

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

In the Matter of the Reduction in Force of:

OAH No. 2011030268

CHRISTINA BRIONEZ, ELENA GUTIERREZ,
AMY KISSEE, STEVEN MARKS, ELSA
MCCLURE, LISA MILLINAZZO-BARNETT,
JEANINE OLIVER-NOMOF, JENNIFER
PARMAN, MEGAN PUNT, JESSICA
RODRIGUEZ, AND MATTHEW STEFFEN,

Respondents.

PROPOSED DECISION

Administrative Law Judge Marilyn A. Woollard, Office of Administrative Hearings (OAH), State of California, heard this matter in Waterford, California, on April 25, 2011.

Chesley D. Quaide, Attorney at Law, appeared on behalf of the Waterford Unified School District. Director of Personnel Ysabel Rockwell was also present.

Ernest Tuttle, IV, Attorney at Law, appeared on behalf of all respondents.

Oral and documentary evidence was presented and the parties waived closing argument. The record was then closed and the matter was submitted for decision on April 25, 2011.

FACTUAL FINDINGS

1. The Waterford Unified School District (District) serves approximately 1700 students in kindergarten through high school.

2. Don Davis is the District's Superintendent. Ysabel Rockwell is the District's Director of Personnel. The actions of Mr. Davis, Ms. Rockwell, and the District Governing Board (Board) were taken in their official capacities.

3. On March 10, 2011, at the Superintendent’s recommendation, the Board passed Resolution No. 110310-01, authorizing a reduction or discontinuance of particular kinds of services with a resulting layoff of certificated employees (hereafter, PKS Resolution). In the PKS Resolution, the Board determined that the reduction of the following particular kinds of services, designated as full-time equivalent (FTE) certificated positions, was in the best interest of the District:

<u>PKS Service</u>	<u>FTE Reduced</u>
K-6 Elementary Teachers	9.0
Middle School Science	1.0
High School Agriculture	1.0
Secondary Special Education	1.0
Secondary Physical Education/Health	1.0
Secondary English/Language Arts	1.0
Secondary Mathematics	1.0
Secondary Social Science	1.0
Principal High School	1.0
TOTAL FTE	= 17.0

4. The PKS Resolution directed the Superintendent or his designee to send all appropriate notices to certificated employees whose positions may be affected by its terms in accordance with the provisions of Education Code sections 44949 and 44955.¹

5. As set forth in section 44955, subdivisions (b) and (c), economic layoffs are generally to be carried out on the basis of seniority. A teacher with more seniority typically has greater rights to retain employment than a junior teacher. 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 credentials and competence to occupy such positions. The displacement of a junior teacher is known as “bumping.” The seniority rule is not absolute, and a junior teacher with a needed credential or skills may be retained even if a more senior teacher is terminated. “Skipping” a less senior employee from inclusion in a layoff proceeding is authorized by statute. In order to depart from a seniority-based economic layoff, section 44955, subdivision (d)(1), requires that the District must demonstrate “a specific need for personnel to teach a specific course or course of study... and that the certificated employee (to be skipped) has special training and experience necessary to teach that course or course of study...which others with more seniority do not possess.”

¹Unless otherwise indicated, all undesignated statutory references are to the Education Code.

6. To assist the Superintendent in implementing its terms, the PKS Resolution included “tie-break” criteria that the District would consider to determine the order of termination if any of the affected certificated employees shared the same seniority date; i.e., the first date of paid service rendered to the District. The PKS Resolution also included: (1) a definition of “competent,” to be used if a more senior employee affected by the PKS reductions seeks to “bump” a junior employee; and (2) “skipping” criteria the District would use to deviate from terminating certificated employees in the inverse order of seniority.

7. On March 11, 2011, a “Notice of Recommendation That Your Services Will Not Be Required for The Ensuing School Year (2011-2012)” (Notice), signed by Superintendent Davis, was served by personal delivery on each of the named respondents and on an additional certificated employee, Tim Swartz. The Notice also contained copies of the PKS Resolution, a blank Request for Hearing form and relevant sections of the Education Code.

8. All respondents timely filed a Request for a Hearing. Mr. Swartz did not file a request and accordingly waived his right to a hearing in this matter. (Educ. Code§ 44949, subd. (b).)

9. On April 6, 2011, Superintendent Davis made and signed the Accusation against respondents, asking that the Board be authorized to give respondents final notice that their services would not be required for the 2011-2012 school year, pursuant to the PKS Resolution and sections 44949 and 44955.

10. On April 6, 2011, each of the respondents was personally served with the Accusation, the PKS Resolution, a blank Notice of Defense, Notice of Hearing, and copies of relevant statutes and related documents. Thereafter, each of the respondents timely filed a Notice of Defense. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et seq.

11. All jurisdictional requirements have been met. Respondents do not contend that there are any procedural defects with the Board’s notice of the reduction in force mandated by its PKS Resolution.

Preliminary Notices Rescinded

12. At the commencement of the hearing, the District advised that it had rescinded the preliminary lay off notices issued to these three certificated employees: Elena Gutierrez, Steven Marks, and Lisa Millinazzo-Barnett. The Accusations against these employees will be dismissed.

Appropriate PKS

13. Respondents did not dispute that the particular kinds of services the Board resolved to reduce or discontinue in the PKS Resolution are particular kinds of services that may be reduced or discontinued.

Implementation of Lay Off

14. Ms. Rockwell, with assistance from her administrative staff, was primarily responsible for creating and maintaining the District's seniority list, identifying the certificated employees to be noticed for layoff and generally implementing the PKS Resolution. Her testimony is paraphrased as relevant below.

15. *District's Seniority List:* The District maintains a seniority list for its certificated employees. The seniority list was initially compiled three years ago when the District implemented its first reduction in force. At that time, the personnel file of each certificated employee was reviewed to determine the seniority date and credential/s for each employee reflected in the District's records. Each certificated employee was then provided this information and asked to verify the accuracy of their particular information. The District's records were updated if appropriate. In each subsequent year, the District has updated its records to accurately reflect seniority dates and credentials.

16. To determine which certificated employees should be noticed for lay off, Ms. Rockwell identified the least senior employee within each PKS identified by the PKS Resolution. Ms. Rockwell testified that it was not necessary to use the tie-break criteria to determine the least senior certificated employee to be laid off.

Respondents posed no challenges to the District's seniority list and provided no evidence or argument to suggest that the District should have implemented the tie-break criteria.

17. *Attrition:* The PKS Resolution affirmed that the Board had considered all positively assured attrition, including deaths, resignations, non-reelections and other permanent vacancies for the 2011-2012 school year in determining the extent of necessary PKS reductions. In her testimony, Ms. Rockwell noted that there was one retirement in special education which satisfied the PKS Resolution requirement for a 1.0 FTE reduction in Secondary Special Education. There was also one retirement in Middle School Science which satisfied the PKS reduction in this area. There were no retirements of teachers with multiple subject credentials.

18. Ms. Rockwell reviewed the credentials of each of the individuals identified as affected by the PKS Resolution in light of the District's seniority list. Based on this review, she determined that none of the respondents had any rights to "bump" less senior employees in other District positions. The PKS Resolution

establishes that less senior teachers who hold necessary authorizations to teach English Language (EL) Learners (CLAD, BCLAD, SDAIE, or regular EL certificate) may be skipped from layoff, over more senior employees who do not possess such authorizations. Because all teachers in the District hold appropriate EL credentials, no junior employee was skipped for layoff over a more senior employee.

19. Respondents posed no challenges to the District's determination that none of them had any bumping rights and did not assert that any junior employees were skipped. There was no evidence that employees junior to respondents are being retained to perform the services which respondents are certificated and competent to render.

20. The District proceeded with the PKS reduction based upon its need to maintain financial solvency in light of its "qualified" status. The reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils.

LEGAL CONCLUSIONS

1. Education Code section 44949 provides, in pertinent part, as follows:

(a) 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, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

[¶]. . . [¶]

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. . . If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision.

2. Education Code section 44955, subdivision (b), provides in pertinent part that:

(b) Whenever in any school year . . . 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. . .

3. The District has the burden of proving by a preponderance of the evidence that the proposed reduction or elimination of particular kinds of services and the preliminary notice of layoff served on respondents are factually and legally appropriate.

4. As set forth in Factual Findings 1 through 11, all notices and all jurisdictional requirements contained in those sections were satisfied. The timely notices personally delivered on each of the 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 notice, 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.)

5. The Governing Board may reduce, discontinue or eliminate a particular kind of service and then provide the needed services to the students in another manner. (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571; *California Teachers Association v. Board of Trustees of Goleta Union School Dist.* (1982) 132 Cal.App.3d 32.) A school board may reduce services within the meaning of the statute either by determining that a certain type of service shall not be performed at all or by reducing the number of district employees who perform such services. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.)

As set forth in Factual Finding 13, the services set forth in the PKS Resolution are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. Cause for reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

6. As set forth in Factual Finding 12, the preliminary layoff notices issued to respondents Elena Gutierrez, Steven Marks, and Lisa Millinazzo-Barnett were rescinded by the District at the hearing. Consequently, the accusations against these three respondents will be dismissed.

7. As set forth in the Factual Findings and Legal Conclusions as a whole, the District has established that no employee/s junior to respondents Christina Brionez, Amy Kisse, Elsa McClure, Jeanine Oliver-Nomof, Jennifer Parman, Megan Punt, Jessica Rodriguez, and Matthew Steffen are being retained to perform the services which the respondents are competent and certificated to render.

RECOMMENDATION

1. The Accusations against respondents Elena Gutierrez, Steven Marks, and Lisa Millinazzo-Barnett are dismissed based on Legal Conclusion 6.

2. Notice shall be given to respondents Christina Brionez, Amy Kisse, Elsa McClure, Jeanine Oliver-Nomof, Jennifer Parman, Megan Punt, Jessica Rodriguez, and Matthew Steffen that the District will not require their services for the 2011-2012 school year, due to the reduction and discontinuance of particular kinds of services.

DATED: April 27, 2011

MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings