

BEFORE THE
SUPERINTENDENT OF THE
PLACER COUNTY OFFICE OF EDUCATION
STATE OF CALIFORNIA

In the Matter of the Statement of Reduction
in Force of:

OAH No. 2014030866

JULIE COMBS
EMILY HARMAN
MIKE JENSEN

Respondents.

PROPOSED DECISION

Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 23, 2014, in Auburn, California.

Marie A. Nakamura, Attorney at Law, represented the Placer County Superintendent of Schools, Placer County Office of Education (PCOE).

Lesley Beth Curtis, Attorney at Law, represented respondents Julie Combs and Mike Jensen.

Emily Harman withdrew her Request for Hearing and Notice of Participation.

Evidence was received, the matter was submitted and the record was closed on April 23, 2014.

FINDINGS

1. Gayle Barbolino-Mojica is the Placer County Superintendent of Schools (Superintendent). Her actions were taken in her official capacity.

2. On March 6, 2014, the Superintendent adopted Resolution No. 2014-03-06 Certificated Employee (Resolution), providing for the reduction or elimination of the following particular kinds of services (PKS) for the 2014-2015 school year:

| Service | Full Time Equivalent |
|-----------------------------------|-----------------------------|
| Special Education Program | |
| Autism Spectrum Disorders Program | 4.00 |
| Severe Multiple Disabilities | 1.00 |
| Functional Skills | 1.00 |
| Adapted Physical Education | 0.40 |
| School Nurse | 0.50 |
| Speech and Language Pathologist | 1.20 |
| | |
| Student Services Program | |
| Teacher, At-Risk Students | 2.00 |
| | |
| TOTAL | 10.10 |

3. The Resolution recited that the Superintendent has deemed it necessary to reduce or eliminate 10.10 FTE as a result of the reduction and/or elimination of the PKS listed above for the 2014-2015 school year.

4. The Resolution provided that the Superintendent shall give appropriate notice to affected employees no later than March 14, 2014. The resolution was adopted by the Superintendent on March 6, 2014.

5. On March 10, 2014, the Superintendent issued a Notice of Non-reemployment to Julie Combs (respondent Combs), informing her that her services would be discontinued no later than the beginning of the school year.

6. On April 3, 2014, the PCOE served on respondents a written "Notice of Placer County Office of Education's Statement of Reduction in Force" (Notice). The Notice advised that the Board had passed a Resolution reducing or discontinuing particular kinds of services which reduced the certificated staff by 10.1 FTE certificated positions. The Notice stated that pursuant to Education Code sections 44949 and 44955, respondents were advised that his/her services would not be required or were reduced.

7. Respondents timely filed Requests for Hearing.

8. The Superintendent made and filed a Statement of Reduction in Force (Statement). The Statement with required accompanying documents and a blank Notice of Participation was timely served on respondents.

9. Respondents timely filed Notices of Participation to the Statement.

10. Each respondent is presently a certificated permanent employee of the County Office of Education.

11. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955.

Implementation of Layoff Procedure

12. In anticipation of the PKS reduction, the Superintendent and her staff began updating the PCOE's seniority list. Associate Superintendent Phillip Williams and Executive Director of Human Resources (HR Director), Marianne Garcia, identified the individuals serving in the positions affected by the PKS reductions. PCOE staff used the updated seniority list to identify vacant positions and to identify the least senior persons occupying the positions affected by the PKS reductions. PCOE staff took into account known attrition, existing vacancies and student enrollment.

13. When the least senior persons occupying the positions affected by the PKS reductions were identified, Ms. Garcia looked at each individual's credentials to determine whether he or she could displace any less senior certificated employees. On April 3, 2014, PCOE served the Notices identified in Finding 6, on the most junior employees affected by the PKS reduction.

Respondent Julie Combs

14. Respondent Julie Combs (respondent Combs) is a permanent employee with a seniority date of August 22, 2005. She holds a clear multiple subject credential and a clear Crosscultural, Language and Academic Development (CLAD) certification. She currently teaches at the Placer County Juvenile Detention Facility. Ms. Combs received a Notice pursuant to the PKS elimination of 2.0 FTE in the Student Services Program, At-Risk Students (At-Risk). Ms. Combs held an At-Risk 1.0 FTE position, and the other At-Risk 1.0 FTE position was vacated by teacher Gary Rose in March 2014. Ms. Combs is the least senior employee teaching in the At-Risk Student program.

15. Ms. Combs contends that she should be retained because: (1) Placer County Pathways Charter School (Pathways Charter) is not exempt from teacher layoffs and that she should be able to displace the less senior teachers at Pathways Charter; (2) PCOE allowed permanent employee Debbie Lum, an At-Risk teacher with a seniority date of February 16, 1999, to fill teacher Gary Rose's vacant At-Risk position, a 1.0 FTE position which was

eliminated; and (3) the reduction cannot be upheld because PCOE is reducing the level of services at Pathways Charter below the legally mandated level.

Pathways Charter School

16. Ms. Combs placed in evidence an excerpt of the approved Pathways Charter Petition. Pathways Charter was formed pursuant to Education Code section 47605, which details the petition process for establishment of charter schools.

17. The Pathways Charter petition addresses the governance structure of the school in Element 4, at page 15. Under “Governance,” it states in pertinent part:

The Placer County Pathways Charter School is a public charter school within the Placer County Office of Education (“PCOE”). The Placer County Board of Education (“Board”) will be the governing body of Pathways Charter School and holder of the charter, which includes the authority to renew and close the Charter School. The ultimate authority for the governance of Pathways remains with the Board. However, the Board designates the County Superintendent to operate Pathways and to ensure that it is operated in accordance with the terms of this charter and applicable PCOE policies and procedures. The Board delegates to the County Superintendent the responsibility to establish and approve all major educational and operational policies, approve all contracts, manage the Charter Schools fiscal affairs, and hire and be the employer of the Charter School’s staff ...

The PCOE will provide all appropriate support services in order to contribute to the successful operation of Pathways Charter School. In general, direct support costs of personnel, financial, legal, purchasing, and facility services shall be budgeted for and paid by revenue generated by student average daily attendance as reported by Pathways and included in the overall budget of the PCOE. Pathways will be funded through the PCOE as other PCOE non-charter schools.

18. In Element 5, at page 16, under “Employee Qualifications,” the Pathways Charter petition states in pertinent part:

The qualifications and duties of the certificated and classified staff employed who work [*sic*] at the Charter School shall be determined by PCOE. The County Superintendent shall have the ultimate decision-making authority with respect to hiring, evaluating, disciplining and releasing of employees working at the Charter School.

19. The Pathways Charter petition addresses employee rights in Element 13, at pages 22-23: The section states in pertinent part:

Certificated Employees

Any certificated individual who is a member of the Placer Association of Certificated Educators, CTA/NTA certificated bargaining unit (PACE), who is offered employment at the Charter School, and chooses to work at the Charter School, will not be covered by the PACE collective bargaining agreement while working at the Charter School.

While PCOE certificated employees who obtained permanent status at the time they began working at the Charter School will continue to have permanency with regards to employment by PCOE in non-charter school programs, they will not have any right to a permanent employment assignment at the Charter School.

Option to Request Reassignment

Certificated employees employed by PCOE as of June 30, 2012, who choose to work at the Charter School will not be given any return rights back to a non-charter PCOE program except for those that may be applicable to PCOE employees under the Education Code. However, such employees will be given the option to request a reassignment to a non-charter PCOE program for the following school year if they notify the PCOE's Human Resources Department in writing of the request for reassignment to a non-charter PCOE program by no later than February 1 of the current school year for a reassignment in the following school year ...

Certificated employees hired by PCOE to work at the Charter School after June 30, 2012 ("New Hires") will be employees of PCOE, but will not be given the option to request a reassignment to a non-charter PCOE program described above in this Element 13. New Hires will not have any permanency or seniority rights or other job retention rights or privileges unless afforded individually by PCOE.

20. Charter schools operate independently from existing school district structure, as intended by the legislature under the Charter Schools Act. (Ed. Code, § 47601.) The legislature exempted charter schools from virtually all of the Education Code provisions that do not specifically pertain to charter schools. (Ed. Code, § 47610.) Charter schools are exempt from Education Code section 44955 relating to teacher rights in layoff proceedings. Respondent has not cited any provision of law or case holding which conflicts with the plain meaning of Education Code 47610. Thus respondent Comb's assertion that Pathways

Charter is not exempt from the layoff provisions of Education Code sections 44949 and 44955 lacks merit.

21. In *Wilson v. State Board of Education* (1999) 75 Cal. App. 4th 1125, the court addressed challenges to the constitutionality of the Charter School Act. In upholding the Act, the court held that the legislature determined that charter schools “would be free from most state laws pertaining uniquely to school districts.” *Id.* at p. 1131. The court held that charter schools are “under the jurisdiction of chartering authorities ... within the Public School System” and explained: “School districts, county boards of education and respondent Board share several things in common: The formation of each entity is provided for in article IX (§ 7 [Board and county boards of education], §§ 14 & 16 [local school districts and their governing boards]). As such each entity is “authorized to maintain” the various schools in our public school system. (*Id.*, § 6.) Finally, each entity is a defined chartering and revoking authority under the Act (§§ 47605, subs. (b), (j), 47605.5, 47607), with supervisory oversight over their charter schools (§§ 47604.3, 47607, 47613.7).” *Id.* at p. 1142.

22. Respondent Combs contends that Pathways Charter employees are PCOE employees, and thus she should be able to displace the less senior Pathways Charter At-Risk teachers. This argument is not persuasive. PCOE is mandated by the Charter Schools Act to govern Pathways Charter. The charter petition and Education Code sections 47610 [charter schools exempt from laws governing school districts], 47611.5 [charter shall contain declaration whether charter school is exclusive public school employer, otherwise, school district is public school employer], and 47611 [regarding whether state teachers retirement system is available to charter school employees], establish that employees of a charter school are school district employees only if the charter petition states so. Here, the charter petition designates PCOE as the employing entity for Pathways Charter teachers. Pathways Charter teachers are not automatically afforded the rights of other certificated employees. They are not afforded the same retirement benefits and tenure provided to PCOE certificated school district employees, and Pathways Charter may set salaries and terms of employment which differ from those of PCOE certificated school district employees. PCOE certificated school district employees have no statutory right to bump into positions within a charter school. Likewise, Pathways Charter certificated employees cannot bump into a non-charter PCOE program. The evidence did not establish that Pathways Charter employees are PCOE certificated school district employees such that they may be assigned to and from Pathways Charter and non-charter school district programs.

23. Respondent Combs also contended that PCOE treated Pathways Charter employees the same as PCOE certificated school district teachers, because PCOE included Pathways Charter employees on its seniority list. However, HR Director Marianne Garcia testified credibly that Pathways Charter employees were kept on the seniority list just so that PCOE could keep track of them. Pathways Charter employees were not placed on the seniority list for purposes of PCOE layoffs. Respondent Combs' argument is not persuasive.

24. Respondent Combs may apply for a vacant position at Pathways Charter; however, she cannot be guaranteed employment at the charter school, and her layoff from PCOE is completely separate and unrelated to any employment possibility at Pathways Charter.

Filling of Vacancy at Alder Grove School

25. Respondent Combs also contends that a PCOE teacher, Debbie Lum, was assigned to fill a vacant At-Risk position at Alder Grove School which was identified as a PKS in the resolution to be eliminated. She asserted that the At-Risk position was vacated by teacher Gary Rose, who left employment with PCOE in March 2014. Associate Superintendent Phillip Williams testified credibly that Ms. Lum was assigned to Independent Study, not to an At-Risk classroom. Independent Study was not identified as a PKS to be reduced or eliminated in the resolution. Respondent Comb's argument was not persuasive.

Level of Services below Legally Mandated Level

26. Respondent Combs contended that her layoff cannot be upheld because the level of services at the Placer County Juvenile Detention Facility (juvenile hall) will fall below the legally mandated level. She offered in evidence an excerpt from the 2010-2011 Placer County Grand Jury Final Report, which contained a finding that there are only two certificated teachers for three classrooms at juvenile hall. Because the report is over three years old, it is given little weight, as it does not reflect the current teaching and classroom status at juvenile hall. Elizabeth Iannone-Lee, a special education teacher at Koinonia and Alder Grove Schools,¹ testified on respondent's behalf. Ms. Iannone-Lee taught special education at juvenile hall for the past two school years with one other teacher. She also provided non-special education services, which felt like two full time jobs. However, she conceded that she was able to provide the students with their full Individual Educational Plan (IEP) requirements, and did not offer testimony that PCOE failed to meet its legally-mandated requirements. While it is clear that the At-Risk teachers who remain in their Districts will be working harder due to the 2.0 FTE reduction, it was not established that the reduction would prevent the Districts from providing mandated services.

Michael Jensen

27. Respondent Michael Jensen (respondent Jensen) is a permanent employee with a seniority date of August 24, 1998. He holds a clear adaptive physical education specialist credential, a clear single subject credential, and a clear certificate for completion of staff development. He currently teaches adaptive physical education (adaptive PE) at nine school

¹ Koinonia School and Alder Grove School are community schools within the Alternative Education Program at PCOE. Students served by the Juvenile Court and Community Schools (JCCS) have been expelled from a local school district, referred by the Probation Department, the local School Attendance Review Board (SARB), or have been placed in the Receiving Home.

sites. He is the only adaptive PE teacher employed by PCOE. His services as an adaptive PE teacher will be reduced from 0.8 FTE in the 2013-2014 school year, to 0.4 FTE for the 2014-2015 school year.

28. Mr. Williams testified that PCOE chose to reduce the FTE for adaptive PE because students at Penryn Elementary School were being served by their school district, the adaptive PE program was closed at EV Cain, Olive Ranch and Sierra Elementary Schools, and students were “aging out” of the program. Mr. Phillips determined that the number of students served by respondent Jensen will be reduced from 23 in the 2013-2014 school year to 11 in the 2014-2015 school year.

29. Respondent Jensen contends that PCOE will not be meeting its legally-mandated level of services for adaptive PE with only 0.4 FTE for the 2014-2015 school year. He asserted that he is required to attend student IEP meetings by law, but could not attend IEP meetings that were scheduled on his day off in the 2013-2014 school year. It is not known how many IEP meetings respondent Jensen missed, or whether he contacted PCOE to inform them of this issue. Respondent Jensen did not establish that the FTE reduction would prevent PCOE from providing mandated services.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in these sections were satisfied. Each respondent is presently a certificated probationary or permanent employee of the District.

2. A District may reduce services within the meaning of Education Code 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.) The burden is on the District to demonstrate that the reduction or elimination of the particular kinds of services is reasonable and that the District carefully considered its needs before laying off any certificated employee. (*Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 807-808.)

3. The services identified in Resolution No. 2014-03-06 are particular kinds of services that could be reduced or discontinued under Education Code sections 44949 and 44955. The description of services to be reduced, both in the PKS resolution and in the Notices, adequately described 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.)

4. Cause exists to reduce or eliminate 10.1 FTE of particular kinds of services offered by the PCOE as set forth in detail in the Findings. PCOE’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 elimination of services relates solely to the welfare of PCOE's schools and pupils within the meaning of Education Code section 44949.

5. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

RECOMMENDATION

1. Cause exists to reduce or eliminate the certificated positions no later than the beginning of the 2014-2015 school year in accordance with the PKS resolution.

2. Notice may be given to respondent Julie Combs that her services will not be required for the 2014-2015 school year.

3. Notice may be given to respondent Michael Jensen that his services will be reduced to 0.4 FTE for the 2014-2015 school year.

Dated: May 1, 2014

DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings