

BEFORE THE
COUNTY SUPERINTENDENT OF SCHOOLS
SACRAMENTO COUNTY OFFICE OF EDUCATION
COUNTY OF SACRAMENTO, STATE OF CALIFORNIA

In the Matter of the Reduction of Particular
Kinds of Services Affecting:

Persons Occupying
27.5 Certificated Full Time Equivalent
Positions.

OAH No. 2010030285

Respondents.

PROPOSED DECISION

Administrative Law Judge Ann Elizabeth Sarli, State of California, Office of Administrative Hearings, heard this matter in Sacramento, California, on April 15, 2010.

Michelle L. Cannon, Attorney at Law, of Kronick, Moskovitz, Tiedmann & Girard, represented the Sacramento County Office of Education (SCOE).

Christina Y. Medina, Attorney at Law, of Beeson, Taylor & Bodine represented the following respondents: Jaime Calderon, Kevin Elkington, Jonathon Freer, Pedro Marquez, Patricia Millings, Bryan Teafatiller, James Scarlett and Frank Lopez.

Respondent, Darren Law, represented himself.

Respondent, Patricia Smith filed a Notice of Defense, but did not appear at hearing. On proof of compliance with Government Code sections 11505 and 11509, and Education Code sections 44949 and 44955, this matter proceeded as a default in respect to Patricia Smith, pursuant to Government Code section 11520.

Evidence was received, the hearing was closed and the matter was submitted on April 15, 2010.

FACTUAL FINDINGS

1. On March 1 2010, David Gordon, Superintendent of Schools of Sacramento County, State of California, (SCOE) made and filed the Accusation in his official capacity.

2. On March 1, 2010, the Superintendent adopted Resolution No. 2010-A (Resolution). The Resolution was based on the Superintendent's determination that it was necessary to reduce or discontinue particular kinds of services no later than the beginning of the 2010-2011 school year. Accordingly, he determined that the following particular kinds of services and corresponding number of full time equivalent (FTE) positions should be reduced or discontinued.

<u>Services</u>	<u>Number of FTE Positions</u>
Academic Intervention Teacher	5.0 FTE
Teacher, Juvenile Institutions	11.0 FTE
Resource Specialist	1.0 FTE
Counselor, Student Programs	.5 FTE
Teacher, County Community Schools	1.0 FTE
ROP Instructor, Auto Specialist	1.0 FTE
ROP Instructor, Dental Assistant	1.0 FTE
ROP Instructor, Heavy Duty Truck Driver	2.0 FTE
ROP Instructor, Hospital/Community Health	1.0 FTE
ROP Instructor, Nursery and Landscape	1.0 FTE
ROP Instructor, Warehouse/Forklift	1.0 FTE
ROP Instructor, Welding	1.0 FTE
Principal	1.0 FTE
Total	<u>27.5 FTE</u>

3. SCOE Assistant Superintendent Tim Taylor oversees juvenile court schools, community schools and ROP programs. The ROP programs provide direct vocational services to students, including job readiness skills, and are located primarily in Sacramento

County (County) run facilities. The juvenile court schools are located in County juvenile facilities and serve youth who are confined to these facilities. The community schools primarily serve youth who have been expelled from school. SCOE provides certificated personnel who teach in these programs.

4. Mr. Taylor testified that the County is experiencing a significant budget deficit and intends to close juvenile court schools at Sacramento County Boys Ranch (Carson Creek Jr./Sr. High School) and River Oaks. As a result, the County directed SCOE to reduce instructional staff at juvenile facilities. Accordingly, Mr. Taylor and the Superintendent determined that it was necessary to eliminate the juvenile institution teaching, counseling, and principal positions and academic intervention positions¹ identified in the Resolution.

5. The County has also reduced its funding for ROP programs by 21.5 percent. Additionally, SCOE has determined, for several reasons, to close or relocate several ROP programs to school district facilities. Those school districts have the responsibility and authority to hire instructors. Mr. Taylor explained that SCOE had made the decision to close or relocate several ROP programs because they did not attract enough students and were not fiscally prudent. Many ROP programs were serving too many adults. The Legislature has mandated that by 2011, 90 percent of the students in ROP programs must be non-adult students. Accordingly, Mr. Taylor and the Superintendent determined that it was necessary to eliminate the ROP services identified in the resolution. Additionally, Academic Intervention Positions had been funded only for the 2009-2010 school year, and that funding is almost exhausted. Accordingly, Mr. Taylor and the Superintendent determined that it was necessary to eliminate the 5.0 FTE Academic Intervention Positions.

6. The evidence established that it is necessary to decrease SCOE's services by 27.5 FTE with reduction in a corresponding number of certificated employees of SCOE. The evidence established that the services identified in the Resolution are particular kinds of services that may be reduced or discontinued within the meaning of Education Code section 44955. The decision to reduce the services is neither arbitrary nor capricious, but rather a proper exercise of the SCOE's discretion. The reduction or discontinuation of services is related to the welfare of the SCOE and its pupils.

7. The Resolution set forth "competency criteria" designed to assist SCOE in determining whether affected employees could displace junior employees. The Resolution stated in pertinent part: "... for purposes of potential displacement rights, competency shall mean, at a minimum, possession of a preliminary, clear, professional clear, lifetime or other full credential, and at least one semester actual teaching experience in the subject area. For outdoor education, competency shall require one semester full time teaching experience in an outdoor education setting within the last five years."

¹ The academic intervention positions were created for the 2009-2010 school year to accommodate five teachers who had been displaced by the closing of another juvenile court school.

8. SCOE's Chief Administrator for Human Resources, Effie Crush, and her staff were charged with identifying the certificated employees who were affected by the reduction and elimination of the particular kinds of services identified in the Resolution. They first took into account attrition in the 2010-2011 school year. They updated the SCOE seniority list and sent the list to all certificated personnel, advising them to verify their information and update any credentials or other information. After receiving input from the certificated employees, Ms. Crush and her staff identified the employees with the least seniority occupying the affected positions, reviewed their credentials and determined whether they had rights to displace (bump) junior SCOE employees, after taking into account the competency criteria for displacement.

9. By letter dated March 8, 2010, Ms. Crush provided respondents with a written "Notice of Nonreemployment" (Notice or Preliminary Layoff Notice). The Notice advised that the Superintendent had recommended that Notice be given to them, pursuant to Education Code sections 1294 and 44955, that their services would not be required for the 2010-11 school year. The Resolution setting forth the reasons for the recommendation was attached to the notice.

10. Respondents made timely written requests for a hearing to determine if there is cause for not reemploying them for the ensuing school year. The Accusation was timely served on respondents and respondents timely filed Notices of Defense. All pre-hearing jurisdictional requirements have been met.

Defenses Raised - General

11. Respondents acknowledge the fiscal crisis faced by the State of California and the County of Sacramento. Respondents maintain that elimination or reduction of ROP programs will only worsen the economic crisis, in that students will no longer be able to gain the skills necessary for entry-level employment in automotive repair, welding, dental assisting and the other careers ROP prepares its students for.

There are long-range implications to any budget cuts an entity makes. However, it is within the discretion of SCOE to determine how best to allocate scarce resources. The decision to reduce and eliminate ROP services was a proper exercise of SCOE's discretion.

Defenses Raised – Frank Lopez

12. Frank Lopez has a seniority date of August 22, 1994. He holds a clear vocational credential in a designated subject-diesel equipment mechanics and automotive mechanics. He is subject to layoff pursuant to the Resolution's direction to reduce ROP Instructor, Auto Specialist by 1.0 FTE. His current assignment is to the EL Hickey Jr./Sr. High School. He is not currently assigned to a particular class but provides project-based learning to classes on most of the SCOE campuses.

Mr. Lopez is concerned because the ROP Automotive classes he was teaching at the community school never really had a chance to achieve full enrollment. The classes were scheduled during the time core courses were offered and very few students could sign up for his classes. He believes that the automotive classes could achieve adequate enrollment if there was more flexibility with the hours the classes were available. Additionally, the first year in which he taught at EL Hickey the program did not have a shop. Accordingly, the class consisted of 70 percent auto design and 30 percent lecture. His students are generally kinesthetic learners and were more interested in hands-on experience. After the shop facility was provided, it was not equipped for months. When the equipment arrived it was not hooked up for half a year and currently there is no car in the shop. Accordingly, there is no enrollment.

Mr. Lopez's point is that it is unfair and erroneous to discontinue an ROP program because its enrollment is historically low, when the program discourages enrollment. He points out that at junior colleges, automotive programs are full to capacity.

As set forth above, declining enrollment was just one of the factors SCOE took into consideration in determining to eliminate the ROP Instructor, Auto Specialist position, and in fact, most ROP positions. SCOE's decision does not reflect upon Mr. Lopez's teaching ability or his ability to attract students. It is very clear that Mr. Lopez is not responsible in any way for the decline in enrollment in the automotive classes. In fact, Mr. Lopez was voted teacher of the year three times. However, it is within the discretion of SCOE to determine how best to allocate scarce resources. The decision to reduce and eliminate the ROP Instructor, Auto Specialist services was a proper exercise of SCOE's discretion.

Defenses Raised – Darren Law

13. Darren Law has a seniority dated January 25, 2006. He holds a vocational Education Credential in a Designated Subject-Dental Services. He is subject to layoff pursuant to the Resolution's direction to reduce ROP Instructor, Dental Assistant by 1.0. Mr. Law maintains that his classes always had full attendance and sometimes are over-enrolled. His students are very successful and often are able to successfully complete the California boards for dental assisting. His clinic is currently located at Encina High School. San Juan School District assisted with remodeling costs of the clinic. He anticipated he would continue to have a very high success rate with the remodeled clinic.

SCOE intends to move the dental assisting program to the San Juan School District. Mr. Law provided suggestions as to how SCOE could continue to keep the dental assisting program within its purview. As noted above, attendance in ROP programs is just one of the factors SCOE took into account in determining to discontinue or move ROP programs to school districts. However, it is within the discretion of SCOE to determine how best to allocate scarce resources. The decision to move the Dental Assistant services program to the San Juan School District was a proper exercise of SCOE's discretion.

Mr. Law also challenged SCOE's failure to bump him into another position within SCOE. He testified that if he had known his dental assisting program would be moved to another district, he could have approached the California Commission on Teacher Credentialing and requested that he be issued additional credentials. He pointed out that he has over 130 units toward a biology degree. He believes he could have bumped into one of the outdoor education courses taught at the Sly Park Recreational program.

Vocational credentials are specific credentials which only permit their holders to teach the class specified on the credential. There is no class within SCOE, including the outdoor education position, which Mr. Law is credentialed to teach. He has clearly not completed the course work and credentialing process necessary to obtain a multiple subject credential or a single subject credential. Even if he were poised to obtain such a credential, SCOE can and must make its assignments and reassignments based upon the credentials that the certificate employee holds at the time of assignment.

Defenses Raised – Jonathan Freer

14. Mr. Freer has a seniority date of August 30, 2004. He holds a multiple subject credential and currently teaches 1 FTE in a self-contained classroom at Carson Creek, one of the juvenile court schools whose program is going to be eliminated in the 2010-2011 school year. Mr. Freer maintains that he can move into (bump) a position occupied by one of the following junior teachers who are assigned to teach outdoor conservation and environmental education (outdoor education) at Sly Park:

Ginger Schlavin holds a multiple subject credential and a CLAD certification and has a seniority date of October 17, 2005.

Patrick McIntosh holds a multiple subject credential and has a seniority date of October 2, 2006.

Todd Gillihan holds a single subject credential in science/ geosciences and has a seniority date of November 16, 2007.

Steffani Lazier holds a multiple subject credential and has a seniority date of August 20, 2008.

15. SCOE maintains that Mr. Freer is not "competent" to teach outdoor education because he does not meet the competency criteria set forth in the Resolution. Further, SCOE maintains that it may prevent senior teachers from displacing Schlavin, McIntosh, Gillihan and Lazier, because these teachers possess special training and experience necessary to teach the specific course, outdoor education, and others with more seniority do not possess these skills.

The Resolution's "competency criteria" requires that for purposes of potential displacement rights into an outdoor education program, competency shall mean, at a minimum; (1) possession of a preliminary, clear, professional clear, lifetime or other full credential; (2) at least one semester actual teaching experience in the subject area; and (3) one semester full time teaching experience in an outdoor education setting within the last five years.

Mr. Freer possesses a multiple subject teaching credential and thus meets the first requirement of the competency criteria.

In order to meet the second requirement of the competency criteria, Mr. Freer must have taught at least one semester in the "subject area." The "subject area" of outdoor education is science and includes biology, life science, environmental education, natural resources, wildlife management and forestry. Mr. Freer is NCLB qualified in science. He received Bachelor's degrees in 1981, in Psychology and Recreational Administration. His bachelors in recreational administration focused on wildlife and biology interpretation. He has taught recreation, field biology and environmental biology for many years. For the past six years he has taught multiple subjects, including science at the Boy's Ranch/Carson Creek Jr./Sr. High. His classes contain science components.

Mr. Freer meets the second requirement that he have at least one semester of actual teaching experience in the subject area (science).

SCOE maintains that Mr. Freer does not meet the third requirement of one semester full-time teaching experience in an outdoor education setting within the last five years. Mr. Freer acknowledged that he has not taught one semester full-time in an outdoor education setting within the last five years. However, he has conducted innumerable classes in the out of doors for his students at Boys Ranch. His suggestion is that the time accumulated outdoors during his class work over the last six years would constitute one semester of full-time outdoor education in the last five years. The minimum qualifications for the position, as stated in the SCOE classification for "Outdoor, Conservation & Environmental Education Teacher" do not require that the incumbent have worked for a semester teaching outdoor education. Rather, that classification statement indicates "Consideration will be given to candidates with background in a regular classroom, outdoor education, and camp experience as well as coursework or experience"

SCOE maintains that it is necessary to place only teachers with one full semester of outdoor teaching experience and special skills in outdoor education in the Sly Park program. SCOE put on substantial evidence that the Sly Park program is unique. It is a total immersion program for fifth and sixth-graders. Student groups rotate into the program and spend a week in residence. Ninety percent of their time is spent outside during fall, winter and spring months. Teachers need enthusiasm, physical stamina, the ability to work well with groups of students who are constantly in motion and knowledge of all areas of science. Those teachers that have been hired had extensive outdoor experience and have taught as substitute teachers in the Sly Park outdoor program before being hired. However, there is no

evidence that any one of these junior teachers taught a semester in an outdoor science program before they were ultimately hired for the Sly Park program. Their substitute service appears to have been intermittent.

Mr. Freer testified as to his extensive background working in recreating in the out of doors. He led one hundred mile hikes for the American Lung Association. He has hiked in the Alps and other mountain ranges. He has guided hikes. He is an avid outdoors person and birder. The only thing that distinguishes Mr. Freer from the four junior teachers currently occupying the outdoor education program is his age. There is no argument or evidence that Mr. Freer is physically incapable of undertaking the demands of the outdoor education program.

While a governing board (or superintendent) has latitude in determining what factors contribute to competency for provision of a particular service, those factors must be reasonable. There must be a rational relationship between the competency criteria and performance of a particular service. The governing board, too, has latitude in choosing to skip junior employees who provide specialized services. But, the board must show these junior employees have special training and experience necessary to teach outdoor education, and others with more seniority do not possess these skills. Mr. Freer has the credential, the outdoor experience in the subject matter and vast experience teaching and motivating groups of students.

SCOE may prefer to keep its junior teachers in place in the Sly Park outdoor education program. These junior teachers appear to have adapted well to the program and have brought much to the program. Even though they may be the ideal teachers for this program, they are not the only SCOE teachers who can effectively teach outdoor education. Even though they may be the ideal candidates in a recruiting situation, this is not a recruitment. Mr. Freer is a senior employee who is certificated and competent to render service teaching science in outdoor education. As set forth below in the Legal Conclusions, the very clear intent of the Education Code,² is to prevent the termination of permanent employees while probationary employees or employees with less seniority are retained to render services which the senior employee is certificated and competent to render. Establishing a preference for existing staff, by enacting competency criteria designed to exclude senior teachers, violates the intent of the Education Code.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955, and all notices and other requirements of those sections have been provided as required.

2. 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 Superintendent's 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 anticipation of receiving less money from the state for the next school year is an appropriate basis for a reduction in services under 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." The County must be solvent to provide educational services, and cost savings are necessary to resolve its financial crisis. The Superintendent's decision to reduce particular kinds of services was a proper exercise of its discretion.

4. The services identified in Resolution No. 2010-A, are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Superintendent'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 County 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 County'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. Education Code section 44955, subdivision (b), provides:

Except as otherwise provided by statute, the services are 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.

7. Education Code section 44955, subdivision (c), provides in pertinent part:

... service of such employees shall be terminated in the inverse order in which they were employed... 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....

8. Education Code section 44955, subdivision (d), provides in pertinent part:

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 ... which others with more seniority do not possess.

[¶]...[¶]

9. Cause does not exist, pursuant to Education Code section 44955, subdivisions (b) and (c), to give notice to respondent Jonathon Freer that his services will not be required for the 2010-2011 school year. As set forth in the Findings, junior employees are being retained to render services which Jonathon Freer's seniority and qualifications entitle him to render.

10. Cause does not exist, pursuant to Education Code section 44955, subdivision (d), to give notice to respondent Jonathon Freer that his services will not be required for the 2010-2011 school year. As set forth in the Findings, SCOE has not demonstrated that it must retain junior employees, Schlavi, McIntosh, Gillihan and Lazier, because they have necessary training or experience that Jonathon Freer does not possess.

11. Cause exists because of the reduction or discontinuation of particular kinds of services pursuant to Education Code section 44955 to give notice to the remaining respondents that their services will not be required for the 2010-2011 school year, as set forth in the Findings. No certificated employees with seniority dates junior to the remaining respondents are being retained to teach classes for which respondents are certificated and competent to teach.

RECOMMENDATION

Notice shall be given to respondents, with the exception of Jonathon Freer, that their services will not be required for the 2010-2011 school year because of the reduction or discontinuation of particular kinds of services.

The Accusation against Jonathon Freer is dismissed.

Dated: April 17, 2010



ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings