

BEFORE THE
GOVERNING BOARD OF THE
ADELANTO SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED EMPLOYEES
OF THE ADELANTO SCHOOL
DISTRICT,

Respondents.

Case No. 2012040261

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on April 30, 2012, in Adelanto, California.

Attorneys Mark W. Thompson and Todd M. Robbins represented the Adelanto School District (District). Assistant Superintendent Ross Swearingen and Sheila Howlett also attended the hearing on behalf of the District.

Attorney Kent Morizawa represented respondents Amanda Anderson, Heather Biewend, Melanie Caven, Gia Devlin, Tiffany Graybill, Davetta Green, Ashley Gudino, Jennifer Harden, Yesenia Hernandez, Vanessa Kutscha, Asacia Lopez, Krystina Ponce De Leon, Amy Rankin, Maria Rivera, Viviana Robles, Catherine Tury, Jonathan Wilson, and Eric Zachary. Dawn Murray of the California Teachers Association and Abigail Serena of the Adelanto District Teachers Association also attended the hearing on behalf of respondents.

Evidence was received, the record was closed, and the matter was submitted for decision on April 30, 2012.

FACTUAL FINDINGS

1. Ross Swearingen is the Assistant Superintendent, Human Resources, of the District. He made and filed the Accusation solely in his official capacity pursuant to a Non-Exclusive Delegation of Authority signed by Darin Brawley, the Superintendent of the District.

2. At the beginning of the hearing, the parties stipulated to the following jurisdictional facts:

- a. Respondents are all certificated employees of the District.
- b. The District has entered into a collective bargaining agreement with the Adelanto District Teachers Association (ADTA) setting forth negotiated criteria for resolving ties in seniority in accordance with Education Code section 44955, subdivision (b).
- c. On March 6, 2012, upon the recommendation of the Superintendent, the District's Board of Education (Board) adopted Resolution No. 11-12-25 recommending a reduction in particular kinds of certificated services for the 2012-2013 school year.
- d. The services identified in Board Resolution No. 11-12-25 are "particular kinds of services" as described in Education Code section 44955, subdivision (b).
- e. On March 12, 2012, the Superintendent delegated his authority to implement the layoff to the District's Assistant Superintendent of Human Resources.
- f. On March 13, 2012, the District served respondents with written notice that the District's Superintendent had recommended to the Board that each of them be given notice that their services will not be required in the upcoming 2012-2013 school year. The Superintendent gave notice of this recommendation to the Board on March 13, 2012.
- g. The District filed and timely served an accusation for non-reemployment and related materials on each respondent in accordance with Government Code sections 11503 and 11505.
- h. The notices and Accusation materials established March 26, 2012, as the deadline for requesting a hearing in this matter.
- i. Respondents each timely submitted a Request for Hearing and/or Notice of Defense pursuant to Government Code section 11506.
- j. The District timely served a Notice of Hearing in accordance with Government Code section 11509 on each respondent.
- k. All jurisdictional requirements under Education Code sections 44949 and 44955 have been met such that an evidentiary hearing may commence to determine if there is cause for not reemploying respondents for the 2012-2013 school year.

3. On March 6, 2012, at a regular meeting, the Board determined that it was in the best interests of the District and the welfare of the schools and pupils thereof to reduce or eliminate particular kinds of services and therefore necessary to reduce or eliminate certificated services affecting employment of 18.00 full-time equivalent (FTE) positions.

The Board adopted Resolution No. 11-12-25 providing for the reduction or elimination of the following particular kinds of services: “Elementary K-6 Teaching Services.”

4. In determining the extent by which to reduce or eliminate particular kinds of services, the Board considered all positively assured attrition up to and including the date of the resolution. The total number of positions to be reduced or eliminated under the resolution is 18.00 FTE certificated positions. The Board determined that the services of a corresponding number of certificated employees shall be terminated at the close of the current 2011-2012 school year.

5. For purposes of determining a certificated employee’s “bumping rights,” the Board defined “competency” as: “(1) possession of a valid credential in the relevant subject matter area; (2) ‘highly qualified’ status under the No Child Left Behind Act in the area to be assigned; and (3) an appropriate EL authorization (if required by the position).”

The Adoption of Resolution 11-12-25

6. Assistant Superintendent Swearingen is responsible for human resources for the District. His duties include overseeing the layoff process. The budget projection for the 2012-2013 school year is that the District will have a negative balance, i.e., that it will be “deficit spending.” The projected shortfall is estimated to be \$4,100,000. These projections are based on the assumption that none of the tax initiatives intended to increase funding for California’s public schools scheduled for the November 2012 ballot will be adopted.

Assistant Superintendent Swearingen explained that approximately 85 percent of the District’s budget is allocated to personnel costs each year. Therefore, the Superintendent recommended to the Board that particular kinds of services be reduced or eliminated beginning no later than the commencement of the 2012-2013 school year. His recommendation was made due to the District’s financial condition.

7. Respondents contend that the real motivation for the reduction or elimination of particular kinds of services is not the District’s financial condition, but pending litigation involving Desert Trails Elementary School. According to Dawn Murray, the District is in “fine” financial condition. The litigation involves a group of parents’ attempt to exercise their rights pursuant to the Parent Empowerment Act (Ed. Code, § 53300 et seq.). If the District loses the litigation, Desert Trails Elementary School will be converted into a charter school and the District will lose control over the school and staff, as well as lose state funding attributable to the average daily attendance at the school.

8. The point of respondents’ argument is unclear. To the extent they are arguing that their preliminary layoff notices violated Education Code section 44949, subdivision (a), by not specifying the reason for the proposed termination of their services, such argument is contrary to the evidence. Each respondent received a preliminary layoff notice that read, in pertinent part:

The Board of Education of the Adelanto School District has determined it is necessary to reduce or discontinue particular kinds of services of the District beginning not later than at the commencement of the 2012-13 school year due to financial conditions. In the opinion of the Board of Education, it will therefore be necessary to decrease the number of certificated employees in the District....

Additionally, Assistant Superintendent Swearingen testified to the District's "dire" financial condition. Respondents did not lay any foundation for Ms. Murray's opinion that the District's financial condition is "fine."

To the extent respondents are arguing that the proposal to terminate their services is actually due to a decline in the average daily attendance in all of the schools in the District and that their preliminary layoff notices do not specify that reason and are therefore defective (see, *Karbach v. Board of Education* (1974) 39 Cal.App.3d 355 [district cannot layoff certificated employees for reasons not specified in the preliminary layoff notice]), such argument is also contrary to the evidence. Resolution No. 11-12-25 contains the Board's specific finding that: "WHEREAS, this Board does not desire to reduce the services of regular certificated employees based upon reduction of average daily attendance during the past two years." Furthermore, respondents concede that the litigation involving Desert Trails Elementary School is still pending and that no one knows what the outcome will be as of the beginning of the 2012-2013 school year. Therefore, there is no evidence of a decline in the average daily attendance to support respondents' argument. Additionally, their argument ignores the fact that the conversion of Desert Trails Elementary School to a charter school would result in the District's loss of funds based on that school's average daily attendance, which would bolster the Board's stated reason of "financial conditions."

And if respondents are arguing that the Board's decision to reduce or eliminate particular kinds of services was fraudulent, arbitrary, or capricious and therefore void, their argument has no evidentiary support. The testimony of respondents' witnesses about the different reasons each was given by Superintendent Brawley, Assistant Superintendent Swearingen, or any other District employee for the need to terminate their services is irrelevant because the decision to take such action was made by the Board and not any of those employees. For the same reason, Exhibit A, the District's analysis and recommendation of the need for terminating respondents' services, is not evidence of the Board's reasons for adopting Resolution No. 11-12-25. Superintendent Brawley made a recommendation to the Board, which it had the discretion to accept, reject, or accept in part and reject in part.

The Determination of Who Received Preliminary Layoff Notices

9. Assistant Superintendent Swearingen testified in detail about the process he and his staff, working under his direct supervision, undertook to determine which certificated employees received a preliminary layoff notice. First, they prepared a seniority list of all the

District's certificated employees based on information in the employees' respective personnel files maintained by human resources. The seniority list ranks each of those employees in order of his or her seniority, starting with the most senior employee. The list contains each employee's seniority ranking; name; tenure status (ie, tenured, probationary 2, probationary 1, or probationary 0);¹ "seniority date;"² position after application of any necessary tie-breaking criteria;³ 2011-2012 school year assignment and school site; type of teaching credential; type of supplementary authorization, if any; type of English Learner certificate or authorization; and bumping rights, if any and if applicable.

10. Next, Assistant Superintendent Swearingen and his staff applied the tie-breaking criteria specified in Section 23.3 of the Memorandum of Understanding between the District and ADTA to determine the relative seniority between two separate groups of employees who shared the same first date of paid service, 27 of whom started on August 8, 2007, and 13 of whom started on August 13, 2008. Once each of those employee's relative seniority was determined, such information was used to determine his or her ranking on the seniority list.

11. Assistant Superintendent Swearingen and his staff then started at the bottom of the seniority list and worked their way up to identify the 18 most junior employees who are performing the particular kinds of services scheduled to be reduced or eliminated. Once those 18 employees were identified, Assistant Superintendent Swearingen and his staff analyzed each of those employees' personnel files to determine their respective credentials and "competency" to determine their bumping rights, if any, starting with the most senior of the 18 employees. Through this process, it was determined that Leticia Castro, the most senior of the 18 employees, is entitled to "bump" into the certificated service being performed by Davetta Green. Therefore, the District issued a preliminary layoff notice to Ms. Green. It was also determined that Tracy Aguayo, the second most senior of the 18 employees identified, is entitled to "bump" into the certificated service being performed by Nanette Cadilli, who in turn is entitled to "bump" into the certificated service being performed by Vanessa Kutscha. Therefore, the District issued a preliminary layoff notice to Ms. Kutscha.

¹ "Probationary 2" means the employee is in his or her second year of probationary employment, "probationary 1" means he or she is in his or her first year of probationary employment, and "probationary 0" means he or she is employed as an intern.

² Assistant Superintendent Swearingen explained that the "seniority date" listed for each employee is based on that employee's first date of paid service in any position with the district, not the statutory definition of first date of paid service in a probationary position. (See, Ed. Code, § 44845.) Therefore, some employees have an earlier "seniority date" than others but are ranked as having less seniority on the list because they were initially employed as a temporary employee (e.g., Rachael Hughes, Davetta Green, and Jonathan Wilson).

³ The application of these criteria is discussed below.

Assistant Swearingen and his staff determined that none of the other 18 elementary employees has any bumping rights.

12. Respondents claim the issuance of a preliminary layoff notice to Ms. Kutscha was improper for two reasons. First, there is no evidence that Ms. Cadilli is “competent” to teach language arts, which is what Ms. Kutscha currently teaches. Specifically, they argue there is no evidence that Ms. Cadilli is “highly qualified” in language arts under the No Child Left Behind Act, relying on Assistant Superintendent Swearingen’s testimony that he did not know whether she met such qualification. But a reasonable interpretation of Assistant Superintendent Swearingen’s entire testimony is that he and his staff confirmed that each employee who was “bumping” another was in fact credentialed and competent to perform the junior employee’s particular service when they made the bumping decisions, but he had no independent recollection of Ms. Cadilli’s status under the No Child Left Behind Act at the hearing. Therefore, respondents’ argument is not persuasive.

13. Respondents also challenge the preliminary layoff notice issued to Ms. Kutscha on the grounds that Ms. Aguayo should not be counted towards the particular kinds of services that are being reduced or eliminated because she teaches middle school level courses. Therefore, there is no need for Ms. Aguayo to “bump” Ms. Cadilli. And since Ms. Cadilli is not performing a service that is to be reduced or eliminated, there is no need for her to “bump” Ms. Kutscha. Respondent’s argument is not persuasive in light of Assistant Superintendent Swearingen’s testimony that Ms. Aguayo teaches at a kindergarten through eighth grade school, which is considered an elementary school. While she teaches a combination sixth/seventh grade class, she is entitled to do so with her multiple subject teaching credential because she teaches two or more subjects to the same group of students. (See, Cal. Code of Regs., tit. 5, § 80003, subd. (c).)

14. Except for Davetta Green and Jonathan Wilson, respondents are permanent employees of the District. Ms. Green and Mr. Wilson are probationary employees of the District.

15. No permanent or probationary certificated employee with less seniority is being retained to render a service for which respondents are certificated and competent to perform.

16. The reduction or elimination of the particular kinds of services set forth in Resolution No. 11-12-25 are related to the welfare of the schools and the students thereof within the meaning of Education Code sections 44949 and 44955. The Board’s decision to reduce or eliminate those services is neither arbitrary nor capricious, but rather a proper exercise of its discretion.

LEGAL CONCLUSIONS

1. Education Code section 44955, subdivision (b), provides the following with regard to a school district's authority to layoff certificated employees.

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. 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.

In computing a decline in average daily attendance for purposes of this section for a newly formed or reorganized school district, each school of the district shall be deemed to have been a school of the newly formed or reorganized district for both of the two previous school years.

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 of 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 in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, 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. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

2. Education Code section 44949 provides the following with regard to a school district's jurisdiction to lay off certificated employees:

(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.

Until the employee has requested a hearing as provided in subdivision (b) or has waived his or her right to a hearing, the notice and the reasons therefor shall be confidential and shall not be divulged by any person, except as may be necessary in the performance of duties. However, the violation of this requirement of confidentiality, in and of itself, shall not in any manner be construed as affecting the validity of any hearing conducted pursuant to this section.

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. A request for a hearing shall be in writing and shall be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified in that subdivision, which shall not be less than seven days after the date on which the notice is served upon the employee. 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.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency

therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

(2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefor within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section as may be necessary to effectuate this section.

(d) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee.

(e) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Section 11524 of the Government Code, the dates prescribed in subdivision (c) which occur on or after the date of granting the continuance and the date prescribed in subdivision (c) of Section 44955 which occurs after the date of granting the continuance shall be extended for a period of time equal to the continuance.

The District complied with all notice and jurisdictional requirements set forth above. (Factual Finding 2; see, *Gonzales v. Pacific Greyhound Lines* (1950) 34 Cal.2d 749, 754-758 [the parties' stipulation to facts constitutes a judicial admission of those facts]; see also, *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 48 ["A judicial admission is a party's unequivocal concession of the truth of the matter, and removes the matter as an issue in the case."])

3. The services identified in Resolution No. 11-12-25 are particular kinds of services that may reduced or eliminated under Education Code section 44955. The Board's decision to reduce or eliminate the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion for the reasons discussed in Factual Findings 6 through 8. Cause for the reduction or elimination of services relates solely to the welfare of the District's schools and their pupils within the meaning of Education Code section 44949.

4. As discussed in Factual Findings 9 through 11, the District correctly identified the eighteen most junior certificated employees who are performing the particular kinds of services that the Board directed be reduced or discontinued in Resolution No. 11-12-25. The District then correctly determined each of those employee's bumping rights, if any, as discussed in Factual Findings 12 and 13.

5. No permanent or probationary employee with less seniority is being retained to render a service for which respondents are certificated and competent to perform.

6. Cause exists to give notice to respondents that their services will be reduced or will not be required for the 2012-2013 school year because of the reduction or elimination of particular kinds of services.

RECOMMENDATIONS

1. Cause exists for the Adelanto School District to reduce or eliminate 18.00 full-time equivalent certificated positions at the end of the 2011-2012 school year.

2. Notice may be given to respondents that their services will be reduced or will not be required for the 2012-2013 school year. Notice shall be given in inverse order of seniority.

DATED: May 4, 2012

COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings