

BEFORE THE GOVERNING BOARD
ELTEJON UNIFIED SCHOOL DISTRICT
COUNTY OF KERN
STATE OF CALIFORNIA

In the Matter of the Layoffs Of:

Certificated Employees of the
El Tejon Unified School District,

Respondents.

OAH Case No. L2011031472

PROPOSED DECISION

Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, heard this matter on May 27, 2011, in Bakersfield, California.

Peter Carton, Attorney at Law, represented Katherine A. Kleier (Kleier), Superintendent of the El Tejon Unified School District.

Joshua Richtel, Attorney at Law, represented Mark Hellman (Hellman), Charles Mullen (Mullen), and Charles Stewart (Stewart), who are collectively referred to as Respondents.

Jeff Beigle (Beigle) and Carolyn Haynes (Haynes), who are included in collective references to Respondents, represented themselves.

The District has decided to reduce or discontinue certain educational services and has given Respondents notice of its intent not to reemploy them for the 2011-2012 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2011-2012 school year.

The hearing in this matter was initially scheduled for April 13, 2011. The matter was thereafter continued to May 4, 2011, to May 10, 2011, and to the actual date of hearing, May 27, 2011, which continuances have extended by a cumulative total of 24 days the deadlines set forth in Education Code¹ sections 44949, subdivision (c), and 44955, subdivision (c). (Ed. Code, § 44949, subd. (e).)

¹ All further statutory references are to the Education Code.

Oral and documentary evidence, and evidence by written stipulation, was received at the hearing. The record was left open for the submission of legal citations in support of the parties' respective legal positions. On May 31, 2011, Respondents Hellman, Mullen, and Stewart submitted their letter brief through counsel. On June 3, 2011, the District submitted its response. The documents have been marked for identification as Exhibits A and 13, respectively. Respondents Beigle and Haynes did not submit any citation or argument. The matter was submitted for decision on June 3, 2011.

FACTUAL FINDINGS

1. Superintendent Kleier filed the Accusation in her official capacity.
2. Respondents are certificated employees of the District.
3. On March 9, 2011, the Governing Board of the District (Governing Board), following the recommendation of Superintendent Kleier, adopted Resolution Number 11-09, reducing or discontinuing the following services for the 2011-2012 school year:

<u>Service</u>	<u>FTE² Reduction</u>
Self-Contained Classroom Instruction, Grades K-12	6.5
Departmentalized Instruction, Junior High and High School:	
English	.5
Physical Education	1.0
Social Science	<u>1.5</u>
Total	9.5

4. Superintendent Kleier thereafter notified the Governing Board that she had recommended that notice be provided to Respondents that their services will not be required for the 2011-2012 school year due to the reduction of particular kinds of services.

5. On March 10, 2011, the District provided notice to Respondents that their services will not be required for the 2011-2012 school year due to the reduction or discontinuation of particular kinds of services. The notices provided by Superintendent Kleier to Respondents stated, in pertinent part: "The governing board has adopted a resolution reducing or eliminating certain certificated services for the 2011-2012 school year. Those services are listed in Exhibit A attached to the resolution (copy of Exhibit A attached). It is the opinion of the governing board that it is therefore necessary to decrease the number of certificated employees of the district. The resolution directed me to determine which

² Full-time equivalent position.

employees' services may not be required for the 2011-2012 school year as a result of this reduction or elimination of services and to give those employees notice prior to March 15. . . ." (Exhibit 3.) The resolution referred to in the notice and attached to it was Resolution number 11-09.

6. Respondents thereafter timely requested a hearing to determine if there is cause for not reemploying them for the 2011-2012 school year.

7. On March 30, 2011, the District issued the Accusation, and served it on Respondents.

8. The District treated Respondents' requests for hearing as their notices of defense.

9. Five other certificated employees of the District, Andria Bloom, Sara Haflich, Anna G. Hughes, Dan Penner, and Michelle A. White filed identical form documents waiving their rights to a hearing.

10. All prehearing jurisdictional requirements have been met.

11. The services set forth in factual finding number 3 are particular kinds of services which may be reduced or discontinued within the meaning of section 44955.

12. Superintendent Kleier took action to reduce or discontinue the services set forth in factual finding number 3 because of the uncertainty surrounding future State funding. The decision of the Governing Board to approve the superintendent's recommendation and to reduce the particular kinds of services set forth in Resolution Number 11-09 is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

13. The reduction of services set forth in factual finding number 3 is related to the welfare of the District's schools and its pupils, in the context of the potential loss of funds and the need to continue providing services to students in the District, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

14. a. On March 9, 2011, the Governing Board adopted Resolution 11-10, setting forth its tie-breaking criteria for employees with the same seniority date. In pertinent part, the Resolution provides: "THIS BOARD RESOLVES that the order of termination as between employees who first rendered paid service to the District on the same date shall be based solely on the needs of the District and the students thereof. The specific criteria used in determining this need shall be as follows, but not necessarily listed in order of importance: [¶] Credentialing [¶] CLAD/BCLAD [¶] Experience [¶] Extracurricular Activities [¶] Training [¶] Special Education Needs [¶] Competence [¶] Evaluations [¶] These criteria shall be applied in determining the order of termination." (Exhibit 2.)

b. Superintendent Kleier applied the tie-breaking criteria to select Respondent Haynes for layoff. Respondent Haynes shares the August 18, 2002, seniority date with J. Domke (Domke). Both hold clear single subject (social science) credentials and have Crosscultural Language and Development (CLAD) certificates. Respondent Haynes also holds a Supplemental Authorization to teach English. Both taught social studies in grades 9 through 12. Respondent also taught English to high school students. Domke taught some classes in a special program, referred to as a “school within a school,” called the Academy.

c. In explaining her decision to break the tie in favor of Domke, Superintendent Kleier testified that the only criterion she applied was that of extracurricular activities. She did so because the criterion was deemed the most important this year, and she did not need to evaluate any other criteria. She viewed Domke’s Academy teaching assignment as extracurricular, requiring extra work, and concluded that Respondent Haynes had no creditable extracurricular activities. Superintendent Kleier did not employ any point system or other verifiable objective system ranking the two teachers on the basis of the pertinent criteria.

d. Respondent Haynes testified about her extracurricular activities. She has been the faculty advisor for the Class of 2011, and has been involved in many activities, including fundraisers, since the students were in Ninth Grade. She runs the Interact Club, through which District students participate in community events. She has been the Social Studies Department Head. These activities are extensive, and should have been considered in the application of the tie-breaking criteria.

e. Domke’s “extracurricular” activity deemed significant enough to break the tie appears to be an instructional assignment and not an activity that takes place outside the established curriculum. In any event, even if the Academy instruction provided by Domke is considered an extracurricular activity, Respondent Haynes’ extracurricular activities are more extensive and require breaking the tie in her favor. Moreover, if it is concluded that Respondent Haynes and Domke both meet the extracurricular activities criterion, Respondent Haynes established, in part through District records, that she objectively satisfies more criteria than Domke. She has one more credential and regularly meets the special education needs of District students as part of her assignment.

f. By reason of application of the tie-breaking criteria, Respondent Haynes is senior to Domke and is certificated and competent to teach the classes he was retained to teach.³

³ Respondent Haynes asserts that the District improperly targeted her for layoff because of her military service in the California Air National Guard, service which requires her to occasionally be absent from her students. Because she has been found certificated and competent to render a service which a junior employee was retained to render, it is unnecessary to reach this issue.

15. a. The District is not reducing or discontinuing the services provided at its continuation school. During the 2010-2011 school year instruction was provided to all students by a single certificated employee, Respondent Beigle. The District plans to provide departmentalized instruction to the students and to assign several, not yet identified, certificated employees to teach the classes as part of their regular assignments.

b. Respondent Beigle has a seniority date of December 21, 2004, and holds a clear single subject (art) credential.

c. Superintendent Kleier testified that Respondent Beigle was selected for layoff because he does not possess any credential that would authorize him to teach, in a departmentalized setting, the core classes that will be taught in the continuation school.

d. The District employs a certificated employee junior to Respondent Beigle, Karen Maxwell (Maxwell), to teach art, a subject matter that Respondent Beigle is certificated and competent to teach. However, Maxwell also possesses a special education credential and part of her day is spent providing special education services.

e. No certificated employee junior to Respondent Beigle was retained to render a service which Respondent Beigle is certificated and competent to render.

16. a. The District is reducing physical education services by one FTE position. It plans to discontinue departmentalized physical education instruction in the primary and middle school grades and to require multiple subject instructors to teach physical education to their students.

b. Respondent Stewart has a seniority date of August 20, 1999. As of March 15, 2011, he held a clear single subject (physical education) credential and a CLAD certificate. He has since obtained a clear multiple subject teaching credential. He teaches physical education at the elementary and middle school levels.

c. M. Stroh (Stroh), a certificated employee displaced by the reduction of an administrative position, was allowed to bump into a physical education instruction position. With a seniority date of August 28, 1985, Stroh is senior to Respondent Stewart. Stroh does not possess a CLAD or other English Learner Student (EL) teaching certification.

d. Respondent Stewart is credentialed and competent to teach at the continuation high school and consents to such assignment. He is senior to Respondent Beigle, the current teacher at the school. However, Superintendent Kleier did not allow Respondent Stewart to bump into the position now held by Respondent Beigle because of the District's plan to shift to single subject instruction and because Respondent Stewart is not credentialed to teach the core subjects in a departmentalized setting.

17. a. Respondent Hellman has a seniority date of August 25, 1989, and holds a clear multiple subject credential and a Mathematics authorization. He teaches math and science in the Eighth grade.

b. Respondent Mullen also has a seniority date of August 25, 1989. He holds a clear multiple subject credential and English and Social Sciences authorizations. He teaches a Fifth Grade class, and has taught Eighth Grade Math and Elementary School Science classes.

c. Respondents Hellman and Mullen are credentialed and competent to teach multiple subject classes that more junior teachers were retained to teach.

d. Superintendent Kleier testified that Respondents Hellman and Mullen were chosen for layoff because they do not hold credentials to teach EL students, those who lack proficiency in English and have special language needs. She did not explain how their situation was different than Stroh's, who also lacks EL certification, and no evidence was presented that EL students were likely to be in Respondents Hellman and Mullen's classes.

18. The District has approximately 965 students, receiving instruction in five schools. Superintendent Kleier was not aware of the number of District students who are English Learners and did not estimate their number. Respondent Stewart testified without contradiction, and his testimony is therefore credited, that the District has typically placed EL students in classes with teachers credentialed to provide instruction to them. In some cases, students have been reassigned to receive instruction from a teacher with an EL certification.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 10.

2. The services listed in factual finding number 3 are determined to be particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 3 and 11.

3. Cause exists under sections 44949 and 44955 for the District to reduce or discontinue the particular kinds of services set forth in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 13.

4. Section 44955, subdivision (b), authorizes districts to reduce the number of certificated employees for specified reasons: "Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session

shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, 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. . . .” The court in *Cousins v. Weaverville Elementary School* (1994) 24 Cal.App.4th 1846, 1853, noted in a case involving the non-retention of a probationary employee, that section 44955 is a narrowly prescribed statute authorizing termination of employees for economic reasons. In this case, the Governing Board determined to reduce particular kinds of services and to terminate the services of a corresponding number of certificated employees as set forth in Resolution Number 11-09.

5. Section 44949, subdivision (a), requires that, “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 . . . that it has been recommended that this notice be given to the employee, and stating the reasons therefor.” In *Karbach v. Board of Education* (1974), 39 Cal.App.3d 355, 362, the court stated that the purpose for providing the reasons for the recommended layoff was “to insure that before the March 15 date the affected employee be informed of facts upon which he can reasonably assess the probability he will not be reemployed.” In this case, Superintendent Kleier provided notice to Respondents that their services will not be required due to the reduction of particular kinds of services and set forth the services identified by the Governing Board.

6. Continuation school services were not identified by the Governing Board for discontinuation or reduction in Resolution 11-09, and, therefore, the Governing Board did not determine to reduce the services of a corresponding number of certificated employees by reason of any such service reduction. Nor were Respondents given notice that any of them would be laid off because of the discontinuation or reduction of continuation school services. Superintendent Kleier confirmed that the District will continue to provide continuation school services during 2011-2012 school year, albeit through a departmentalized structure. In these circumstances, cause does not exist for the layoff of one certificated employee providing continuation school services. Whether such employee, other certificated employees currently teaching at the high school, or a combination of the two, actually provides continuation school services for the 2011-2012 school year has not been determined and is not within the purview of this hearing.

7. Section 44955, subdivision (c) provides, in pertinent part: “[t]he governing board shall make assignments and reassignments in such manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render.” The District failed to meet its burden in this regard, as the evidence establishes that Respondent Stewart possesses the seniority and qualifications to teach in the continuation school, a service which was not reduced or discontinued pursuant to Resolution 11-09. He has greater seniority than Respondent Beigle and must be retained to render continuation school services. Because the continuation services were not reduced or discontinued, and since Respondent Stewart was not given notice that his services might not be needed due to such reduction or discontinuation, he must be retained even if the District actually decides to provide continuation services in a different manner.

8. Cause exists to terminate the services of Respondent Beigle, by reason of factual finding numbers 15 and 16 and legal conclusion number 7. No junior employee was retained to render a service that Respondent Beigle is certificated and competent to render. While Maxwell is junior and teaches art as part of her assignment, she also provides special education services, and a district may not be forced to break up the full-time assignment of another teacher to make a part-time position for a more junior employee. (*Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334; *Murray v. Sonoma County Office of Education* (1989) 208 Cal.App.3d 456; *King v. Berkeley Unified School District* (1979) 89 Cal.App.3d 1016.)

9. Section 44955, subdivision (b), provides that, “[a]s between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of the needs of the district and the students thereof. . . .” The tie-breaking criteria adopted by the Governing Board is based on the needs of the District and its students and, therefore, may be used to rank teachers with the same seniority date. However, because the Governing Board resolution did not rank the criteria in order of importance or gave them any particular weight, it was necessary for the superintendent to clearly explain how all the criteria were applied, or the reason(s) they were not applied, both to ensure adherence to the statutory requirement that application be consistent with the needs of the District and its pupils as well as to ensure fair and reasonable application of the criteria.

In this case, the criteria were not properly applied to break the ties involving Domke and Respondent Haynes. Superintendent Kleier did not persuasively explain why it was in the best interest of the students to break the tie using the single criterion she chose. Nor did she adequately explain the reason(s) she disregarded Respondent Haynes’ extensive extracurricular activities. Superintendent Kleier conclusorily testified that the Academy was the most important extracurricular activity for the District this year, but did not explain why Respondent Haynes’ four-year journey with the Class of 2011 or her other extracurricular activities should be disregarded. No articulated description of the extracurricular activities that were considered in breaking seniority ties was presented at the hearing, and no objective measurement of how the affected individuals fared against one another was presented.

Respondent Haynes engaged in extensive extracurricular activities, as set forth in factual finding number 14. If Domke's educational assignment is deemed to involve extracurricular components, Respondent Haynes met or exceeded his extracurricular involvement. Moreover, absent any statement regarding the quality or quantity of qualifying activities, Respondent's activities are of equal or greater extracurricular value. If participation in any extracurricular activity satisfies the criterion, and both Respondent Haynes and Domke remain tied, objective examination of the remaining criteria results in the tie breaking in her favor. At a minimum, it must be concluded that she is just as senior as Domke. Inasmuch as she holds the same pertinent credential as Domke and has taught the same subject matter she is certificated and competent to teach the social studies classes at the Academy that Domke was retained to teach. Therefore, cause does not exist to terminate her services for the 2011-2012 school year.

10. Superintendent Kleier testified that the District laid off Respondents Hellman and Mullen because they lacked EL certification. In some circumstances, districts are permitted to disregard seniority, or "skip" junior employees, in accordance with section 44955, subdivision (d): "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, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course of study or to provide those services, which others with more seniority do not possess. . . ." However, a district may not simply lay off otherwise certificated and competent individuals simply because it desires to keep those with EL certifications. (See: *Alexander v. Board of Trustees of Delano Joint Union High School District* (1983) 139 Cal.App.3d 567 [court disallowed retention of all bilingual teachers regardless of whether they actually provided services in a bilingual setting].)

In this case, the District did not establish that it had a specific need to skip junior employees to teach a specific course or course of study or that any employee junior to Respondents Hellman or Mullen was retained to provide services in such course or course of study. No evidence was presented about the likelihood that either respondent would be teaching any EL students. On the contrary, as established by the testimony of Respondent Stewart, students requiring instruction by EL certified individuals have been reassigned to classes taught by teachers with the EL authorizations. In fact, it has retained Stroh to provide instruction despite his lack of EL certification. Cause, therefore, does not exist to terminate the services of Respondents Hellman or Mullen.

11. Cause does not exist to terminate the services of Respondents Haynes, Hellman, Mullen, or Stewart, by reason of factual finding numbers 14 through 18 and legal conclusion numbers 4 through 7, 9 and 10.

ORDER

1. The Accusation is sustained in part and the District may notify Respondent Beigle that his services will not be needed during the 2011-2012 school year due to the reduction of particular kinds of services.

2. The Accusation is dismissed against Respondents Haynes, Hellman, Mullen and Stewart.

DATED: _____

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings