

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

In the Matter of the Accusations Against:

Certificated Employees of the Tehachapi
Unified School District,

Respondents.

OAH No. 2009030576

PROPOSED DECISION

David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 20, 2009, in Tehachapi, California.

Schools Legal Service, by Peter C. Carton, Attorney at Law, represented the Tehachapi Unified School District (District).

Schwartz, Steinsapir, Dohrmann & Sommers, by Tamra M. Boyd, Attorney at Law, represented Respondents Paula DiGerolami-Macon*, Amber Epley*, Rhonda Heal, Sharon Heitman*, Danny Ingraham, Shannon Kitt*, Leslie Walz* and Anne Wood*. (“*” indicates that they were present at the hearing.) Respondent Julie Trigueiro was present and represented herself. The District withdrew its notices of termination of Respondents Jennifer L. Butler, Doug DeGeer and Chris A. Hood.

Evidence was received by way of stipulation, testimony and documents. The record was closed and the matter was submitted for decision on May 20, 2009. Due to continuances of the hearing date for a total of 22 days, and by operation of Education Code sections 44949 and 44955, the time periods in those sections are extended by 22 days.

SUMMARY OF PROPOSED DECISION

The Governing Board of the District determined to reduce or discontinue particular kinds of services provided by certificated teachers for budgetary reasons. The decision was not related to the dedication of the individuals whose services are proposed to be reduced or eliminated.

District staff carried out the Board’s decision by using a selection process involving review of credentials and seniority. The selection process was in accordance with the

requirements of the Education Code, except as set forth below. The Board may proceed as indicated herein.

FACTUAL FINDINGS

Jurisdiction and Parties

1. The District provides educational services for approximately 5,000 students in grades kindergarten through 12 at a high school, a continuation high school, a middle school and three elementary schools. The District employs certificated staff in permanent or probationary positions.

2. Richard L. Swanson, Ph.D., is the Superintendent of the District, and Bobbie Wieder is the chief administrator of personnel services. Their actions were taken in those official capacities. Bobbie Wieder and her staff were responsible for implementation of the technical aspects of the layoff.

3. Before March 15, 2009, the District served numerous teachers, including Respondents, by personal service and/or certified mail, with a written notice (notice) that it had been recommended that notice be given to them pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year. Each notice set forth the reasons for the recommendation and noted that the Board had passed a Resolution reducing the certificated staff by 17.34 full-time equivalent (FTE) positions.

4. Respondents submitted timely written requests for a hearing to determine if there is cause for not reemploying them for the ensuing school year.

5. The Superintendent made and filed Accusations against each of the Respondents. On April 3, 2009, the District served the Respondents in person with an Accusation along with required accompanying documents and blank Notices of Defense.

6. Respondents completed Notices of Defense that they then served on the District.

7. Respondents are probationary or permanent certificated employees of the District.

8. The District rescinded its notices to Respondents Jennifer L. Butler, Doug DeGeer and Chris A. Hood.

The Governing Board and the Layoff Resolution

9. The Governing Board of the District (Board) was given notice of the Superintendent's recommendation that 17.34 FTE employees be given notice that their services would not be required for the next school year.

10. Board Resolution number 22MAR09, adopted on March 10, 2009, proposed a layoff of 17.34 FTE certificated employees (Resolution). Specifically, the Resolution provided for the reduction or elimination of the following particular kinds of services:

<u>Service Being Reduced or Eliminated</u>	<u>FTE Reduction</u>
Instruction: Grades K-6	7.84
Grant-funded P.E.	0.5
Middle School: Careers	1.0
Middle School: Guitar	0.2
Middle School: Social Studies	1.0
Middle School: SDC	1.0
High School: Agriculture	1.8
High School: English	1.0
High School: Math	1.6
High School: Vocational Education/Electives	
Consumer Family Service	0.6
Keyboarding	0.4
Work Experience	0.4

11. The Resolution was required by the District’s fiscal crisis and need to reduce expenses and services to balance its budget for the welfare of students.

12. The Resolution also directed the Superintendent to determine which employees’ services may not be required for the 2009-2010 school year as a result of the reduction in services.

13. The decision to reduce services was not related to the professionalism and dedication of the individuals whose services are proposed to be reduced or eliminated.

14. The Board also utilized tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. It provided that the order of termination shall be based on the needs of the District and the students in accordance with the criteria stated therein. These criteria are found in Board regulation AR 4117.3, approved on May 19, 2003. (Exhibit 2.)

The Seniority List and the Layoffs

15. The District maintains a seniority list which contains employees’ seniority dates (first date of paid service), current assignments and credentials.

16. 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 then determined whether the least senior employees held credentials in another area and were entitled to displace, or “bump,” other employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by

the known vacancies, and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and whether they could “bump” other employees.

17. The District determined that Respondents could not bump other employees with less seniority because Respondents were not credentialed and competent to perform the services for which these other employees were being retained.

18. The District used information from the seniority list and personnel files to apply the tie-breaker criteria.

19. The services identified in the Resolution are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Board’s decisions to reduce or discontinue the identified services were neither arbitrary nor capricious, and were a proper exercise of its discretion. The decisions were based on the welfare of the District and its pupils.

20. The District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

Respondents’ Contentions

21. Respondents raise numerous contentions, including those set forth herein. All other contentions of Respondent are rejected as unsupported by the facts and/or the law. Respondents contend that:

a. The Resolution does not set forth a particular kind of service to be reduced in its reference to: “Instruction: K-6.”

b. The District served more notices than were required to be sent, specifically with respect to reduction in services for middle school social studies and high school English.

c. The District incorrectly performed tie-breaking for employees with the same first date of service, including using criteria from the Board regulation as opposed to using criteria from the collective bargaining agreement.

d. By failing to consider positively assured attrition, the District served more notices than were required to be sent.

e. They are certificated and competent to perform assignments for which the District is retaining personnel who are more junior to them on the seniority list.

f. Respondent Trigueiro contends that she was not offered the opportunity to fill a newly-created full-time position at another school site, and the person who took that position has less seniority than she.

22. With respect to Respondents' contentions, the following additional evidence was considered.

23. Among the District's classes at grades K-6 are regular self-contained classes as well as Title I programs for math and reading, Resource Specialist programs, speech programs, English Language Development programs, music programs and physical education programs.

24. The District applied the tie break regulation to determine that Respondent DiGerolami-Macon had more seniority than Respondent Epley, both of whom had a first date of paid service of August 20, 2008, because Respondent DiGerolami-Macon held a clear single subject credential in social science while Respondent Epley held a preliminary single subject credential in social science. Although the Resolution may have justified that only one of these Respondents receive a notice, the District sent notices to both to allow for flexibility in these proceedings if the application of the tie-break regulation was found to be improper.

25. Teacher Charlie Walz, seniority date October 6, 2008, holds an Internship Single Subject Credential and a Short-Term Staff Permit in social studies, and is assigned to teach social studies in the middle school. He was given a notice of non-reelection by the District. According to Ms. Wieder, his release results in the reduction of one FTE position in social studies at the middle school level.

26. Lawrence Elman, seniority date January 3, 2006, holds a Clear Single Subject Credential in English, with a Supplemental Authorization in World History that would permit him to teach social sciences/social studies in the middle school. He presently teaches English in the high school. The District suggested that Mr. Elman may be reassigned to teach social studies at the middle school, however class schedules have not been finalized.

27. The District served a notice on Katie Hanson, a high school English teacher. Ms. Hanson did not request a hearing.

28. There are teachers on the seniority list who will not be returning to teach in the District due to retirement or death.

29. The District did not send a notice to Amy Trillo, seniority date August 20, 2007, who holds a Preliminary Multiple Subject Credential and teaches 6th grade. However, Respondent Heal has the same seniority date and holds a Clear Multiple Subject Credential. Respondent Heal is assigned to teach a 0.5 FTE position of a Kindergarten class.

30. Respondent Trigueiro, seniority date August 17, 2006, holds a Clear Multiple Subject Credential and has a present assignment of 0.667 FTE teaching in the English Language Learners program. When a similar position at another school was changed from part-time to full-time, Respondent Trigueiro expressed interest in the position however it was ultimately filled by Lara Manges, seniority date August 20, 2007. Respondent Trigueiro has a complaint to the Public Employees Retirement Board pending against the District concerning the manner in which that assignment was made, including that it was given to someone with less seniority.

31. The District applied the tie break regulation to determine that Rosina Telemontes and Lara Manges, who hold Clear Single Subject Credentials in English, have greater seniority than Respondent Leslie Walz and Respondent DeGeer, who hold Preliminary Single Subject Credentials in English. Between Respondents Leslie Walz and DeGeer, more seniority was awarded to DeGeer because he held his credential longer.

32. The Collective Bargaining Agreement between the District and the teachers' union contains Article 22, "Effects of Layoff" (Exhibit G), which includes provisions that layoffs will be implemented under Education Code sections 44955, and also section G, covering "Criteria for determining order of termination and reemployment of employees having the same seniority date." The first criterion is "Area of credential."

33. According to Ms. Wieder, the District may have served more notices than were necessary under the strict application of the law because of the need for flexibility should any of the notices be found defective, particularly in light of questions about the tie breaking process.

LEGAL CONCLUSIONS AND DISCUSSION

1. Education Code¹ section 44949, subdivision (a), states in pertinent part:

"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."

2. Section 44955 provides, in pertinent part:

"(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

¹ All citations are to the Education Code, except where indicated otherwise.

“(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, . . . 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.

“As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. . . .

“(c) . . . [S]ervices of such employees shall be shall be terminated in the reverse order in which they were employed, as determined by the board in accordance with Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

“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. . . .

“(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

“(1) The district demonstrates a specific need for personnel to teach a specific course or course of study . . . 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.”

3. Sections 44949 and 44955 establish jurisdiction for this proceeding. The notice and jurisdictional requirements set forth in sections 44949 and 44955 were met. (Factual Findings 3 through 7.)

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. 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. (Factual Findings 9 through 20.)

6. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.)

7. A school district may deviate from strict seniority in layoffs and skip employees if it can demonstrate a "specific need" and that the employees have "special training and experience . . . which others with more seniority do not possess." (Section 44955, subd. (d)(1), set out in more detail in Legal Conclusion 2.)

8. Respondents contend that the District improperly applied tie break criteria by referring to the Board regulation, when the criteria of the Collective Bargaining Agreement should have been used. They cite Government Code section 3543.2, subdivision (c), which provides: "Notwithstanding Section 44955 of the Education Code, the public school employer and the exclusive representative shall, upon request of either party, meet and negotiate regarding procedures and criteria for the layoff of certificated employees for lack of funds. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of Section 44955 of the Education Code shall apply."

9. The general language of this Government Code section does not supplant the specific authority of the District, based on section 44955, subdivision (b), set forth above in Legal Conclusion 2, to enact the tie break regulation and apply it as it did herein. There was insufficient evidence that the District improperly applied the tie break regulation.

10. Some of Respondents' contentions are based upon the theory that a part-time certificated employee, such as Respondent Trigueiro and Respondent Heal, who has more seniority, can take the place of a more junior full time employee. This theory was rejected in *Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334.

11. The ruling in *Hidebrandt* also undercuts Respondents' contention that the District improperly effectuated the reduction of 7.84 FTE positions in the K-6 service area by not including grade 6 teachers in its determination of who should receive notices. While Amy Trillo teaches grade 6, holds a preliminary credential and shares the same seniority date with Respondent Heal, Respondent Heal holds a clear credential but occupies a part-time position with the District.

12. The contention that the Resolution was legally insufficient in describing services to be reduced as “Instruction: K-6” is rejected. The description was sufficient. (*Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796; *Rutherford v. Board of Trustees, supra*, 64 Cal.App.3d 167)

13. The District is not required to consider positively assured attrition after March 15 in layoff proceedings based upon reduction of particular kinds of services. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627.) There was insufficient evidence that the District improperly considered attrition.

14. The District served more notices than were required under the Resolution, and as explained and supported by the evidence. The notice to Katie Hansen, a high school English teacher who did not request a hearing, satisfied the Resolution’s direction to reduce one FTE position in that service. There was insufficient evidence to support service of a notice on Respondent Leslie Walz, who also teaches high school English, and the Accusation against her should be dismissed. Similarly, the notice of non-reelection to Charlie Walz eliminated the need to further reduce middle school social science services. There was insufficient evidence to support service of notices on Respondents DiGerolami-Macon and Epley, who also teach middle school social studies, and the Accusations against them should be dismissed. (See Factual Findings 24, 25, 27 and 31.)

15. The evidence suggested that the District might reassign Lawrence Elman, presently a more senior high school English teacher, to a middle school social science position under his supplemental authorization, thereby requiring elimination of a position held by Respondent DiGerolami-Macon or Respondent Epley. (For this reason, the District applied the tie break criteria and determined that Respondent DiGerolami-Macon had greater seniority.) However, Mr. Elman’s present position is not slated for layoff because, as noted above in Legal Conclusion 14, the Resolution’s direction to reduce one FTE position in high school English was satisfied by the notice to Katie Hansen. Under these circumstances, Mr. Elman would not have a right to “bump” one of these more junior employees. (See Factual Findings 24, 25, 26 and 27.)

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16. The District can exercise flexibility in the layoff process and the service of more notices than are strictly required under the Resolution did not amount to a denial of due process. The contention that the proceedings should be dismissed because the District sent more notices than was required is not supported by law and is rejected.

ORDER

1. Notice may be given to employees occupying 17.34 full-time equivalent certificated positions that their services will not be required for the 2009-2010 school year because of the reduction and discontinuance of particular kinds of services. Such notices may be given to Respondents Rhonda Heal, Sharon Heitman, Danny Ingraham, Shannon Kitt, Julie Trigueiro and Anne Wood.

2. Notice shall be given in inverse order of seniority.

3. The Accusations are dismissed as to Respondents Paula DiGerolami-Macon, Amber Epley and Leslie Walz.

DATED: May 28, 2009.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings