

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

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED
EMPLOYEES OF THE DENAIR
UNIFIED SCHOOL DISTRICT,

Respondents.

Case No. 2013031033

PROPOSED DECISION

This matter was heard by Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, on April 18, 2013, in Denair, California.

Attorney Chesley D. Quaide of the law firm Atkinson, Andelson, Loya, Ruud & Romo represented the Denair Unified School District (District). Carol Hammond, Associate Superintendent of Elementary Curriculum, and Jody Jorge, Administrative Assistant to the Superintendent, also appeared on behalf of the District.

Attorney Ernest H. Tuttle, IV, of the Law Offices of Ernest H. Tuttle, IV, represented respondents Halla (Inga) Bernard, Marlene Dhallin, William Douglas, Cathy George, Patricia Gullen, Diana Hulbert, Korene (Gypsy) Keene Stark,¹ Joshua Lindsey, Sean Pham, Maria Rickard, Justin Riggs, Cristina Rojas, Robert (James) Wagner, Rachel Watts, Curtis Wooten, and Keli Youkhana.

Evidence was received, the record was closed, and the matter was submitted for decision on April 18, 2013.

FACTUAL FINDINGS

Procedural Matters

1. On February 14, 2013, at a regular meeting, the governing board of the District determined that it was in the best interests of the District and the welfare of the schools and

¹ Ms. Keene Stark is identified on the District's seniority list as "Korene Keene."

pupils thereof to reduce or eliminate particular kinds of services and therefore necessary to reduce or eliminate certificated services affecting the employment of 7.24 full-time equivalent (FTE) positions. The governing board adopted Resolution No. 021413-R12 providing for the reduction or elimination of the following particular kinds of services:

.14	FTE	Band Teacher
.14	FTE	High School Web Design
1.14	FTE	High School Math
.14	FTE	High School Sheltered English
.14	FTE	High School Photography
.14	FTE	High School Computer Literature
.14	FTE	High School World History
.28	FTE	High School Spanish
.14	FTE	High School English
.14	FTE	High School Science/Biology
.14	FTE	High School Ag Biology
.14	FTE	High School Physical Education
.14	FTE	Ag Mechanics
.28	FTE	High School ELD Teacher
1.0	FTE	High School English/Drama Teacher
.50	FTE	Kindergarten Teacher
.50	FTE	K-8 ELD Teacher
<u>2.0</u>	<u>FTE</u>	<u>K-8 Teachers</u>
Total: 7.24 FTE		

2. In determining the extent by which to reduce or eliminate particular kinds of services, the governing 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 7.24 FTE certificated positions. The governing board determined that the services of a corresponding number of certificated employees shall be reduced or eliminated at the end of the 2012/2013 school year.

3. In addition to identifying the particular kinds of services the governing board intends to reduce or eliminate, Resolution No. 021413-R12 provided the governing board’s definition of “competency” for purposes of determining whether any certificated employee selected to receive a preliminary layoff notice is “certificated and competent” to perform the service rendered by a certificated employee with less seniority who was not selected to receive such notice. The Resolution said:

That “competency” for the purpose of Education Code section 44955 shall be determined upon current possession of a preliminary or clear credential for the subject matter or grade level and the certificated employee having taught the class to which they will be assigned at the beginning of the 2013-2014 school year at least one (1) semester in the past ten (10) years.

4. On March 14, 2013, former Superintendent Edward E. Parraz gave notice to the District’s governing board of his recommendation that the following certificated employees be given notice of his recommendation that each of their services be reduced or eliminated for the 2013/2014 school year, as well as the reason for such recommendation:²

Standard Layoff Notices:

Monica Gonzalez	.28 FTE
Diana Hulbert	.50 FTE
Joshua Lindsey	1.0 FTE
Cristina Rojas	1.0 FTE
Rachel Watts	1.0 FTE
Keli Youkhana	1.0 FTE

Reduction Notices:

Halla (Inga) Bernard	.14 FTE
Marlene Dhallin	.14 FTE
William Douglas	.14 FTE
Cathy George	.14 FTE
Patricia Guillen	.86 FTE
Korene (Gypsy) Keene Stark	.14 FTE
Sean Pham	.14 FTE
Maria Rickard	.14 FTE
Justin Riggs	.42 FTE
Robert (James) Wagner	.14 FTE
Donna Williams	.42 FTE
Curtis Wooten	.42 FTE

Reassignment Notices:

Craig Cumberland	.28 FTE
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5. Each respondent is a permanent or probationary teacher of the District. On March 15, 2013, the District served each respondent with written notice that Superintendent Parraz recommended that notice be given to each of them pursuant to Education Code sections 44949 and 44955 that each of their services be reduced or eliminated for the 2013/2014 school year. Each written notice set forth the reasons for the recommendation and noted that the District’s governing board had passed Resolution No. 021413-R12 reducing or eliminating 7.24 FTE positions. Each respondent timely requested, in writing, a

² Superintendent Parraz recommended that the District “over-notice” his recommendation, i.e., send notice to certificated employees holding 8.3 FTE positions even though Resolution No. 021413-R12 authorized the reduction or elimination of only 7.24 FTE positions.

hearing to determine if there is cause for not reemploying him or her for the ensuing school year.

6. On April 8, 2013, Carol Hammond, Associate Superintendent of Elementary Curriculum, made and filed the Accusation in this matter solely in her official capacity. The Accusation and all required documents were timely served on the respondents. Each respondent timely filed a Notice of Defense to the Accusation. All prehearing jurisdictional requirements were satisfied.

Rescission of Preliminary Layoff Notices

7. On April 17, 2013, Associate Superintendent Hammond sent letters to Messrs. Wagner and Wooten notifying them that their preliminary layoff notices were rescinded and their respective “1.0 FTE assignments with the District will continue for the 2013-2014 school year.”

The District’s Need to Reduce or Eliminate Certain Particular Kinds of Services

8. According to Associate Superintendent Hammond, the District has had a “negative budget” since the beginning of the 2012/2013 school year and is at risk of being “taken over” by the State of California. She further explained that in November 2012, she sat down with Superintendent Parraz and Deputy Superintendent/Chief Business Officer Judy Sylvester to begin planning the District’s budget for the 2013/2014 school year. Since no reduction in the District’s costs were “on the table” (i.e., salary reductions or reductions in employee benefits), the three of them began looking at ways to cut the District’s costs. Based on projected student enrollment for the 2013/2014 school year, it was decided that the District could not continue to offer all the classes it is offering during the current school year and still remain fiscally solvent. But instead of completely eliminating programs, the decision was made to keep all existing programs and reduce the number of times certain classes were offered. They also decided to consolidate courses that were not full, i.e., consolidate two classes of Algebra with 10 students each into one class with 20 students.

9. After deciding which services to reduce or eliminate, Superintendent Parraz and Associate Superintendent Hammonds reviewed the District’s seniority list, which is discussed in more detail below, to make an initial determination about which teachers would receive a preliminary layoff notice. After making that initial determination, they worked with the District’s attorney to determine which of those identified, if any, could “bump” into any position currently held by a teacher with less seniority.

The District’s Seniority List

10. The District maintains a seniority list for all teachers. The seniority list contains the following information for each teacher: name, date of hire, type of credential, the FTE designation for current assignment, current site assignment, and current teaching assignment. All respondents hold full-time positions with the District during the current

2012/2013 school year, except Ms. Hulbert. She holds a part-time .50 FTE teaching position.

Challenges to the Preliminary Layoff Notices Issued

Positively Assured Attrition

11. “Attrition” consists of “[r]esignations, mandatory retirements, deaths, etc.” (*Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, 653.) “‘Positively assured attrition’ is attrition which has actually occurred and is to be distinguished from ‘potential attrition’ which may be anticipated but is still unknown.” (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 635.)

12. The governing board considered all positively assured attrition it was aware of as of the date it adopted Resolution No. 021413-R12 – February 14, 2013. Associate Superintendent Hammond stated there was none. However, shortly before the hearing – Associate Superintendent Hammond estimated the end of March 2013 – the District was informed that a teacher holding a multiple subject credential would be retiring at the end of the 2012/2013 school year. Respondents argued that such attrition should be considered in determining the number of final layoff notices the governing board ultimately decides to issue. For the reasons discussed in Legal Conclusion 8, respondents’ argument is not persuasive.

Competency Criteria

13. As discussed in Factual Finding 3, the governing board adopted “competency” criteria for determining respondents’ “bumping” rights. Respondents challenged part of those criteria as being too narrow. As discussed in Legal Conclusion 7, governing boards have broad discretion to define “competency” for purposes of determining a teacher’s bumping rights. But such discretion is not unfettered, and is subject to review for arbitrariness and capriciousness. According to the District’s definition of “competency, a teacher is deemed “competent,” in part, if he or she has “taught the class to which they will be assigned at the beginning of the 2013-2014 school year at least one (1) semester in the past ten (10) years.”

According to Associate Superintendent Hammond, the District’s “master” schedule has not been finalized for the 2013/2014 school year, and it is unknown what specific course(s) any particular teacher will be teaching next year. But the absence of such information does not render the District’s competency criteria too narrow because a “bumping” analysis requires the determination of whether an “[e]mployee with less seniority ... is [being] retained to render a service which [the more senior employee] is certificated and competent to render.” (Ed. Code. § 4955, subd. (b).) In other words, the analysis is whether the teacher noticed for layoff is certificated and competent to perform the service that the junior teacher is *currently* performing because that is the “service” for which the latter will be retained to perform if not bumped. The relevancy of the District not knowing

what specific course(s) any teacher will be teaching next year pertains to the definition of the “service” the teacher is currently performing. And since it is unknown what course(s) that teacher will be teaching next year, “service” is broadly defined as any course(s) authorized by the credential under which he or she is currently teaching. Therefore, the District’s “competency” criteria is interpreted as requiring the teacher seeking to bump another to have taught any course authorized by the credential the two of them hold in common (because the first prong of the District’s criteria is that both hold the same credential) for at least one semester within the last 10 years. Such definition of “competency” relates to the skills and qualifications of the teacher threatened with layoff and is therefore reasonable and valid, except as discussed in Factual Findings 22 and 29. (See, e.g., *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555 [concluding that the requirement of having taught class within the last 10 years is related to the skills and qualifications of the teacher threatened with layoff].)

Marlene Dhallin

14. Ms. Dhallin is ranked ninth on the District’s seniority list. She holds a standard secondary credential in home economics and history, as well as a language development specialist authorization. Her teaching assignment for the 2012/2013 school year is at Denair High School, where she teaches World History.

15. Associate Superintendent Hammond explained that based on the projected student enrollment for the 2013/2014 school year, the decision was made that one less class period of World History can be offered and the District will still be in compliance with Education Code section 51225.3, subdivision (a)(1)(D), which requires all high school students to take a course in World History in order to earn a high school diploma. Therefore, Ms. Dhallin was given a preliminary layoff notice based on the governing board’s decision to reduce High School World History by the equivalent of a .14 FTE position, which amounts to one class period.

16. Associate Superintendent Hammond agreed that Darrin Allen, who also currently teaches World History at Denair High School, has less seniority than Ms. Dhallin – he is number “18” on the seniority list. She explained, however, that Mr. Allen is not going to teach World History next year. Instead, he is being retained to teach classes authorized by his Vocational Education credential. Therefore, Mr. Allen did not receive a preliminary layoff notice. Such explanation was credible. While Associate Superintendent Hammond said the District does not know what specific courses any particular teacher will be teaching next year; she also explained that based on projected student enrollment, as well as the requirements for state mandated services, the District knows the types and numbers of courses it will offer next year. Her entire testimony is interpreted to mean that while it is currently unknown who will be teaching World History next year; the District knows that it will offer the course, it has an estimate of the number of periods the course will be offered, and Mr. Allen will not be teaching the course at all while Ms. Dhallin will be teaching one less period of it. Associate Superintendent Hammond also said that Ms. Dhallin will be the

first teacher offered any additional period of World History added if next year's actual enrollment turns out to be greater than anticipated.

17. The evidence discussed above demonstrates that the District made an initial determination that Ms. Dhallin was not entitled to "bump" Mr. Allen because he is not being retained to teach World History, and she is not certificated and competent to teach any courses authorized by his Vocational Education credential – the services for which he is being retained to perform. Ms. Dhallin did not satisfy her burden of establishing otherwise. Nor did she identify any other teacher with less seniority who is being retained to perform services that she is certificated and competent to perform. Therefore, cause exists for reducing Ms. Dhallin's teaching position by the equivalent of a .14 FTE position for the 2013/2014 school year, and the District's governing board has a legal basis for issuing her a final layoff notice in that regard.

Patricia Guillen

18. Ms. Guillen is identified as number "53" on the District's seniority list. She holds a multiple subject credential, as well as a BCLAD authorization. Her teaching assignment during the current 2012/2013 school year includes teaching English learners in kindergarten at Denair Elementary School and all grade levels at Denair Middle School. According to Associate Superintendent Hammond, which Ms. Guillen did not dispute, Ms. Guillen has taught for the District only on a "pull in basis," a method of teaching special education students whereby the special education teacher "pulls" the students out of their assigned classrooms for extra assistance. An alternative method of teaching special education students is to "push in" to those students' assigned classroom(s) and provide the extra assistance as the classroom teacher is teaching the entire class. The former method is often used when there are multiple special education students in the same grade level, who need assistance in the same subject areas, and are being taught those subject areas at the same time during the day. Since the special education teacher cannot be in multiple classrooms at the same time, the students are "pulled" from their classrooms and brought to her.

19. The testimony explaining why Ms. Guillen received a preliminary layoff notice was vague, confusing, and unclear. Associate Superintendent Hammond explained that Ms. Guillen received notice because Superintendent Parraz had recommended that her position be reduced by .86 FTE. Part of that reduction, according to Associate Superintendent Hammond, is based on the governing board's decision to reduce High School Spanish by .28 FTE. Maria Olivas and Ana Kilgallen were identified as the two most junior Spanish teachers. But since they share the same date of first paid service as a probationary employee with the District, the tie-breaking criteria was applied, and Ms. Olivas prevailed because she has a Master's degree. Therefore, Ms. Kilgallen was designated for layoff. But when the seniority list was reviewed to determine if Ms. Kilgallen could "bump" into any positions held by more junior teachers, Associate Superintendent Hammond determined that Ms. Kilgallen is certificated and competent to "bump" into Ms. Guillen's position teaching

English learners. Therefore, Ms. Guillen received a preliminary notice based, in part, on the .28 FTE reduction to High School Spanish.

20. Associate Superintendent Hammond said Ms. Guillen was designated for layoff also based on the governing board's decision to reduce a K-8 ELD Teacher by .50 FTE and High School Sheltered English by .14 FTE. But Ms. Guillen does not teach High School Sheltered English (she teaches at the elementary and middle schools), and it was not clearly explained why she received notice based on the reduction of that service. Furthermore, the sum of all the reduction in services for which Associate Superintendent Hammond testified Ms. Guillen received notice is .92 FTE (.28 FTE High School Spanish + .50 FTE K-8 ELD Teacher + .14 FTE High School Sheltered English), but she was noticed for only a .86 FTE reduction. One possible explanation for this discrepancy was that the District "over-noticed" for the .28 FTE reduction to High School Spanish – an explanation offered by the District, but not clearly articulated.

21. Ultimately, the absence of clarity in the evidence is of no import because the District improperly concluded that Ms. Guillen is not certificated and competent to perform any service for which a junior teacher is being retained to perform. As previously discussed, she holds a multiple subject credential, and she identified at least three other teachers who hold the same credential, have less seniority, and are being retained to performed services which she is certificated and competent to perform: Susanna Jones, who is number "65" on the seniority list and currently teaches second grade at Denair Academic Avenues; Amanda Naranjo, who is number "66" on the seniority list and also currently teaches second grade at Denair Academic Avenues; and Stacy Criswell, who is number "70" on the seniority list and currently teaches fifth grade at Denair Elementary School.³

³ California Code of Regulations, title 5, section 80003, describes the scope of a multiple subject credential as follows:

The Multiple Subject Teaching Credential authorizes the holder to provide the services described below in grades twelve and below, including preschool, and in classes organized primarily for adults.

(a) Teach all subjects in a self-contained class;

(b) Teach in a team teaching setting or regroup students across classrooms as authorized in Education Code Section 44258.15. For the purpose of this section, team teaching is defined as two teachers of the same grade level exchanging students for the purpose of instruction in specific subjects. Regrouping of students is the practice of two or more teachers combining students across classes for specific instructional purposes;

22. Associate Superintendent Hammond explained that Ms. Guillen does not satisfy the District’s “competency” criteria for bumping into an elementary teaching position because she has not taught in a classroom where she has had her own roster of students assigned to her for at least one semester within the last 10 years, instead having taught strictly on a “pull out” basis. But competency criteria must relate to the skills and qualifications necessary to teach in order to be reasonable and valid. (*Duax v. Kern Community College District, supra*, 196 Cal.App.3d 555, 565.) The District offered no rational explanation why it is necessary for a teacher who holds a multiple subject credential and is assigned to a self-contained classroom to have previously taught in a self-contained classroom with her own class roster, especially given the broad range of teaching experience held by Ms. Guillen in her current “pull out” teaching assignment. The competency criteria as applied to Ms. Guillen do not relate to her skills and qualifications as a teacher, and are invalid. She may “bump” into the position held by the least senior teacher who is teaching under a multiple subject credential during the current school year. Therefore, no cause exists for not reemploying Ms. Guillen during the 2013/2014 school year, and there is no legal basis for the District’s governing board to issue her a final layoff notice.

Rachel Watts

23. Ms. Watts is identified as number “78” on the District’s seniority list. She holds a multiple subject credential and a CLAD authorization. She currently teaches Language Arts and History to seventh graders at Denair Middle School.

24. Associate Superintendent Hammond said Ms. Watts received a preliminary layoff notice based on the governing board’s decision to reduce K-8 Teachers by 2.0 FTE. Associate Superintendent Hammond analyzed whether Ms. Watts could “bump” into Allison Loftin’s (number “83” on the District’s seniority list) position teaching at Denair Middle School or Stephanie De Muro’s (number “88” on the seniority list) position teaching fifth grade at Denair Academic Avenues. She concluded that Ms. Watts cannot “bump” Ms. Loftin because Ms. Loftin’s current teaching assignment includes teaching general education students (based on her preliminary multiple subject credential), while concurrently teaching special education students (based on her preliminary special education credential) on a “push in” basis. With regard to Ms. De Muro’s teaching position, Associate Superintendent Hammond concluded that Ms. Watts cannot “bump” into that position because Ms. De Muro teaches a combination of general education (based on her intern multiple subject credential)

(c) Teach core classes to students in grades five through eight pursuant to Education Code Section 44258.1. Core classes consist of teaching two or more subjects to the same group of students; and

(d) Teach any of the core subjects he or she is teaching to a single group of students in the same grade level as the core classes for less than fifty percent of his or her work day.

and special education (based on her intern special education credential) students each day until 1:00 p.m. and then special education students exclusively after that.

25. Ms. Watts admitted she does not have a special education credential, but explained that she applied for the fifth grade teaching position at Denair Academic Avenues for which Ms. De Muro was ultimately hired. That position was as a fifth grade teacher teaching general education students, and only required a multiple subject credential. Therefore, Ms. Watts argued that Ms. De Muro's assignment teaching fifth grade at Denair Academic Avenues only requires a multiple subject credential, at least until 1:00 p.m. each day, and she is certificated and competent to perform that assignment.

26. But even if Ms. Watts is certificated and competent to teach Ms. De Muro's assignment teaching fifth grade general education students in the morning, she does not hold the proper credential to teach Ms. De Muro's special education students in the afternoon. And the court in *Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334, held the following with regard to a senior teacher's ability to force a district to divide a full-time teaching position into multiple positions to avoid being laid off:

We thus agree with the court in *Murray*⁴ that appellants do "not have the right to force the [district] to divide the full-time position to accommodate [their] desire for a part-time position" (citation), and we conclude that this is true with respect to the application of [Education] section 44955 as well as section 44956.

(*Id.*, at p. 346.)

Therefore, Ms. Watts did not establish that she is certificated and competent to perform the services for which a junior teacher is being retained to perform, and cause exists for not reemploying her during the 2013/2014 school year. The District's governing board has a legal basis for issuing Ms. Watts a final layoff notice.

William Douglas

27. Mr. Douglas is number "82" on the District's seniority list. He holds a single subject credential in Agriculture and a CLAD authorization. He currently teaches Agriculture classes at Denair High School. He has previously taught Introductory and Advanced Agriculture Mechanics, Small Engine and Farm Mechanics, Farm Management, and Horticulture/Floriculture.

28. Associate Superintendent Hammond explained that Mr. Douglas currently teaches Agriculture Mechanics, a service that the governing board has identified for reduction by the equivalent of a .14 FTE position. She considered allowing Mr. Douglas to

⁴ *Murray v. Sonoma County Office of Education* (1989) 208 Cal.App.3d 456.

“bump” into Korene (Gypsy) Keene Stark’s (number “86” on the seniority list) position teaching Agriculture Biology, but concluded he could not. Associate Superintendent Hammond explained that her decision was based on the fact that either Mr. Douglas’ teaching credential does not allow him to teach Agriculture Biology or he has not taught Agriculture Biology for at least one semester within the past 10 years, she could not recall which. Either way, she concluded he is not certificated and competent to teach Agriculture Biology.

29. Associate Superintendent Hammond’s conclusion that Mr. Douglas is not certificated and competent to teach Agriculture Biology is mistaken. He holds the identical teaching credential as Ms. Keene Stark, and that credential allows them to teach “[a]gricultural management, agricultural mechanics, agricultural science, animal science, forestry, horticulture, landscaping, and plant science” (Cal. Code of Regs., tit. 5, § 80005, subd. (a)(1)), or, as Mr. Douglas testified, “anything with ‘Agriculture’ in front of it.” The District offered no rational explanation why Mr. Williams’ experience teaching other Agriculture classes does not make him qualified to teach Agriculture Biology. The District’s competency criteria as applied to him are invalid, and he may “bump” into Ms. Keene Stark’s position teaching Agriculture Biology, or any other Agriculture class she teaches during the 2013/2014 school year. Therefore, no cause exists for not reemploying Mr. Douglas during the 2013/2014 school year, and there is no legal basis for the District’s governing board to issue her a final layoff notice.

Halla (Inga) Bernard

30. Ms. Bernard is number “80” on the District seniority list, and holds a multiple subject credential, with a supplemental math authorization, and a CLAD authorization. She currently teaches Pre-Algebra, Math Rewind, and Geometry to seventh graders at Denair Middle School. While Ms. Bernard attended the hearing, she did not testify about any grounds for challenging her preliminary layoff notice. Nonetheless, evidence was presented regarding her notice, which is discussed below.

31. Associate Superintendent Hammond explained that the governing board’s decision to reduce High School Math by the equivalent of 1.14 FTE positions was carried out by “non-reelecting” Christina Rojas (number “84” on the seniority list) to her current position teaching Algebra Essentials, Algebra, and CAHSEE Algebra at Denair High School and consolidating two course offerings of the same type of math class into one. Ms. Bernard received a preliminary layoff notice based on the consolidation of those two classes – a .14 FTE reduction. But Associate Superintendent Hammond’s explanation why Ms. Bernard was selected to have her services reduced is contrary to law. She explained that Ms. Bernard teaches solely at Denair Middle School,⁵ the governing board’s decision was to reduce math

⁵ Associate Superintendent Hammond contradicted herself. First, she testified that Ms. Bernard teaches only at Denair Middle School. When questioned further, however, she said Ms. Bernard may be teaching one class at Denair High School because at one time Ms. Bernard was “shared” by Denair Middle School and Denair High School. Finally, Associate

at the *high school* level, and the governing board has not proposed reducing or eliminating any of the *middle school* math courses Ms. Bernard teaches. In other words, Ms. Bernard received noticed based on the reduction of a service she does not provide.

32. Associate Superintendent Hammond provided testimony about Jamie Pecot, who is number “54” on the seniority list and currently teaches Geometry at Denair High School. She explained that Ms. Pecot took a voluntary reduction to a .71 FTE position for the current school year for personal reasons. However, Ms. Pecot has contractual rights to return to a full-time position at the beginning of the 2013/2014 school year. But a final decision whether she will exercise that right has not been made.

33. The relevance of such testimony was not entirely clear. One potential interpretation is that Ms. Pecot is the high school math teacher whose two math courses were consolidated based on the governing board’s decision to reduce High School Math, and she was allowed to “bump” into Ms. Bernard’s position teaching seventh grade math. But Associate Superintendent Hammond’s inability to clearly articulate that as the basis for Ms. Bernard’s notice, as well as her testimony that Ms. Pecot “can” bump into Ms. Bernard’s position but the final determination of whether she will has not been made, is more compelling evidence that Ms. Bernard has not been bumped by Ms. Pecot. Therefore, no cause exists for not reemploying Ms. Bernard during the 2013/2014 school year, and there is no legal basis for the District’s governing board to issue her a final layoff notice.

34. After due consideration and adjustments made for the matters noted above, no permanent or probationary employee with less seniority is being retained to render a service for which a respondent is certificated and competent to perform.

35. The reduction or elimination of the particular kinds of services set forth in Resolution No. 02141312-R12 are related to the welfare of the schools and the students thereof within the meaning of Education Code sections 44949 and 44955. The governing board’s decision to reduce or discontinue these services is neither arbitrary nor capricious, but rather a proper exercise of its discretion.

LEGAL CONCLUSIONS

1. The appellate court in *San Jose Teachers Association v. Allen, supra*, 144 Cal.App.3d 627, said the following about the manner in which California’s public school are funded in California:

Superintendent Hammond stated that she could not say whether Ms. Bernard currently teaches “100 percent” at Denair Middle School. No other witnesses testified about Ms. Bernard’s current teaching assignment. Associate Superintendent Hammond’s initial testimony, which is bolstered by the District’s seniority list, is persuasive evidence of Ms. Bernard’s current assignment.

Faced with significant difficulties since the passage of Proposition 13, school districts are placed in the uncomfortable position of having to terminate teachers before knowing what the district's financial circumstances will be for the ensuing school year. This cannot be ascertained until the state budget has been chaptered and the district knows what state funding it will receive.

Thus, the present process requires preliminary notices to be sent by March 15 to all certificated employees who may be terminated and requires the final notice to be given by May 15, even though the school board does not know until the state budget is chaptered late in June exactly what state funding will be available to the district for the ensuing school year. Clearly, the present statutory timetable is unrealistic; however, any changes in that timetable are the responsibility of the Legislature. Although a teacher who is terminated has preferential rights to reemployment under sections 44957 and 87745, this provides little solace to the understandably upset teacher who is given a needless preliminary (and perhaps final) notice because the school district cannot accurately ascertain its financial circumstances for the ensuing school year until the chaptering of the state budget.

(*Id.*, at pp. 632-633.)

2. The process for laying off certificated employees the appellate court referred to is codified in Education Code sections 44949 and 44955. The former statute 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.

(Ed. Code, § 44949.)

The District complied with all notice and jurisdictional requirements set forth above, and no respondent argued otherwise. (Factual Findings 1, 2, and 4 through 6.)

3. Education Code section 44955, subdivision (b), provides the following with regard to a school district's authority to lay off 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.

4. When a district's governing board decides to reduce or eliminate particular kinds of services and a corresponding number of certificated employees, the general rule is that the order of layoffs must be determined by seniority. (Ed. Code, § 44955, subd. (b) ["[E]xcept 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."]; *Davis v. Gray* (1938) 29 Cal.App.2d

403, 406.) This general rule is applied equally to probationary certificated employees. (*Krausen v. Solano County Junior College District* (1974) 42 Cal.App.3d 394, 402.)

5. After a district's governing board decides to reduce or eliminate services, the district's first step is to identify those certificated employees providing the particular services to be reduced or eliminated. (Ed. Code, § 44955, subd. (b).) The district has a mandatory duty to make an initial determination whether those certificated employees who are performing the services to be reduced or eliminated are certificated and competent to perform the services of any certificated employee with less seniority who is being retained. (*Hildebrandt v. St. Helena Unified School District, supra*, 172 Cal.App.4th 334, 340.) But once the district makes the initial determination that such employee has no "bumping rights," the burden shifts to the certificated employee asserting the right to bump the junior employee that the former is certificated and competent to perform the service for which the latter is being retained. (*Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, 656.)

6. In determining a certificated employee's right to "bump" a more junior employee, the test is whether the former is "certificated and competent" to perform the service being performed by the latter. (Ed. Code § 44955, subd. (b).) For purposes of this analysis, the term "certificated" refers to whether the senior employee holds the necessary credential or authorization to teach. (Ed. Code, § 4406.) For example, a senior teacher who is credentialed only to teach fashion merchandising is not "credentialed," and therefore not entitled to bump, junior teachers who teach decorative arts and related technologies, cosmetology and barbering, or marketing and distribution. (See, e.g., *Duax v. Kern Community College District, supra*, 196 Cal.App.3d 555, 569.)

"Competent," on the other hand, refers to the senior teacher's skills and qualifications. (*Duax v. Kern Community College District, supra*, 196 Cal.App.3d at p. 565.) And districts have broad discretion in defining "competency." (*Ibid.*) However, such discretion is not unfettered, and is subject to review for arbitrariness or capriciousness. (*Fair v. Fountain Valley School District* (1979) 90 Cal.App.3d 180, 187 ["A writ of mandate will also lie to correct an abuse of the discretion vested in a court, official or board, though it will not lie to control the exercise of the discretion reposed in those bodies. (Citations.) In such a case the party seeking the writ must make some showing that the body invested with discretion has acted arbitrarily, capriciously, fraudulently, or with-out due regard for his rights and that the action was prejudicial to him. (Citations.)"])

The District's "competency" criteria, as described in Factual Finding 3, are reasonable and valid, except as discussed in Factual Findings 22 and 29.

7. A district "[n]eed not consider positively assured attrition occurring between the date of the preliminary notice and the final notice in determining the number of certificated employees to be terminated by reason of a reduction or discontinuation of a particular kind of service." (*San Jose Teachers Association v. Allen, supra*, 144 Cal.App.3d 627, 630.)

8. The services identified in Resolution No. 021413-R12 are particular kinds of services that may be reduced or eliminated under Education Code section 44955. The governing board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. (See, e.g., *San Jose Teachers Association v. Allen*, *supra*, 144 Cal.App.3d at p. 638-639 ["Section 44955 does not prohibit consideration of financial difficulties as the motivation for terminations 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 a reduction."]) Cause for the reduction or discontinuance of services relates solely to the welfare of the District's schools and their pupils within the meaning of Education Code section 44949.

9. The preliminary layoff notices issued to Messrs. Wagner and Wooten have been rescinded by the District, and there is no legal basis for the District's governing board to issue either of them a final layoff notice. (Factual Finding 7.)

10. Cause exists for reducing Marlene Dhallin's teaching position by the equivalent of a .14 FTE position for the 2013/2014 school year, and the District's governing board has a legal basis for issuing her a final layoff notice in that regard. (Factual Finding 17.)

11. No cause exists for not reemploying Patricia Guillen during the 2013/2014 school year, and there is no legal basis for the District's governing board to issue her a final layoff notice. (Factual Finding 22.)

12. Cause exists for not reemploying Rachel Watts during the 2013/2014 school year, and the District's governing board has a legal basis for issuing her a final layoff notice. (Factual Finding 26.)

13. No cause exists for not reemploying William Douglas during the 2013/2014 school year, and there is no legal basis for the District's governing board to issue him a final layoff notice. (Factual Finding 29.)

14. No cause exists for not reemploying Halla (Inga) Bernard during the 2013/2014 school year, and there is no legal basis for the District's governing board to issue her a final layoff notice. (Factual Finding 33.)

15. Except for those teachers discussed in Legal Conclusions 9, 11, 13, and 14, individually and collectively, the District correctly identified the teachers providing the particular kinds of services that the governing board directed be reduced or discontinued in Resolution No. 0214013-R12.

16. After the adjustments discussed in Legal Conclusions 9, 11, 13, and 14, individually and collectively, no permanent or probationary teacher with less seniority is being retained to render a service for which any respondent is certificated and competent to perform.

17. Except for the respondents identified in Legal Conclusions 9, 11, 13, and 14, individually and collectively, cause exists to give notice to respondents that their services will be reduced or will not be required for the 2013/2014 school year because of the reduction or discontinuance of particular kinds of services.

18. All arguments of the parties not specifically addressed herein were considered and are rejected.

RECOMMENDATIONS

1. Cause exists for the Denair Unified School District to reduce or eliminate 7.24 full-time equivalent certificated positions at the end of the 2012-2013 school year.

2. As set forth in Legal Conclusions 9, 11, 13, and 14, individually and collectively, the Denair Unified District shall rescind the preliminary layoff notices issued to respondents Halla (Inga) Bernard, William Douglas, Patricia Guillen, Robert (James) Wagner, and Curtis Wooten.

3. Other than as set forth in Recommendation No. 2, notice may be given to respondents that their services will be reduced or will not be required for the 2013-2014 school year. Notice shall be given in inverse order of seniority.

DATED: May 3, 2013

COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings