondents.

THE STIPULATIONS AND ATTACHMENTS

14. Following very lengthy negotiations and extraordinary efforts by the parties⁸ and their representatives, the parties entered into a set of written Stipulations (the Stipulations). The Stipulations form the basis for the remainder of this Decision. The Stipulations were put on the record and are here fully incorporated by reference into this Decision, including the four attachments to the Stipulation (Attachments A-D)

JURISDICTION

15. All prehearing jurisdictional requirements were met. Jurisdiction exists for this matter.

16. Counsel for the represented respondents represents each individual listed on Attachment B to the Stipulations.

17. Before the commencement of the evidentiary hearing it was agreed that:

No Requests for Hearing/Notices of Defense were withdrawn by any respondent;

⁷ Government Code section 11506, subdivision (c).

⁸ KUDOS-It is important for the Board, others in District administration and for the teachers of the District to have called to their attention and recognize that the parties and their representatives worked exceptionally hard, extraordinary hours with great diligence in order to resolve the myriad issues raised by these proceedings. These work days began before 6 a.m. and went past 10 p.m. on two nights and past 1:00 a.m. on one night. These exceptional efforts should not go unrecognized. Numerous errors were corrected, to the great benefit of many teachers, and a significant amount of time and money was saved due to these extraordinary efforts. Both parties demonstrated great flexibility, patience and an abiding concern for the welfare of the District, its teachers and its students. Thus, considerable good came from unpleasant proceedings.

No preliminary notice of layoff was rescinded by the District; and

All respondents named on Attachment C to the Stipulations are the proper subject of these proceedings.

PKS REDUCTION ACTION AND LAYOFFS UNRELATED TO SKILL OR COMPETENCE

18. The issuance of preliminary notices of layoff to any respondent was not related to any respondent's competence, skill or ability as a certificated employee serving in the District. The cause for issuance of the preliminary notices of layoff was exclusively related to the grounds and causes set forth in Education Code sections 44949 and 44955.

RESPONDENTS "NOT LAID OFF"

19. Certain respondents are listed in Attachment C to the Stipulations as "Not Laid Off." Upon the approval and adoption of this Proposed Decision by the Board pursuant to Government Code section 11517, subdivision (b), the District shall rescind preliminary notices of layoff issued to each person listed on Attachment C as "Not Laid Off."

CORRECTED SENIORITY DATES OF CERTAIN RESPONDENTS ONLY

20. Certain respondents listed on Attachment C and Attachment D to the Stipulations raised issues regarding whether their seniority dates reflected in the District's official records were correct. The parties met and conferred and determined by agreement among them that the respondents listed on Attachment D are entitled to the seniority dates listed for those respondents on Attachment D. The parties specifically limit means and methodology used to determine these dates to this action and agreement specifically and exclusively; and specifically disclaim that any decision made with respect to any affected respondent is precedential or binding or relied upon in any fashion in any other action save this one. This limitation applies to any District employee not receiving a preliminary notice of layoff in these proceedings, and such employees may not rely upon or seek to apply or enforce the rationale and reasoning underlying these decisions to themselves. These agreements are specifically limited to those respondents appropriately receiving preliminary notices of layoff and thus subject to the jurisdiction of these proceedings.

CORRECTED EMPLOYMENT STATUS OF CERTAIN RESPONDENTS ONLY

21. Certain respondents listed on Attachment C and Attachment D to the Stipulations raised issues regarding their employment status as reflected in the District's official records. The parties met and conferred and determined by agreement among themselves that the respondents listed on Attachment D are entitled to the employment status listed for those respondents on Attachment D. The parties specifically limit means and methodology used to determine the employment status of the affected respondents to this action and agreement specifically and exclusively; and specifically disclaim that any decision made with respect to any affected respondent is precedential or binding or relied upon in any fashion in any other action save this one. This limitation applies to any District employee

not receiving a preliminary notice of layoff in these proceedings, and such employees may not rely upon or seek to apply or enforce the rationale and reasoning underlying these decisions to themselves. These agreements are specifically limited to those respondents appropriately receiving preliminary notices of layoff and thus subject to the jurisdiction of these proceedings.

ENTIRE AGREEMENT AND LIMITATIONS TO PRESENT PARTIES

22. The Stipulations and the agreements regarding seniority dates and/or employment status reflected in Attachment D reflect the entire agreement of the parties. All remaining issues regarding any respondent properly served with a preliminary notice of layoff not reflected in Attachment D are dismissed with prejudice.

RESERVATION OF RIGHTS FOR THOSE "NOT LAID OFF"

23. Respondents listed on Attachment C who are listed as "Not Laid Off," specifically reserve the right to challenge their seniority dates listed on the District's official Seniority List, saving and excepting that no such respondent may challenge his or her seniority date with respect to the current 2008-09 Reduction in Force PKS Resolution.

RESERVATION OF REHIRE RIGHTS PROTECTIONS

24. All respondent/employees of the District receiving a preliminary notice of layoff and properly subject to the jurisdiction of these proceedings shall be entitled to all the protections set forth in Education Code sections 44956 and 44957. During the 24 or 39 month re-employment period, as applicable:

a. Provided a teacher is credentialed and competent to render the service, District shall offer any vacant probationary or permanent positions to laid off employees in order of seniority (with same seniority date ties broken as reflected by the order set forth in Attachment D to the Stipulations).

1. Should any teacher be reappointed, the period of absence shall not be considered a break in service.

2. The teacher/employee shall retain the classification and order of employment he/she had when his/her services were terminated as provided for in Education Code sections 44956 and 44957.

b. The District shall offer any temporary and/or substitute positions of employment (for which a laid off teacher is credentialed and competent to render service) to laid off certificated employees in order of classification and original hire date (most senior permanent teacher first, etc.)

RESCISSION OF CERTAIN NOTICES TO TEMPORARY EMPLOYEES

25. Certain respondent certificated employees were given notice and released as temporary employees as part of the District's PKS reduction action, but were, as part of the negotiations, agreements and Stipulations, reclassified as probationary employees. For all such employees whose employment status changed from temporary to probationary as part of this action, the releases from temporary employment notices served by the District on these employees are rescinded.

TEMPORARY TEACHER ALLOCATION STANDARDS MET IN 2008-2009

26. The District did not exceed its entitlement to temporary teachers teaching in the District. All temporary teachers teaching in the District during the 2008-2009 school year were properly classified by the District as temporary.

NECESSITY OF PKS REDUCTION/ELIMINATION AND LAYOFFS

27. The District is facing financial pressure necessitating the reduction or elimination of the particular kinds of services set forth in the Resolutions.

ALL KNOWN ATTRITION CONSIDERED

28. The Assistant Superintendent, on behalf of the District, considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

COMPLIANCE WITH STATE AND FEDERAL MANDATES

29. There was no evidence that the District proposes to eliminate any services that are State or federally mandated.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied. The District has the burden of proving by a preponderance of the evidence that the proposed reduction or elimination of particular kinds of services and the preliminary notice of layoff served on respondent is factually and legally appropriate.⁹ The District met its burden. All claims and issues raised by the giving of preliminary notices of layoff are resolved here, by the Stipulations or by waiver or default.

⁹ Education Code section 44944.

2. The services the District seeks to eliminate in this matter are “particular kinds of services” that may be reduced or discontinued within the meaning of Education Code section 44955. The Board’s decision to reduce or discontinue these particular kinds of services was not demonstrated to be arbitrary or capricious, but constituted a proper exercise of discretion.

3. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The District is facing a projected deficit related to the loss of enrollment and funding. The reduction in particular kinds of services proposed is necessary to avert the District operating in a deficit in the upcoming school year.

4. Other than that reflected in the Stipulations and Attachments, there was no evidence any person receiving a preliminary notice of layoff is being laid off in favor of a junior employee being skipped, or that any employee being laid off is entitled to bump into a position held by a more junior employee where the employee being laid off has the credentials and competence to take the position of the more junior employee being retained. There was no evidence that any certificated employee of the District is being retained to provide a service any of the respondents are certificated and competent to render.

5. Legal cause exists pursuant to Education Code section 44949 and 44955 for the Lodi Unified School District to reduce or discontinue 224.74 FTE of particular kinds of services, as set forth in the District’s Resolutions 2009-07, as amended. The cause for the reduction or discontinuation of particular kinds of services relates solely to the welfare of the schools and the pupils thereof. Legal cause therefore exists to sustain the Accusations. The Board may give respondents final notices that their services will not be required by the District in the upcoming school year, in inverse order of seniority, as governed by the Stipulations and Attachments.

ORDER

The Accusations are SUSTAINED.

The Lodi Unified School District action to reduce or eliminate 224.74 FTE of particular kinds of services for the 2009-2010 school year is AFFIRMED.

Final notice may be given to respondents, as governed by the Stipulations and Attachments, by the District that their services will not be required for the upcoming school year. Notice shall be given in inverse order of seniority.

DATED: May 7, 2009


STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings