

BEFORE THE
GOVERNING BOARD OF THE
BELLFLOWER UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

KELLY AVALOS, et al.,

Respondents.

OAH No. 2012030528

PROPOSED DECISION

David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Bellflower, California, on April 24, 2012.

Eric Bathen, Attorney at Law, represented Bellflower Unified School District (District).

Carlos R. Perez, Attorney at Law, represented respondents Kelly Avalos, Eleanora Bassi, Karen Bomgaars, Sadie Cousins, Teresa Driscoll, Daniel Droessler, John Kevin Gaffney, Maria Gonzalez-Valdovinos, Holly Leas, Victoria Martinez, Charmaine McLaughlin, Kelli Olmedo and Robert Tully, who were present at the hearing except as noted below.

Respondents Stacy Johnson, Karen Meisner and Leah Moak represented themselves. Respondents Sadie Cousins, Maria Gonzalez-Valdovinos and Leah Moak were not present at the hearing.

Evidence was received by stipulation, testimony, and documents. The record was closed and the matter was submitted for decision on April 24, 2012.

FACTUAL FINDINGS

1. Brian Jacobs, Ed.D. is the District's Superintendent. Lisa Azevedo is the District's Assistant Superintendent for Instructional Personnel and Programs. Their actions were taken in their official capacity. Dr. Jacobs made and filed the Accusation in his official capacity. The District serves approximately 13,000 students and has over 400 teachers who work at its two comprehensive high schools (grades 7-12), one alternative high school, or ten elementary schools.

2. Respondents in this proceeding are certificated employees of the District.

3. On March 9, 2012, the District provided written notice to respondents pursuant to Education Code¹ sections 44949 and 44955 that their services would not be required for the 2012-2013 school year.

4. On March 26, 2012, the District filed and thereafter served the Accusation and related documents on respondents. Each respondent appearing in this matter filed a timely Notice of Defense requesting a hearing for a determination of whether cause exists for not reemploying them for the 2011-2012 school year or, if no Notice of Defense was filed, the District has waived the requirement to do so. All prehearing jurisdictional requirements were met.

5(A). On March 8, 2012, the Board of Education (Board) of the District adopted *Resolution of the Board of Education's Intention to Reduce and/or Discontinue Particular Kinds of Service* (Exhibit 3), which provides for the elimination of 20 full time equivalent (FTE) positions described as follows:

“[T]wo (2) single subject FTE reduction due to the elimination of the district instructional coaches (TOSA), two (2) multiple subject FTE reduction due to the elimination of the district instructional coaches (TOSA), ten (10) multiple subject FTE reduction, due to the anticipated reduction in student enrollment and the need for further budget reductions, four (4) designated subjects vocational education FTE reduction due to the elimination of the Adult School, two (2) designated subjects adult education FTE reduction due to the elimination of the Adult School, for a total of twenty (20) FTE reductions of particular kinds of services in grades K-Adult School.”

5(B). The same resolution indicated that the District could retain certain certificated employees, regardless of their seniority, if they were “considered necessary to meet the District’s program staffing needs. Such employees shall be retained based upon their qualifications and credentials and include, but are not necessarily limited to, special education teachers, speech and language specialists, and math and science teachers. In accordance with Education Code Section 44955(c) the Governing Board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which seniority and qualifications entitle them to render.”

¹ All statutory citations are to the Education Code, unless indicated otherwise.

5(C). The services set forth in Factual Finding 5(A) are particular kinds of services which may be reduced or discontinued within the meaning of section 44955.

6. On March 8, 2012, the Board of the District adopted *Resolution of the Board of Education to Determine the Order of Termination of Certificated Personnel* (Exhibit 4), which establishes tie-breaker criteria for determining the relative seniority of certificated employees with the same date of first rendered paid service to the district. The resolution used the same criteria used for the prior two years. The criteria establish a point system and process to be applied.

7. The Board took action to reduce the services set forth in Factual Finding 5(A) because of uncertainty surrounding future funding from the State as well as an anticipated decrease in enrollment of students for elementary schools. Ms. Azevedo estimated that the projected budget deficit for next year was seven million dollars. The decision to reduce services was not related to the capabilities and dedication of the individuals whose services are proposed to be reduced or eliminated. The decision to eliminate the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

8. Ms. Azevedo was responsible for implementation of the technical aspects of Board's Resolutions. She reviewed available information to compile a tentative seniority list containing seniority dates, current assignments, credentials, certifications and other pertinent data. The list was available for review by certificated employees within the District for them to verify, update or correct pertinent information.

9. The District used the seniority list to develop a proposed layoff list of the least senior employees currently assigned in the various services being reduced, including whether more senior employees affected by the layoffs held credentials in another area and were entitled to displace or "bump" other less senior employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and determined whether they could "bump" other employees.

10. The District properly considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of layoff notices to be delivered to employees by March 15, 2012.

11. The District rescinded the layoff notices to Kathleen Callahan, Amy Gehrig, Lori Ann Miyakawa and Lauro Sanzaro, due to further resignations after March 15, 2012.

12. The parties stipulated that the seniority date for Eleanora Bassi should be changed from September 13, 1999, to August 25, 1997.

13. Respondents questioned the manner in which the District skipped Jane Nishimoto, whose seniority date is August 27, 2003, and who holds a multiple subject credential. Ms. Azevedo explained that Ms. Nishimoto is assigned to a self-contained classroom in the BAE Center, which is the District's alternative high school, attended by students who have been expelled from the other high schools or placed there by administrative assignment. Specialized training is required for the position, such that Ms. Nishimoto is in the process of becoming highly qualified under the No Child Left Behind law in the four core subjects needed for her assignment. She is more than halfway through this training, which is paid for by the District. When the position was open approximately two years ago, it was available to other certificated employees of the District; however no other employees expressed interest in the position except Ms. Nishimoto. Respondents did not establish that any of them had the special training and experience necessary to teach in that position.

LEGAL CONCLUSIONS

1. Section 44949 provides in pertinent part:

(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 . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefore.

2. Section 44955 provides in pertinent part as follows:

(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever . . . 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 certified and competent to render.

[¶] . . . [¶]

As 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 on needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish . . . a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group

(c) . . . [S]ervices of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

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. . . .

(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 demonstrated 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 or to provide those services, which others with more seniority do not possess.

3. All notice and jurisdictional requirements set forth in sections 44949 and 44955 were met.

4. Boards of education hold significant discretion in determining the need to reduce or discontinue particular kinds of services, which is not open to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified*

School Dist. (1976) 64 Cal.App.3d 167.) Such policy-making decisions are not subject to arguments as to the wisdom of their enactment, their necessity, or the motivations for the decisions. (*California Teachers Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1529.) Such decisions and action must be reasonable under the circumstances, with the understanding that “such a standard may permit a difference of opinion.” (*Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831, 845.) Numerous cases stand for the proposition that the process of implementing layoffs is a very flexible one and that school districts retain great flexibility in carrying out the process. (*Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796.)

5. The services set forth in Factual Finding 5 are particular kinds of services which may be reduced or discontinued within the meaning of section 44955. The 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 discontinuation of services relates solely to the welfare of the District’s schools and pupils within the meaning of section 44949.

6. A school 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 service’ 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.)

7. Cause exists pursuant to sections 44949 and 44945 to reduce the number of certificated employees of the District due to the reduction or discontinuation of the particular kinds of services set forth in Factual Finding 5(A). The District properly identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued.

8. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

9. Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara, supra.*) This “skipping” is a process, under section 44955, subdivision (d)(1), wherein a school district may choose to demonstrate a specific need and that an employee has the special training and experience to meet that need. In fact, school districts have been permitted to present at hearing, for the first time, evidence of the type of tie-breaking that might apply. (*Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838; *Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127.) In the case of Ms. Nishimoto, the decision to retain her was proper under the general language of the resolution

allowing the board to deviate from strict seniority to retain her, based upon her qualifications and credentials and to meet the needs of the District, as well as the statutory authority under section 44955, subdivision (d)(1).

ORDER

The Bellflower Unified School District may give notice to respondents Kelly Avalos, Eleanora Bassi, Karen Bomgaars, Sadie Cousins, Teresa Driscoll, Daniel Droessler, John Kevin Gaffney, Maria Gonzalez-Valdovinos, Stacy Johnson, Holly Leas, Victoria Martinez, Charmaine McLaughlin, Karen Meisner, Leah Moak, Kelli Olmedo and Robert Tully, that their services will not be required for the 2012-2013 school year.

Dated: April 24, 2012

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings