

BEFORE THE
GOVERNING BOARD OF THE
TWIN RIVERS UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

OAH No. 2012020573

In The Matter of the Reduction In Force of:

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE TWIN RIVERS
UNIFIED SCHOOL DISTRICT,

Respondents.

PROPOSED DECISION

This matter was heard before Administrative Law Judge Dian M. Vorters, State of California, Office of Administrative Hearings, on April 11 and 12, 2012, in Sacramento, California.

Loni Y. Chhen, Attorney at Law,¹ represented the Twin Rivers Unified School District (District). Also present was Patty L. Smart, Associate Superintendent of Human Resources for the District.²

Margaret Geddes, Attorney at Law,³ represented all respondents. Also present was Kenya Spearman, representative of the California Teacher's Association.

Evidence was received and the case was submitted for decision.

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² Twin Rivers Unified School District, 3222 Winona Way, North Highlands, California 95660.

³ Margaret A. Geddes, Attorney at Law, Beeson, Tayer & Bodine, 520 Capitol Mall, Suite 300, Sacramento, California 95814.

FACTUAL FINDINGS

1. Patty L. Smart is the Associate Superintendent for Human Resources/Labor Relations of the Twin Rivers Unified School District (District). The actions of Ms. Smart, and the District Governing Board were taken in their official capacities.

2. On or before February 28, 2012, the Superintendent determined that funding for the 2012-2013 school year would be reduced, thereby necessitating the reduction or elimination of particular kinds of services (PKS). The Assistant Superintendent recommended to the Board that certain PKS be reduced or eliminated. The Assistant Superintendent's recommendation to eliminate and reduce teaching services was made solely for the welfare of students.

3. On March 6, 2012, the Board adopted five resolutions as follows:

- a. Resolution No. 304 (PKS Resolution), providing for the reduction or elimination of PKS resulting in the reduction or elimination of certificated positions. The services and equivalent positions are listed in Attachment A.
- b. Resolution No. 305, providing for the reassignment or release of administrative staff.
- c. Resolution No. 306, providing for the non-reelection of probationary employees.
- d. Resolution No. 307, providing for the release and non-reelection of temporary certificated employees.
- e. Resolution No. 308 (Tie-breaker Resolution), providing for criteria to be used in determining the order of seniority as between employees who first rendered paid service to the District on the same date.

4. On March 9, 2012, the Assistant Superintendent served on persons affected by the reduction and elimination of PKS a preliminary notice that their services would not be required for the ensuing 2012-2013 school year (Layoff Notice). The Layoff Notice stated that the Assistant Superintendent had recommended to the Board that notice be given to respondents pursuant to Education Code sections 44949 and 44955. The Layoff Notice advised that the Board had passed resolutions reducing or discontinuing PKS in order to reduce certificated staff, and included copies of the resolutions identifying the PKS to be reduced or eliminated.

5. Of the 33 certificated employees who were served with a Layoff Notice, eight did not request a hearing. The remaining 25 certificated employees (respondents) timely requested a hearing to determine if there was cause for not re-employing them for the ensuing school year. (Ed. Code, §44949, subd. (b).)

6. On March 22, 2012, the Assistant Superintendent made and filed Accusations against each of the respondents. The Accusations, statutorily required enclosures, and blank Notices of Defense were timely served on respondents.

7. Respondents timely filed Notices of Defense to the Accusation. (Ed. Code, § 44949, subd. (c)(1).) The list of respondents is at Attachment B.

Rescissions

8. Before hearing, the District and respondents entered into a written Stipulation that Layoff Notices issued to Lilibeth Gaddess and Norm Zack are rescinded. Both employees are credentialed in Adult Education services and are credentialed and competent to teach in a position held by a less senior certificated employee.

9. At hearing, the District and respondent entered into a Stipulation that Layoff Notices issued to the following six certificated employees are rescinded:

1. Leigh Sumers
2. Evelyn Shannon
3. Constance Early
4. Gayle (Kimi) Shibata
5. Terri Williams
6. Kathleen McCarthy

Seniority Date Changes

10. In December 2011, the District provided respondents an opportunity to correct errors in their seniority dates and credentials by mailing notice and soliciting corrections. Ms. Smart testified that the District did receive responses and made appropriate changes. The District otherwise assumed the information was correct.

11. A probationary or permanent employee is “deemed to have been employed on the date upon which she or he first rendered paid service in a probationary position.” (Ed. Code, § 44845.) At hearing, the District modified the seniority date of six certificated employees who participated in paid training or other service on a date earlier than that noted on the seniority charts. The corrections to these seniority dates did not prompt additional rescissions. Corrected seniority dates are as follows:

Employee Name	Erroneous Seniority Date	Corrected Seniority Date
Kalaysia Conway	December 30, 2009	June 11, 2009
Alyssa Hall	January 5, 2009	December 28, 2009
Mai Vaing	January 4, 2010	December 28, 2009
Marla Horne	January 6, 2010	December 28, 2009
Elaine Flora	January 5, 2010	December 28, 2009
Cheng Vang	January 8, 2010	December 28, 2009

Skipping

12. The PKS Resolution, also provided that the District had the need to retain certain certificated employees who possess certain credentials and which more senior employees do not possess. The Assistant Superintendent was authorized to deviate from terminating certificated employees in order of seniority in instances where they are currently assigned to teach specific courses and will be assigned to teach those courses again for the next school year, and more senior employees do not possess the same specialized training and experience related to the course.

13. The Board authorized the Superintendent to retain regardless of seniority (skip) those certificated employees a) who possess special education certifications who are currently using those certifications, b) whose position requires a Bilingual Cross-cultural, Language and Academic Development (BCLAD) Certificate for their position, and c) who possess the certifications necessary to teach at the secondary level such that the District may maintain its current academic departments at legally required levels.

14. Respondents did not offer any specific challenges to the validity of the skipping criteria or its application to the 2012-2013 school year.

Administrative Reductions

15. School administrative employees hold their administrative positions at the pleasure of the employer. They have no statutory right or tenure in their administrative position, as distinguished from their tenure as a teacher, and no right to due process prior to a change in assignment. (*Tucker v. Roach* (1985) 163 Cal.App.3d 1051, 1053; *Barthuli v. Board of Trustees* (1977) 19 Cal.3d 717, 721-722; *Hentschke v. Sink* (1973) 34 Cal.App.3d 19, 23.) Upon compliance with the notice requirements of Education Code section 44951, a school board may, without due process and for any reason, refuse to reappoint an administrator for the following school year. (*Barton v. Governing Board* (1976) 60 Cal.App.3d 476, 479.) Administrators whose assignments are being eliminated retain their tenure as classroom teachers and have the right to bump into non-administrative positions provided they have the appropriate credential, competence, and seniority. (see *Tucker v. Roach, supra*, 163 Cal.App.3d at p. 1053.)

16. The District determined to eliminate 8.01 FTE Administrative Services positions. Michelle Abrams is the Director of Certificated Personnel. She is responsible to assist with hiring, dismissal, discipline, and other matters including administration of the layoff process. Ms. Abrams testified that with the exception of one affected administrator, all others moved into “vacant” positions. Jerald Ferguson is the one exception. He is a Vice Principal at Martin Luther King Jr. Academy. His seniority date is August 19, 2004. Mr. Ferguson was the only administrator to bump into a classroom teaching position. He will fill the position held by Kendra Harback at Joyce for 1.0 FTE. Ms. Harback has a seniority date of August 11, 2008. Ms. Harback did not receive a layoff notice because she possesses a seniority date and multiple subject credential that allowed her to bump into an elementary education position at Smythe (1.0 FTE), held by a less senior employee, Christine Fisher (seniority date August 9, 2011).

Positively Assured Attrition

17. Ms. Abrams testified that the District considered all positively assured attrition as of February 29, 2012, including resignations, retirements, non-reelections, and other permanent vacancies for 2012-2013. A resignation chart was submitted that listed 33 resignations and retirements effective August 16, 2011, through June 30, 2012. Ms. Abrams stated that several of these employees were temporary and some of the positions were categorically funded. Some of the temporary positions vacated prior to March 2012, were non-reelected or filled with other temporary employees. If categorical funding was continuing, then the position was taken into account in the layoff. If categorical funding was terminating, then the position would also end unless other funding was allocated.

18. The Board must allow for “positively assured attrition” such as voluntary resignations and retirements which occur during the computation period.” (*Santa Clara Federation of Teachers v. Gov. Bd. of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 847.) A district is not required to consider certificated employees who have requested leaves of absence for the next school year in determining positively assured attrition during the computation period. (*Ibid.*) According to Ms. Abrams, only four of the resignations/retirements were in services affected by the PKS resolution. She stated that attrition was taken into account in determining the number of FTE positions to reduce or eliminate. There is no evidence that the District failed to consider positively assured attrition prior to submitting the PKS resolution to the Board for approval.

Application of Tie-Breaking Criteria

19. The Board passed the Tie-breaker Resolution setting the criteria to be applied in determining the order of seniority as between employees who first rendered paid service to the District on the same date. This Tie-breaker Resolution provided that the criteria were based “solely on the needs of the District and the students thereof” as is required under Education Code section 44955, subdivision (b). The specific tie breaking criteria used in determining the order of seniority was listed in order of importance, as follows:

1. Credentialing
2. Experience
3. Competence
4. Advanced Degrees
5. School Improvement Grant Participation
6. Specialized Training Based on Position Need: AVID, Improving Teacher Quality, Independent Study Compliance, Project Lead the Way, Sierra North Arts Project
7. Training
8. Strategic School Finding for Results Pilot Participation

20. The District did apply the Tie-breaker Resolution in administering the layoff. Ms. Abrams stated that approximately 30 individuals with a seniority date of August 9, 2011, were affected by tie-breaker criteria. All of these teachers held multiple subject credentials. Ms. Abrams shared that she had discussed with the Assistant Superintendent in previous years, the methodology for administering tie-breaking criteria. The District began by listing all 30 employees. For each individual, the District then notated whether the multiple subject credential was “clear” or “preliminary,” and listed all additional credentials and/or authorizations. If there were no additional credentials or authorizations, the District listed years of experience both in and out of the District. Employees received credit for any contract experience where they worked more than 75 percent of the school year.

21. Eight employees were found to possess “preliminary” credentials and were listed at the bottom of the tie-breaker application chart. It is noted that certificated employees holding less than a regular credential (i.e. preliminary), are licensed to perform the service specified in the certificate. (Ed. Code, § 44002, 44004, 44005, 44006.) Ms. Abrams acknowledged that such employees were qualified to teach a multiple subject curriculum with either a preliminary or clear credential. Ms. Abrams explained that certificated employees with a clear credential had gone through an induction program for beginning teachers (holding preliminary credentials). The District’s induction program is called BTSA or Beginning Teacher Support and Assessment and takes three to five years to complete. Upon completion of BTSA, the employee is awarded a clear credential.

22. The second tie-breaker criteria after “Credentialing” is “Experience.” According to Ms. Abrams, those employees with a clear credential necessarily have at least three to five more years experience than those holding a preliminary credential. Hence, for tie-breaking purposes, employees with clear credentials will surpass those with preliminary credentials based on experience. For the eight employees holding preliminary credentials, their actual number of years experience is listed on the tie-breaker application chart. The PKS resolution identified for elimination 19 FTE in Elementary Education. The bottom eight teachers who first rendered paid service on August 9, 2011, or later, with the exception of Leigh Sumers who was found to have an additional credential, were proper recipients of the Layoff Notice.

23. Respondents contend that the Tie-breaker Resolution is vague and ambiguous leading to confusion and not clarity. “Generally, the same rules of construction that apply to statutes govern the interpretations of rules and regulations of administrative bodies.” (*Forrest v. Trustees of the California State University and Colleges* (1984) 160 Cal.App.3d 357, 362.) “The basic objective of statutory construction is to ascertain the purpose of the legislation and to effectuate that intent.” (*Ibid.*) Where the meaning of the statute is plain and its language is clear and unambiguous, the court must follow the language used and give it its plain meaning. (*Ibid.*) The plain meaning of the Tie-Breaker Resolution is clear and unambiguous. The District’s intent was to set forth bases, in order of importance, by which ties among employees with the same seniority date could be broken. The first factor to be considered was the number of credentials, authorizations, or certificates qualifying employees to teach. The second factor is years of experience. The District did not need to go beyond the first two criteria to break the tie amongst Elementary teachers who shared a seniority date of August 9, 2011.

Over-noticing

24. The number of positions eliminated by a PKS layoff is not required to be identical to the number of layoff notices a school district serves on its employees. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636; *Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334.) Ms. Smart testified that though the PKS Resolution identified approximately 74 FTE for reduction or elimination, the total number of individuals sent Layoff Notices is lower than the target FTE number. This is due to the District having taken into account retirements, resignations, and partial FTEs.

25. *Temporary Employees.* Respecting noticing of temporary employees, the District implemented Resolution No. 307, which authorized the release and non-reelection of temporary employees. Employees classified as temporary are listed on page two of Resolution No. 307. Ms. Abrams testified that these temporary employees were released. She also stated that no temporary employee was “double noticed” i.e. given a Layoff Notice and a release notice.

“Substitute and temporary employees ... fill the short range needs of a school district and generally may be summarily released.” (*Bakersfield Elem Teachers v. Bakersfield City School District* (2006) 154 Cal.App.4th 1260, 1278.) “Temporary employees-the first to be released in a layoff...enjoy no such reappointment rights and are not entitled to the formal notice and hearing available to probationary and permanent employees.” (*California Teachers Assoc. v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135, 146.) Temporary employees, unlike permanent and probationary employees, need be given only a more limited form of notice before the end of the school year, and no hearing. (*Ibid.*) There is no evidence of over-noticing of temporary employees by the District in implementation of the 2012-2013 layoff.

26. *Partial FTEs.* The District was authorized to reduce or eliminate 3.6 FTE English instruction. The initial 3.0 FTE were attained by reassigning two full-time English

instructors to vacant positions and releasing a 1.0 FTE temporary employee. Christopher Jones and John Comeau are the two least senior English teachers from whom the partial 0.6 FTE was exacted. Mr. Comeau is an English & Language Arts (ELA) teacher at Foothill High School at 1.0 FTE. His seniority date is August 22, 2011. Mr. Jones teaches Journalism at Creative Connections Center for 0.2 FTE for which he received a Layoff Notice. The remaining 0.4 FTE was exacted from Mr. Comeau ostensibly leaving him with 0.6 FTE. Rachel Burnett, an ELS instructor with a seniority date of August 17, 2011, was more senior to Mr. Comeau by five days. Hence, she was allowed to bump him for 0.2 FTE of English instruction, leaving Mr. Comeau with 0.4 FTE.

27. Mr. Comeau contends that the District improperly over-noticed him for this partial 0.4 FTE and that because he is a full-time employee, he should be retained for 0.4 FTE. Ms. Abrams testified that the District's practice respecting partial FTE positions is to take the entire FTE position and upon re-hire, give the employee the same FTE. A school district has discretion to define a position as full-time and define a "service" in terms of the hours required to perform it. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.) "[S]o long as the determination is reasonable and made in good faith, neither section 49455 nor any other provision of the Education Code precludes a school district from defining a position, or a 'service,' as full time." (*Id.* at p. 344.) As such, the District cannot be compelled to create a partial position to reassign Mr. Comeau to 0.4 FTE English instruction. He retains his return rights into up to 1.0 FTE.

28. With due consideration and adjustments made for the matters noted above, no permanent or probationary certificated employees junior to respondents are being retained to perform a service which respondents are certificated and competent to render. Those certificated employees junior to respondents being retained will provide services which respondents are not certificated and competent to perform.

29. The District's reductions of PKS and certificated employees relate solely to the welfare of the District's schools and pupils.

LEGAL CONCLUSIONS

Applicable Laws

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met.

2. 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 District 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 his discretion.

3. The services identified in PKS Resolution are particular kinds of services that can be reduced or discontinued under Education Code section 44955. Cause exists to reduce the number of certificated employees of the District 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 District’s schools and pupils within the meaning of section 44949.

4. 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.)

5. The Layoff 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 Board’s Resolutions and in the Layoff Notices, adequately describes 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.)

6. Education Code section 44955 provides that when certificated employees face layoffs due to reduction or elimination of PKS, 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 intent of the Legislation is clearly to prevent school districts from laying off senior teachers while retaining junior teachers. Education Code section 44955, subdivision (c) provides in pertinent part:

Services of such employees shall be terminated in the inverse of the 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...

7. As set forth in Factual Findings 8 and 9, the District has rescinded notices of layoff to eight certificated employees. As set forth in the Factual Findings 11 through 13, the District has considered, provided a reasonable explanation for, or made corrections to seniority dates for six respondents.

8. As set forth in Factual Findings 18 and 19, the District appropriately considered all positively assured attrition which occurred during the computation period prior to submitting the PKS Resolution to the Board for its approval.

9. As set forth in Factual Findings 13 through 15, the District applied the PKS Resolution skipping language only to those teachers with special education certifications who are currently using these certifications, and to those teachers whose positions require BCLAD certificates. With regard to certificated employees with necessary certifications to teach at the secondary level such that the District may maintain its current academic departments at legally required levels, there was no evidence that the District applied this skipping criteria. Respondents did not challenge skipping for certificated employees. There was no evidence that the District abused its discretion in doing so.

10. The District appropriately applied bumping rules and allowed bumping based upon the more senior employee holding a credential or authorization to teach the assignment of the less senior teacher. The District was properly applied tie-break criteria as set forth in the Tie-breaker Resolution. (Factual Findings 20 through 24.)

11. The District did not engage in over-noticing of respondents. After consideration of the eight rescinded notices, positively assured attrition, administrators returning to the classroom, and the employees reduced because of those returning from leave, the number of Layoff Notices issued by the District was neither unreasonable nor excessive. It was well within the District's discretion to serve approximately 33 certificated employees with preliminary layoff notices. (Factual Findings 25 through 29.)

12. Cause exists for the reduction of the particular kinds of services and for the reduction of full-time equivalent certificated positions at the end of the 2011-2012 school year pursuant to Education Code sections 44949 and 44955. Therefore, and except as otherwise noted above, cause exists to give respondents notice that their services will be reduced or will not be required for the ensuing 2012-2013 school year.

RECOMMENDATION

Cause exists for the reduction of 74.1475 full-time equivalent certificated positions at the end of the 2011-2012 school year. After making the adjustments set forth in the Factual Findings and Legal Conclusions, notice shall be given to remaining respondents that their services will be reduced or will not be required for the ensuing school year, 2012-2013,

because of the reduction and discontinuance of particular kinds of services. Notice shall be given in inverse order of seniority.

DATED: April 19, 2012

DIAN M. VORTERS
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT A
TWIN RIVERS UNIFIED SCHOOL DISTRICT
PKS RESOLUTION

SERVICES	EQUIVALENT POSITIONS
Site Administration	2.0
Instructional Support	25.8
Elementary Counseling	8.6
Administrative Services	11.0
Physical Education Services	9.6
Math Instruction	13.6
Social Science Instruction	12.0
English Instruction	16.6
Student Services	2.0
Grades 7/8 Social Science/ELA Instruction	1.0
Grades 7/8 Math/Science Instruction	2.0
Spanish Instruction	2.0
Grades 7/8 Self Contained	4.0
Life Science/Biology Instruction	9.6
Business Instruction	0.4
Work Experience-Counseling	1.0
Technology Coaching	0.5
Elementary Classroom Instruction	51.0
EL/Independent Study Instruction	0.4
Resource Specialist	1.0
Opportunity	4.0
Industrial Arts	0.6
Woodworking	0.6
Visual and Performing Arts	10.3
TOTAL	74.1475 (FTE)

ATTACHMENT B
TWIN RIVERS UNIFIED SCHOOL DISTRICT
RESPONDENT EMPLOYEES

1. Ambrose, Daniel
2. Bourgeois, Dana
3. Brevik, Shelli
4. Capodice, Lisa
5. Clark, Codi
6. Cole, Teresa
7. Comeau, John
8. Contreras, Priscilla
9. Conway, Kalysia
10. Earley, Constance
11. Fisher, Christine
12. Gaddes, Lilibeth
13. Hall, Alyssa
14. Henry, Victoria
15. Jones Christopher
16. Jurich, Stacey
17. McCarthy, Kathleen
18. Shannon, Evelyn
19. Shibata, Gayle (Kimi)
20. Stansfield, Veronica
21. Summers, Leigh
22. Vang, Mai Yang
23. Vidlund, Andrea
24. Zack, Norman
25. Zazula, Chelsea