

BEFORE THE  
GOVERNING BOARD OF THE  
SALIDA UNION SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Reduction In Force of:

VIRGINIA BERRY,

Respondent.

OAH No. 2009060782

**PROPOSED DECISION**

Catherine B. Frink, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Salida, California, on July 23, 2009.

Atkinson, Andelson, Loya, Ruud & Romo, by Marisa Rubitz Lincoln, Attorney at Law, and Chesley D. Quaide, Attorney at Law represented the Salida Union School District,

Paul E. Echols, Attorney at Law, represented Virginia Berry (respondent).

The matter was submitted for decision on July 23, 2009.

**FACTUAL FINDINGS**

1. Douglas D. Baughn, Superintendent of the Salida Union School District (District), State of California, filed the Accusations in his official capacity as a public officer.

2. On June 12, 2009, the Governing Board of the Salida Union School District (Board) was given written notice by the Superintendent of the recommendation that notice be given to 18 certificated employees, including respondent, that their services will not be required for the next school year, and stating the reasons for that recommendation.

3. On June 12, 2009, the Board adopted Resolution No. 0809-23, which reduced and/or discontinued particular kinds of certificated services no later than August 15, 2009.

4. The Board further determined that it shall be necessary by reason of the reduction and/or discontinuance of services to decrease the number certificated employees by a corresponding number of full-time equivalent positions, and directed the Superintendent or

his designee to proceed accordingly by notifying the appropriate employees to implement the Board's determination.

5. On June 23, 2009, the District served via certified mail on 18 certificated employees, including respondent, the following documents: a written notice that it had been recommended that notice be given to them pursuant to Education Code sections 44949, 44955, and 44955.5, that their services would not be required for the next school year, which set forth the reasons for the recommendation; an Accusation made and filed by the Superintendent, with accompanying documents and a blank Notice of Defense; and a Notice of Hearing. The Accusation attached and incorporated by reference Resolution No. 0809-23, which listed the services to be reduced or discontinued, resulting in a proposed reduction in the certificated staff by 14.0 full-time equivalent (FTE) positions, as follows:

Multiple Subjects Teachers – Grades K-3	13.0 FTE
Dean	1.0 FTE

6. Prior to the hearing, on a date not established by the evidence, the District rescinded the layoff notices for 17 certificated employees, all of whom were affected by the proposed reduction in multiple subjects teachers – grades K-3.

7. Respondent made a timely written request for a hearing to determine if there is cause for not reemploying her for the next school year.

8. At hearing, the parties stipulated that the necessary preconditions had been met to initiate layoff proceedings pursuant to Education Code section 44955.5, as follows:

- A. The Budget Act of 2009-2010 was passed on February 20, 2009.
- B. The Budget Act of 2009-2010 did not increase the funded total revenue limit per unit of average daily attendance for the District by at least two percent.

9. Respondent is employed by the District as a site administrator. During the 2008-2009 school year, respondent occupied the position of Dean of Students at Salida Middle School (SMS). Respondent was hired by the District on August 1, 1988. She has served as an administrator during her entire tenure with the District. There are administrators who will be retained by the District for the 2009-2010 school year who were hired after respondent.

10. Jack Scott is an administrator employed by the District. He was hired on August 18, 1981. During the 2008-2009 school year, Mr. Scott occupied the position of Principal of After School Programs and Extended Year Programs.

11. For the 2009-2010 school year, the District has eliminated the positions of Dean of Students at SMS, and Principal of After School Programs and Extended Year

Programs. The District has instead created the position of Dean of Students and Coordinator of After School Programs at SMS. This position combines some of the former duties of Dean of Students with some of the former duties of the Principal of After School Programs and Extended Year Programs. Mr. Scott will fill the position of Dean of Students and Coordinator of After School Programs for the 2009-2010 school year.

12. Respondent contends that the District has not discontinued the position of “Dean,” as set forth in Resolution No. 0809-23. This contention is without merit. The District has created a position that will encompass some of the duties previously performed by the Dean position previously held by respondent, but those duties will be performed in a different fashion, along with additional duties. As upheld in *Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796, at pp. 810-812:

“A board may ‘reduce services’ either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or ... by determining that proffered services shall be reduced in extent [in that] fewer employees [will be] made available to deal with the pupils involved. Either (or both) determination falls within the statutory language.” (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)...

[¶]...[¶]

... the *particular kind* of service of the employee may be eliminated even though a service continues to be performed or provided in a different manner by the district. (See *Davis v. Berkeley School Dist.* (1934) 2 Cal.2d 770; *Fuller v. Berkeley School Dist.* (1934) 2 Cal.2d 152; *Jones v. Board of Trustees* (1935) 8 Cal.App.2d 146.) In *Davis v. Berkeley School Dist.*, *supra.*, 2 Cal.2d 770, the governing board discontinued the service performed by so-called traveling art teachers-experts who went from school to school giving instruction in art. Thereafter, the district continued to offer art instruction but only by the regular departmental teachers. The court affirmed the judgment denying a writ of mandate to compel reinstatement of one of the traveling art teachers on the ground that the *particular service* performed by the petitioner had in fact been discontinued even though the teaching of art was a service still being performed by the school district. Where, as here, the district apparently contemplated a change in the method of teaching or in the particular kind of service in teaching a subject, there was a discontinuance of the former particular kind of service.

13. Education Code section 44956.5 states:

For a certificated employee initially employed in an administrative position on or after July 1, 1983, who transfers to a teaching position, the period of employment in the administrative position shall not be included in determining seniority for purposes of Sections 44955 and 44956, except for school site administrators who shall earn up to a maximum of three years seniority while serving as site administrators.

14. As a site administrator, respondent is entitled to three years of seniority credit with the District under Education Code section 44956.5. Her seniority date is June 30, 2006.

15. As a result of prior layoffs, the District has a 36-month rehire list (rehire list), involving 30 certificated employees. The seniority date of the most senior employees on the list is August 22, 2000. There are 27 certificated employees on the rehire list with more seniority than respondent. Depending on the credential(s) held, some or all of these individuals would have priority over respondent in filling vacancies in the District for which credentials are required.

16. In general, the District has an affirmative obligation to reassign senior teachers who are losing their positions into positions held by junior teachers if the senior teacher has both the credential and competence to occupy such a position. The Board adopted “competency criteria” as part of Resolution No. 0809-23. Paragraph 5 of Resolution No. 0809-23 states, in part:

That “competency” for the purpose of Education Code section 44955 shall be determined upon current possession of a preliminary or clear credential for the subject matter or grade level and the certificated employee having taught the class to which they will be assigned at the beginning of the 2009-2010 school year at least one (1) semester in the past ten (10) years in the Salida Union School District.

17. Language identical to that in Paragraph 5 of Resolution No. 0809-23 was contained in Board Resolution No. 0809-14, and was addressed in layoff proceedings that took place in April and May of 2009. The application of the competency criteria to particular certificated employees was upheld by the Board after an administrative hearing held on April 23, 2009.

18. Respondent has never taught in the District, and she has not served as a classroom teacher for more than 20 years. Therefore, she would not be deemed “competent” to serve as a classroom teacher in the District, under the criteria adopted by the Board.

19. Respondent contended that she should have been given the opportunity to seek a teaching position within the District. However, respondent did not identify any certificated employee with less seniority (i.e., a hire date after June 30, 2006) whose position she was certificated and competent to fill.

20. Respondent contends that she should be retained by the District due to her long years of service as an administrator, and that an administrator with fewer years of District service should be laid off. This contention is not persuasive. An administrator attains no “tenure” in an administrative position, and serves at the pleasure of the appointing power. (*Hentschke v. Sink* (1973) 34 Cal.App.3d 19, 22.)

21. Respondent contended that, by not making an effort to find a position for her within the District, the District’s decision to lay her off “smacks of discrimination.” Respondent is one of the more “senior” employees of the District. However, respondent provided no legal argument in support of the contention that the District engaged in age discrimination by exercising its discretion to reduce or discontinue services, or by identifying respondent as the employee to be laid off.

22. The services identified in Resolution 0809-23 are “particular kinds of services” that can 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 arbitrary or capricious, but constituted a proper exercise of discretion.

23. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

24. No certificated employee junior to respondent was retained to perform any services which respondent was certificated and competent to render

## LEGAL CONCLUSIONS

1. Education Code section 44955.5, subdivision (a), states:
  - (a) During the time period between five days after the enactment of the Budget Act and August 15 of the fiscal year to which that Budget Act applies, if the governing board of a school district determines that its total revenue limit per unit of average daily attendance for the fiscal year of that Budget Act has not increased by at least 2 percent, and if in the opinion of the governing board it is therefore necessary to decrease the number of permanent employees in the district, the governing board may terminate the services of any permanent or probationary

certificated employees of the district, including employees holding a position that requires an administrative or supervisory credential. The termination shall be pursuant to Sections 44951 and 44955 but, notwithstanding anything to the contrary in Sections 44951 and 44955, in accordance with a schedule of notice and hearing adopted by the governing board.

2. Jurisdiction in this matter exists under Education Code sections 44949, 44955, and 44955.5. All notices and jurisdictional requirements contained in those sections were satisfied.

3. The anticipation of receiving less money from the state for the next school year is an appropriate basis for a reduction in services under Education Code section 44955. As stated in *San Jose Teachers Assn v. Allen* (1983) 144 Cal.App.3d 627, 638-639, the reduction of particular kinds of services on the basis of financial considerations is authorized under that section, and, “in fact, when adverse financial circumstances dictate a reduction in certificated staff, section 44955 is the only statutory authority available to school districts to effectuate that reduction.” Education code section 44955.5 specifically authorizes the District to terminate the services of certificated employees where, as in this case, the District’s total revenue limit per unit of average daily attendance will not increase by at least two percent. The Board’s decisions were a proper exercise of its discretion.

4. The services identified in Resolution No. 0809-23 are particular kinds of services that could be reduced or discontinued under section Education Code section 44955. Cause exists to reduce the number of certificated employees of the District due to the reduction or discontinuance of PKS. Cause for the reduction or discontinuance of services relates solely to the welfare of the District’s schools and pupils within the meaning of Education Code section 44949.

5. 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.)

6. Respondent’s arguments challenging the propriety of her layoff were considered and are rejected, for the reasons set forth in Findings 9 through 21.

7. No employee with less seniority than respondent is being retained to render a service which respondent is certificated and competent to render. The Board may give respondent final notice before August 15, 2009, that her services will not be required for the ensuing school year, 2009-2010.

ORDER

The Accusation served on respondent is sustained. Notice shall be given to respondent Virginia Berry that her services will not be required for the 2009-2010 school year because of the reduction or discontinuation of particular kinds of services.

Dated: \_\_\_\_\_

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CATHERINE B. FRINK  
Administrative Law Judge  
Office of Administrative Hearings