

BEFORE THE
BOARD OF TRUSTEES OF THE
TRINITY ALPS UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

KATHLEEN GRAHAM and
DAN HARRIS,

Respondents.

OAH No. 2009030969

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, on April 22, 2009, in Weaverville, California.

Thomas E. Gauthier, Attorney at Law, appeared on behalf of the Trinity Alps Unified School District.

Donald A. Selke, Jr., Attorney at Law, appeared on behalf of respondent Dan Harris.¹

Submission of the case was deferred pending filing of legal argument. Briefs from the District and respondent were received by close of business Friday, April 24, 2009, and marked respectively as Exhibits 8 and K for identification. The case was submitted for decision on April 24, 2009.

FACTUAL FINDINGS

1. Edward Traverso is the Interim Superintendent of the Trinity Alps Unified School District (District). He made and filed the Accusation in his official capacity.

2. Dan Harris (respondent) is a permanent certificated employee of the District. On February 11, 2009, the District served on respondent a written notice that it had been recommended that notice be given to him pursuant to Education Code sections 44949 and 44955 that his services would not be required for the 2009-2010 school year. The written notice set forth the reasons for the recommendation and noted that the District's Board of Trustees had passed a Resolution (No. 089-45) reducing the certificated staff by 14.14 full-

¹ Prior to the hearing a resolution was reached between the District and Kathleen Graham. She did not appear at the hearing.

time equivalent (FTE) positions. Respondent and Kathleen Graham 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 respondent and Ms. Graham. The Accusation with required accompanying documents and blank Notice of Defense were timely served on respondent on March 9, 2009. On March 10, 2009, respondent timely filed a Notice of Defense to the Accusation. All pre-hearing jurisdictional requirements were satisfied.

4. On February 10, 2009, at a regular meeting, the District’s Board of Trustees was given notice of the Superintendent’s recommendation that certificated employees holding 14.14 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.

5. On February 10, 2009, the District’s Board of Trustees determined that it was necessary to decrease programs and services and thus it was necessary to reduce teaching and other certificated services affecting employment of 14.14 FTE positions. The District’s Board of Trustees adopted Resolution No. 089-45 providing for the reduction or elimination of the following particular kinds of services (PKS):

	<u>Services</u>	<u>FTE</u>
a.	Counseling Services	1.0
b.	Mathematics	1.0
c.	Spanish	5/7
d.	English	5/7
e.	Chemistry	1/7
f.	Science	1.0
g.	Physical Education	4/7
h.	Industrial Arts	1.0
i.	Elementary School Teaching	8.0
Total Full-Time Equivalent Reduction		14.14

In determining the extent by which to reduce or discontinue particular kinds of services, the District’s Board of Trustees considered all positively assured attrition up to and including the date of the resolution. The total number of positions to be reduced or discontinued under this resolution is 14.14 FTE certificated positions. The Board has determined that the services of a corresponding number of certificated employees shall be terminated at the close of the current 2008-2009 school year.

6. The District employs 56 certificated teachers, and serves 850 students. The District was newly formed per election results of a November 2007 ballot measure. It commenced as a new district on July 1, 2008, joining the former Weaverville Elementary and Trinity High School Districts. The District went into the 2008-2009 fiscal year with a budget deficit of \$1.2 million. It relied upon carryover funds from the previous fiscal year, and also upon reserves to meet this shortfall. With delays in the budget for school year 2009-2010, the District continues to operate at a deficit, and is looking to cut the same amount again, approximately \$1.2 million.

7. The District maintains a Certificated Seniority List which contains employees' seniority dates (first date of paid service), credentials, authorizations and assignments. The District used the seniority list to develop a proposed layoff list of the least senior employees assigned in the various services being reduced.

8. In determining which physical education instructor to notice for layoff, the District skipped Kathleen Lynch, a physical education teacher at Trinity High School. Ms. Lynch has a District seniority date of August 22, 2006. She holds a single subject credential in physical education. She currently teaches three periods of high school physical education. For school year 2009-2010, she is tentatively assigned to teach three periods of high school physical education (PE1/Health & Wellness), two periods of AVID², one preparation period and one period as a high school athletic director.

Mr. Traverso explained that Ms. Lynch was skipped on the basis of her gender. This is because there are only two high school physical education teachers, the other being Ernest Jones who has a March 10, 1977 District seniority date. Mr. Traverso noted that high school physical education teachers are responsible for supervising locker room activities at the beginning and at the end of each period, when students are getting undressed or dressed up for class. Locker room supervision is required for 10 to 13 minutes out of a 52-minute physical education class. It would not be appropriate for a male teacher to supervise the girls' locker room under these circumstances.

9. Respondent has a District seniority date of August 23, 2004. He is senior to Ms. Lynch. Respondent holds a clear single subject teaching credential for physical education, with a supplemental authorization to teach Introductory Health Science. He has taught physical education (Grades 2 – 8) at Weaverville Elementary School over the past ten years. He has also taught Family Life and Health classes to seventh and eighth grade students. Respondent was part of a Physical Education Steering Committee charged with developing a regional³ course of study that incorporated and was consistent with California's Physical Education Framework. Based upon this experience, he noted that the content and grade level themes for high school physical education are similar, if not the same as what he

² AVID is a program that offers students encouragement and additional help in developing study skills, note taking and completing assignments. It is designed to give students an "extra push" to prepare them for state college and university level education.

³ The Regional Implementation Guided Grades K-12 was for Region 2, comprising Butte, Glenn, Lassen, Modoc, Plumas, Shasta, Siskiyou, Tehama and Trinity Counties.

now uses to teach physical education at his level. Respondent also performs athletic director duties at Weaverville Elementary School. This includes organizing all sport programs, advertising and hiring into coaching positions, coordinating three tournaments (volleyball, and boys and girls basketball), arranging for uniforms and mediating coach/parent disputes. Respondent believes the duties of athletic director are similar at the primary and secondary school levels.

Respondent has not received AVID training, but has an application to do so. It is a certificate program one can attend over the summer for one week.

10. The District does not assert that respondent is lacking qualifications in any respect to teach high school physical education. It only asserts that his gender prevents him from supervising the girls' locker room at the beginning and end of each period.

At the present time, Ms. Lynch is able to supervise the high school girls' locker room for all but one period when supervision is needed. For the one period when she is unable to do so, the District has arranged to have Trinity County Office of Education employee Diane Wiberg provide locker room supervision. Ms. Wiberg is a special education aide and when she supervises the girls' locker room she is also overseeing a special education student in that same class. The District does not pay the County Office of Education for Dianne Wiberg's time. In the past, other male teachers (Steve Geanakos and Chris Kennedy) at Trinity High School have benefited from having female non-certificated employees serve as girls' locker room supervisors when needed.

11. The District believes that it is appropriate for it to consider gender as a bona fide occupational qualification in certain limited circumstances, this qualifying as one. It believes that it should not be required to hire an extra employee to serve as a girls' locker room supervisor so that respondent can be retained and reassigned to teach high school physical education. The District also noted that the proposed reductions in services are prompted by fiscal considerations, and that it would be an abuse of discretion for it to hire an additional employee to preserve respondent's job. The use of gender as a skipping criterion is further addressed in the Legal Conclusions below.

12. Except as provided by statute, no other permanent or probationary certificated employee with less seniority is being retained to render a service which respondent and other noticed teachers, or any of them, are certificated and competent to render. As between employees who first rendered paid service to the District on the same date, the order of termination will be based solely on the needs of the District and the students thereof. The District was not required to apply tie-break criteria as part of the layoff process.

13. The reduction or discontinuation of the particular kinds of services set forth in Resolution No. 089-45 are related to the welfare of the schools and the students thereof within the meaning of Education Code sections 44949 and 44955. The decision to reduce or discontinue these services is neither arbitrary nor capricious, but rather a proper exercise of discretion of the District.

LEGAL CONCLUSIONS

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

2. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 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. 089-45 are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The District Board of Trustee'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 Trinity Alps Unified School District due to the reduction and discontinuation of particular kinds of services. Cause for reduction or discontinuation of services relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

4. As set forth in Factual Findings 8 through 11, the District skipped high school physical education teacher Kathleen Lynch solely on the basis of her gender and the perceived need to have a female high school physical education teacher available to supervise the girls' locker room and the beginning and at the end of each period. A district is allowed to skip an employee only after demonstrating that the skipped teacher could teach a specific course or course of study in which they had special training and experience, and which others with more seniority did not possess. (Ed. Code, § 44955, subd. (d)(1).)

The District relies upon gender as a bona fide occupational qualification (BFOQ) for teaching girls' high school physical education. The BFOQ is an affirmative defense to employment discrimination and is defined as follows:

Where an employer or other covered entity has a practice which on its face excludes an entire group of individuals on a basis enumerated in the Act (e.g., all women or all individuals with lower back defects), the employer or other covered entity must prove that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined.

(Cal. Code of Regs., tit. 2, § 7286.7, subd. (a).)

5. Among situations that will not justify the application of the BFOQ defense are the necessity for providing separate facilities for one sex, or the fact that members of one sex have traditionally been hired to perform the particular type of job. (Cal. Code of Regs., tit. 2, § 7290.8, subds. (a)(4) & (5).) However, personal privacy considerations may justify a BFOQ where:

- (1) The job requires an employee to observe other individuals in a state of nudity or to conduct body searches, and
- (2) It would be offensive to prevailing social standards to have an individual of the opposite sex present, and
- (3) It is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of the opposite sex present.

(Cal. Code of Regs., tit. 2, § 7290.8, subd. (b).)

6. Respondent notes that the legal analysis must focus on the more specific criteria of Education Code section 44955, subdivision (d)(1), contending that gender was never contemplated as a type of “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.” Respondent believes that if the legislature intended gender to be an exception to section 44955, it would have so stated. He contends that denying him employment for the ensuing school year on the basis of gender is discriminatory⁴ and violates the equal protection provisions of the 14th Amendment to the United States Constitution, and Article I, section 8 of the California Constitution. Official notice was taken of a California Department of Education publication providing guidance on application of Title IX amendments, and Education Code sections 200 through 264, to physical education.⁵ The publication lists under permitted practices:

May consider sex a bona fide condition of employment only when hiring attendants or supervisors of locker rooms and toilet facilities used only by members of one sex (34 CFR, § 106.55.)

7. However, the same publication sets forth the following question and answer with respect to locker room supervision by physical education teachers:

⁴ Respondent cites Government Code section 12940; Title IX, at 20 U.S.C. section 1681; Education Code sections 220 et seq.; and the Sex Equity in Education Act, Education Code section 221.5 et seq.

⁵ Sex Equity in Education, Physical Education, California State Department of Education, Project SEE.

Q. May locker room supervision be considered a bona fide condition of employment for physical education teachers?

A. No. The job is that of being a teacher. Locker room supervision is not the job. Only if a school is hiring a locker room attendant is locker room supervision a bona fide condition for employment (34 CFR, § 106.61.)⁶

Some deference is accorded to the construction of a statute by an agency, such as the Department of Education, charged with the law's administration and enforcement. (*Diablo Valley College Faculty Senate v. Contra Costa Community College District* (2007) 148 Cal.App.4th 1023; *Board of Education of City of Los Angeles v. Watson* (1966) 63 Cal.2d 829, 836.) Administrative interpretations of statutes will normally be accorded respect by the courts and will be followed if not clearly erroneous. (*In re Parker's Adoption* (1948) 31 Cal.2d 608.)

8. Respondent contends that the District failed to prove that locker room supervision requires certification or a credential, noting that certificated classroom teachers are typically employed in a position or positions requiring certification qualifications whose duties require him or her to provide direct instruction to pupils in classrooms of the school in that school district. He believes the District's reliance upon the title 2 BFOQ regulations is misplaced, that the BFOQ defense is an extremely narrow exception to the general prohibition against discrimination on the basis of sex, and that even if an employer demonstrates that certain jobs require members of one sex, the employer must "bear the burden of proving that because of the nature of the operation of the business they could not rearrange job responsibilities..." in order to reduce the BFOQ necessity. (*Bohemian Club v. Fair Employment and Housing Commission* (1986) 187 Cal.App.3d 1, 19.)

Respondent agrees that there should be adult female supervision of the girls' locker room at the beginning and end of each period. He contends that the District is required to make an attempt to make suitable accommodation in this matter where the privacy interest of the girls to be served clash with respondent's right to a job without fear of gender discrimination. He suggests that such accommodation is and would be providing a locker room attendant such as an aide, or volunteer, or another certificated employee or classified employee to provide the locker room supervision as the practice is currently, and has been, at Trinity High School whenever a teacher of a co-ed physical education class needs assistance to supervise the opposite gender locker room.

9. Currently, Diane Wiberg, an instructional aide, supervises the girls' physical education locker room third period, five days a week for Mr. Jones' class. When two other male teachers taught co-ed physical education classes at Trinity High School, and when one

⁶ Citation to section 106.61 of the Code of Federal Regulations by the California Department of Education is somewhat puzzling because that section provides, in part: "...but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex."

female teacher taught a co-ed physical education class there, they were all assisted by having a female or male aide supervise the respective locker rooms. The history at Trinity High School over the past five years is pertinent, notwithstanding the formation of the Trinity Alps Unified School District only one year ago.

At the present time, Mr. Traverso has not given consideration to having a locker room aide available to assist next year. Respondent suggests that there are available options. For example, the planned assignments for next year indicate that there are two teachers who have a preparation period for first period, four teachers have a preparation period for second period, and four teachers have a preparation period for fourth period. These are the three periods when physical education is offered and when female locker room supervision is needed. Respondent suggests that teachers could volunteer or be compensated to provide locker room supervision for this short amount of time during their preparation period.

10. The District cites *DFEH V. San Luis Obispo Coastal Unified School District* (1998) Case No. E95-96 L-0725-00.⁷ In *San Luis*, the Commission denied a claim that a school district must assign other employees to cover a locker room for a physical education teacher where same-sex locker room supervision was needed, finding that locker room supervision was an integral part of the physical education teacher's duties because the teacher supervised locker rooms during assigned teaching periods, comprising 30 to 40 percent of instructional time. The Commission noted that reasonable accommodation did not require an employer to supplant the essential job functions of the position in question or otherwise adopt an alternative which results in undue hardship. (*Id.* at p. 13.)

11. In reaching its decision, the Commission also recognized that except in extreme circumstances, government agencies must attempt to make suitable accommodations in matters where the privacy interests of the population to be served clash with the applicant's right to obtain a job without fear of sexual discrimination. (*Ibid.* See also *County of Alameda v. Fair Employment and Housing Commission* (1984) 153 Cal.App.3d 499, 506.) The employer must normally assign job duties and make other reasonable accommodation so as to minimize the number of jobs for which sex is a BFOQ. (Cal. Code of Regs., tit. 2, § 7290.8, subd. (c).) When an employer neither explores the possibility of providing reasonable accommodation nor provides a feasible accommodation which will serve both the privacy concern and the interest of equal employment opportunity, the employer may have violated the Act. (*DFEH v. San Luis Obispo Coastal Unified School District, supra*, at p. 14.) In *San Luis*, the school district evaluated a variety of rescheduling scenarios, none resulting in adequate supervision of the boys. This included an evaluation of other physical education teachers available to supervise, the availability of non-core teachers, the use of male student aides, community volunteers and supervision by a campus police officer. The Commission found in *San Luis* that the school district "met its burden of showing that reasonable accommodation was unavailable." (*Id.* at p. 16.)

⁷ Decisions of the Fair Employment and Housing Commission are entitled to great respect. (*Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Commission* (2004) 121 Cal.App.4th 1578, 1591.)

12. The analysis in *San Luis* is instructive. While the BFOQ defense may legitimately be raised where a teacher cannot supervise a boys or girls locker room, the school district must still meet its burden of demonstrating that reasonable accommodation was unavailable. In this case, locker room supervision duties comprise approximately a quarter of class time. The District has determined that it wants a single employee to provide both supervision and teaching functions. It argued that under *San Luis* it is per se unreasonable to assign 25 percent of respondent's duties for three physical education classes to another employee. The District believes that either another employee will have to be hired – such as a classified employee – or another female teacher will have to give up his or her duties.

13. The District Superintendent was asked whether consideration had been given to having an aide such as Ms. Wiberg serve in a similar capacity next year. Mr. Traverso had not given any consideration to this as he was in the process of doing layoffs for classified employees. Respondent noted that there are office staff and library staff at the high school and the District offered no evidence of any consideration for their use as locker room supervisors. Respondent also suggested that the planned assignments at the high school next year include teachers who are possibly available over their preparation period to supervise the girls' locker room.⁸ There was no evidence that the District considered this possibility. As noted in Finding 10, even though Trinity High School was part of a different district up until last year, there has been a recent history at Trinity High School of arranging for locker room supervision as needed. This practice has continued through this year with the assignment of Diane Wiberg, an instructional aide, to assist during third period, five days per week.

The District has the burden of demonstrating that reasonable accommodation was unavailable. “Even if an employer can demonstrate that certain jobs require members of one sex, the employer must also ‘bear the burden of proving that because of the nature of the operation of the business they could not rearrange job responsibilities ...’ in order to reduce the BFOQ necessity. (Citations omitted.)” (*Bohemian Club v. Fair Employment and Housing Commission, supra*, 187 Cal.App.3d at p. 19.) Here, the District neither explored the possibility of providing reasonable accommodation nor provided a feasible accommodation which will serve both the privacy concern and the interest of equal employment opportunity. Even if reasonable accommodation is ultimately unavailable, it is still incumbent upon the District to demonstrate this. It must show that it has evaluated alternative scenarios, as the district did in *San Luis*, and indicate whether they are feasible.

14. The District has not met its burden of demonstrating that reasonable accommodation was unavailable. Respondent seeks District accommodation in the form of providing a locker room attendant such as an aide, or volunteer, or another certificated employee or classified employee to provide the locker room supervision as the practice is

⁸ There are two teachers who may be available first period, four teachers available second period and four teachers available fourth period.

currently, and has been at Trinity High School where a teacher of co-ed physical education class needs assistance to supervise the opposite gender in the locker room.

15. The District's decision to skip Ms. Lynch on the basis of gender was improper. By retaining Ms. Lynch to teach physical education, the District has retained an employee junior to respondent to perform services which respondent is competent and certificated to render. The Accusation against respondent Dan Harris should be dismissed.

ORDER

1. The Accusation against Dan Harris is DISMISSED.
2. Notice shall otherwise be given to respondents and teachers occupying up to 14.14 FTE that their services will not be required for the 2009-2010 school year because of the reduction or discontinuation of particular kinds of services.

DATED: April 28, 2009

JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings