

BEFORE THE
GOVERNING BOARD OF THE
TURLOCK UNIFIED SCHOOL DISTRICT
STANISLAUS COUNTY
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE TURLOCK UNIFIED
SCHOOL DISTRICT,

Respondents.

OAH No. 2010031652

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, in Turlock, California, on May 20, 2010.

Roberta L. Rowe, Attorney at Law, represented the Turlock Unified School District (District).

Ernest H. Tuttle, IV, Attorney at Law, represented the respondents who are listed on Attachment A hereto (represented respondents).

There was no appearance by or on behalf of the respondents listed on Attachment B hereto (unrepresented respondents).

Evidence was received, the record was closed, and the matter was submitted for decision on May 20, 2010.

Because this matter was continued pursuant to Education Code section 44949, subdivision (e),¹ the May 7 date set forth in section 44949, subdivision (c)(3), was extended to June 7, 2010, and the May 15 date set forth in section 44955, subdivision (c) was extended to June 15, 2010.

¹ All further statutory references are to the Education Code unless otherwise indicated.

FACTUAL FINDINGS

1. On March 2, 2010, the Governing Board of the District adopted Resolution #16/2009-2010 (PKS Resolution), by which it determined that it was necessary to reduce or discontinue certain identified particular kinds of services (sometime referred to herein as PKS). By reason of this reduction or discontinuance of particular kinds of services, the Governing Board determined that it will be necessary to terminate, at the end of the 2009-2010 school year, the employment of certain certificated employees of the District, and directed the Superintendent or his designee to send appropriate notices to all employees whose services will be terminated by virtue of the Governing Board's action. The PKS reductions and discontinuances are based solely upon economic reasons, and are not related to the skills, abilities or work performance of the affected teachers.

2. The PKS Resolution identified the following particular kinds of services for reduction or discontinuance:

<u>Position</u>	<u>Grade Level</u>	<u>FTE²</u>
Adapted PE	K-6	1.0
SDC/LH	K-12	2.0
Resource Specialist	K-6	1.0
Language Arts	7-8	1.0
Math/Science	7-8	1.0
Drafting	9-12	1.0
Foreign Language	9-12	.6
Math	9-12	1.0
Opportunity	9-12	2.0
English	9-12	<u>1.0</u>
	Total 7-12	11.6
Classroom Teachers	K-8	<u>64.0</u>
	TOTAL	75.6

3. Pursuant to the PKS Resolution, on March 10, 2010, Mike Trainor, Assistant Superintendent, Human Resources, sent preliminary layoff notices to the certificated employees identified for layoff. The preliminary layoff notices informed the certificated employees of their right to request a hearing, and enclosed copies of the PKS Resolution, sections 44949 and 44955, and a blank request for hearing form.

² "FTE" stands for full-time equivalent.

4. The District did not receive requests for hearing from the unrepresented respondents. The unrepresented respondents did not appear and were not represented at the hearing. The hearing proceeded by way of default pursuant to Government Code section 11520 against the unrepresented respondents.

5. In response to the preliminary layoff notices, the District received requests for hearing from the represented respondents. On March 23, 2010, the District served the Accusation, Statement to Respondent, form Notice of Defense, Notice of Hearing, and Request for Discovery on the represented respondents. On March 29, 2010, a Notice of Defense was served on behalf of the represented respondents.

6. The represented respondents are certificated employees of the District. The District timely served the represented respondents with all notices required by sections 44949 and 44955. The Notice of Defense was timely filed on behalf of the represented respondents.

7. Prior to the hearing, after reviewing new information from the May Revise and considering additional attrition, the District rescinded a number of preliminary layoff notices. Although the District rescinded a number of preliminary layoff notices, the Governing Board has not modified the number of PKS reductions it approved in the PKS Resolution.

8. At the hearing, the District corrected the seniority date of respondent Jennifer Babakhan from August 18, 2009, to August 27, 2008. This change in Ms. Babakhan's seniority date does not affect her layoff status.

9. The represented respondents raised the following issues in opposition to the proposed layoff: (1) whether the resignation of Susan Milligan, a Math/Science teacher at Dutcher Middle School, satisfied the 1.0 FTE reduction of Math/Science set forth in the PKS Resolution, thereby requiring the rescission of the preliminary layoff notice served on respondent Charlyn D. Selee; and (2) whether respondent Carol Aleson, who has a Multiple Subject teaching credential with a supplementary authorization in English, should be allowed to bump a more junior certificated employee and be assigned to teach ninth-grade English in the next school year. These issues are addressed below.

Charlyn D. Selee

10. As set forth in the PKS Resolution, the Governing Board has decided to reduce Math/Science in the seventh and eighth grade by 1.0 FTE.

11. Represented respondent Charlyn D. Selee is a 1.0 FTE permanent certificated District employee with a seniority date of August 17, 2007. She has a clear Multiple Subject teaching credential and a Crosscultural, Language, and Academic Development (CLAD) certificate. She also has a general education limited assignment single subject teaching permit (Permit) in Math. She is currently teaching Math/Science in grades seven and eight at Dutcher Middle School.

12. When Ms. Selee was initially hired by the District, she was asked to obtain a Permit in Math in order to teach the Math/Science classes she is currently teaching. Because she had enough college credits for a minor in science, she was not asked to obtain a Permit in Science. The Permit provides that, after issuance, it may be renewed for two additional one-year terms as long as the holder maintains a valid teaching credential, and either: (a) completes a minimum of six semester units of applicable coursework; or (b) passes two sections of an appropriate examination. Ms. Selee has complied with these requirements and her Permit in Math has already been renewed twice. Her Permit in Math will expire on October 1, 2010.

13. Even though her Permit in Math will expire shortly after the beginning of the 2010-2011 school year, Ms. Selee does not need the Permit to continue teaching Math/Science at Dutcher Middle School. As both Mr. Trainor and Ms. Selee testified, Ms. Selee is credentialed and competent to teach Math/Science at Dutcher Middle School with her Multiple Subject teaching credential.

14. Susan Milligan was a teacher of Math/Science at Dutcher Middle School. Effective January 5, 2010, she resigned her position. Her classes are currently being taught by a substitute.

15. Unrepresented respondent Amanda Brazil is a .66 FTE probationary 2 certificated District employee. Her seniority date is July 1, 2008. She has a preliminary Multiple Subject teaching credential and a CLAD certificate. She is currently teaching Math/Science at Dutcher Middle School.

16. The evidence presented at the hearing about Ms. Selee's layoff was contradictory and confusing. Prior to the hearing, the District's counsel confirmed to the represented respondents' counsel that the 1.0 FTE reduction in Math/Science set forth in the PKS Resolution was satisfied by the resignation of Ms. Milligan. The District's counsel provided represented respondents' counsel with a document entitled, "Turlock USD Layoffs." That document lists, in typing, the particular kinds of services identified for reduction in the PKS Resolution. In handwriting next to "Math/Science 7-8 (1.0)," the District's counsel wrote, "Susan Milligan midyear retiree." There is nothing on that document to indicate that Ms. Selee's layoff was related to the 1.0 FTE reduction in Math/Science in the seventh and eighth grade.

17. During the hearing, before lunch, Mr. Trainor testified that he believed that the PKS Resolution's 1.0 FTE reduction in Math/Science was satisfied by the attrition of Ms. Milligan. After lunch, Mr. Trainor testified that, prior to the resignation of Ms. Milligan, the District was considering reducing Math/Science by 2.0 FTE; after Ms. Milligan resigned, the District decided to reduce Math/Science by 1.0 FTE, and Ms. Selee was noticed for layoff to satisfy that 1.0 FTE reduction. The District did not present any documentary evidence to substantiate Mr. Trainor's afternoon testimony. Mr. Trainor also testified that Ms. Brazil was being laid off as part of the 64.0 FTE reduction in Classroom Teachers K-8.

18. Given the contradictory evidence that was submitted at the hearing, the District did not meet its burden of establishing that Ms. Selee's preliminary layoff notice was issued to satisfy the 1.0 FTE reduction of Math/Science set forth in the PKS Resolution. Instead, the preponderance of the evidence established that the District was relying upon the resignation of Ms. Milligan to satisfy that PKS reduction. The District did not assert or establish that Ms. Selee was being laid off pursuant to any other reductions set forth in the PKS Resolution. Given the District's failure to establish by a preponderance of the evidence that Ms. Selee was being laid off to satisfy the 1.0 reduction in Math/Science, Ms. Selee's preliminary layoff notice must be rescinded.

Carol Aleson

19. On March 2, 2010, the Governing Board adopted Resolution No. 17/2009-10 (Competency Resolution). The Competency Resolution states, in relevant part, that, "the Governing Board recognizes that, to make effective layoff decisions, objective criteria as to competency must be established" and that "the District may deviate from the order of least seniority when laying off a certificated employee, to fill a demonstrated specific need for fully credentialed personnel and for personnel to teach a specific course or course of study which others with more seniority do not possess." In the Competency Resolution, the Governing Board, in relevant part, resolved that:

...deviation from the layoff or reappointing in order of least seniority can include, but shall not be limited to:

1. Teachers who currently hold a preliminary or clear credential.

20. Represented respondent Carol Aleson is a permanent certificated District employee. Her seniority date is August 17, 2007. She is currently a kindergarten teacher.³ She holds a clear a Multiple Subject teaching credential and a CLAD certificate. She also has a supplementary authorization in English. Her supplementary authorization allows her to teach English in a single subject classroom to students in the ninth grade and below. It does not allow her to teach English in a single subject classroom to students in the tenth through twelfth grades. Certificated employees with preliminary or clear credentials in English may teach in the tenth through twelfth grades.

21. The District did not serve preliminary layoff notices on four teachers (Christopher Beebout, Michael Watson, Justin Clark and Ellen Newman) currently teaching English at the high school level.⁴ All four of these teachers have seniority dates of July 1,

³ There was no evidence presented at the hearing as to why Ms. Aleson was given a preliminary layoff notice. It appears that she was laid off as part of the reduction of 64.0 FTE Classroom Teachers K-8.

⁴ The PKS Resolution reduces English in the ninth to twelfth grades by 1.0 FTE. There was no evidence to establish that any of the four teachers identified by Ms. Aleson were designated for layoff to satisfy this reduction. According to the evidence presented by the District, a probationary teacher who is teaching English at Turlock High School was non-reelected. It appears that this non-reelection satisfies the 1.0 FTE English teacher reduction.

2008, hold single subject teaching credentials in English, and are probationary 2 employees. Ms. Aleson argued that, because she is senior to these four teachers, she should be allowed to bump one of them and be assigned to teach ninth-grade English in the 2010-2011 school year.

22. The evidence did not establish which grades the four identified English teachers are currently teaching. Mr. Trainor testified that the District had not yet made its final assignments for the 2010-2011 school year. Given the four more junior teachers' credentials, they could be assigned to teach in any of the high school grades, nine through twelve. Given her supplementary authorization, Ms. Aleson could only be assigned to teach ninth grade at the high school level. Mr. Trainor testified that, given the Governing Board's Competency Resolution, the District gave priority to certificated employees with single subject teaching credentials when determining which teachers to lay off. But Mr. Trainor conceded that the District would consider Ms. Aleson, with her supplementary English authorization, to be credentialed and competent to teach English at the ninth grade level and below if the District did not have sufficient English teachers with single subject teaching credentials. Ms. Aleson is not, however, credentialed and competent to teach English in the tenth through twelfth grades.

23. There was argument at the hearing about whether this was a "skipping" or "bumping" issue, and whether the Competency Resolution stated competency or skipping criteria. A senior teacher may "bump" a more junior teacher when the senior teacher establishes that the junior teacher has been "retained to render a service which [the senior teacher] is certificated and competent to render." (§ 44955, subd. (b).) A school district may "skip" a more junior teacher – i.e., either not lay off a junior teacher who is serving in a PKS identified for reduction or not allow a senior teacher to "bump" a more junior teacher – when the school district "demonstrates a specific need for personnel to teach a specific course or course of study." (§ 44955, subd. (d)(1).)

24. Although the Competency Resolution is not a model of clarity, its requirement that a certificated employee must possess a preliminary or clear credential to displace a more junior employee applies generally, and not just to a specific course or course of study. It establishes a competency criteria that a certificated employee must meet in order to "bump" a more junior employee. Thus, any respondent wishing to displace a teacher at the secondary level must hold a preliminary or clear single subject credential to do so. It was within the discretion of the Board to establish this competency criteria. There was no evidence to show that the Board acted arbitrarily or capriciously in doing so.

25. In this case Ms. Aleson seeks to "bump" a more junior employee and be assigned to teach a ninth-grade English class. She therefore bears the burden of establishing that she is credentialed and competent to render the service that the four identified more junior teachers are currently providing. Ms. Aleson did not establish that she has a preliminary or clear credential in English. In addition, she did not establish that any of the four identified junior teachers are currently teaching ninth-grade English or have been assigned to teach ninth-grade English in the next school year. Consequently, Ms. Aleson did not establish that she is credentialed and competent to "bump" any of the four identified

teachers. As a result, the evidence did not establish that Ms. Aleson's preliminary layoff notice should be rescinded.

26. There was no evidence that the District proposes to reduce any services that are mandated by state or federal laws or regulations below mandated levels.

27. There was no evidence that the District proposes to retain junior employees to render services that more senior respondents are certificated and competent to perform.

28. The District's reductions and discontinuances of particular kinds of services relate solely to the welfare of the District's schools and pupils.

29. Any other assertions put forth by respondents and not addressed above are found to be without merit and are rejected.

LEGAL CONCLUSIONS

1. The District complied with all notice and jurisdictional requirements set forth in sections 44949 and 44955.

2. The services identified in the PKS Resolution are particular kinds of services that may be reduced or discontinued under section 44955. The Governing Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuance of services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949.

3. Cause exists to reduce certificated employees of the District due to the reduction or discontinuance of particular kinds of services. Except as set forth in Legal Conclusion 5 below, the District properly identified the certificated employees to be laid off as directed by the Governing Board.

4. As set forth in Finding 8, the District shall correct the seniority date of respondent Jennifer Babakhan to August 27, 2008.

5. As set forth in Finding 18, the District shall rescind the preliminary layoff notice served on respondent Charlyn D. Selee.

6. As set forth in Finding 25, respondent Carol Aleson did not establish that she should be allowed to bump a more junior certificated employee or that her preliminary layoff notice should be rescinded.

7. No junior certificated employee is scheduled to be retained to perform services that a more senior respondent is certificated and competent to render.

8. Except as set forth in Legal Conclusion 5, cause exists to give notice to all the represented and unrepresented respondents in accordance with this decision that their services will be reduced or will not be required for the 2010-2011 school year because of the reduction or discontinuance of particular kinds of services.

RECOMMENDATION

1. In accordance with Legal Conclusion 4, the District shall correct the seniority date of Jennifer Babakhan to August 27, 2008.

2. As set forth in Legal Conclusion 5, the District shall rescind the preliminary layoff notice served on Charlyn D. Selee.

3. Cause exists to reduce or discontinue certificated positions at the end of the 2009-2010 school year in accordance with the PKS Resolution.

4. Except as set forth in Recommendation 2, notice may be given to the represented and unrepresented respondents that their services will be reduced or will not be required for the 2010-2011 school year. Notice shall be given in inverse order of seniority.

DATED: May 27, 2010

KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT A

TURLOCK UNIFIED SCHOOL DISTRICT
REPRESENTED RESPONDENTS

Aleson, Carol
Amaya, Nicole K.
Anderson, Michele
Babakhan, Jennifer M. Nyquist
Beyer, Marshall L.
Lowe, Angela M.
Moreno, Erin L.

Newell, Christine S.
Patterson, Katherine G.
Selee, Charlyn D.
Tovar, Jaime V.
Ulrich, Tiffany G.
Valgos, Stephen P.

ATTACHMENT B

TURLOCK UNIFIED SCHOOL DISTRICT
UNREPRESENTED RESPONDENTS

Bishop, Dennis
Brazil, Amanda L.
Leigh, Kristen M.

Rowell, Brad M.
Valadez, Sophia A.
Waterson, Tiffany A.