

BEFORE THE GOVERNING BOARD OF THE
SOUTH WHITTIER SCHOOL DISTRICT

In The Matter Of The Accusation Against:

OAH No. 2009030084

Violet Avelar-Romo, Tiffany Baides,
Darien Baldriche, Jean Beers, Tracy Boeltl,
Nancy Boster, Sonya Brannan, Elizabeth
Butsch, Alexis Clark, Shawna Fleischer,
Jean Foster, Ann Geib, Dolores Hermosillo,
Ana Arellano Hernandez, Amrita Hills,
Kimberly Israelson, Connie Jones, Jenny
Kim, Kathleen Kivi, Erin Leckington, Rich-
ard Martinez, Susanna Medellin, Rebecca
Miller, Teresa Morehead, Shawna Palo-
mino, Eva Perez, Kelly Rawley, Tara Robi-
son, Marina Simental-Gutierrez, Elizabeth
Simms, Greg Solis, Maria Ubeda-Kim,
Patricia Underwood, and Lindsey White,

Respondents.

PROPOSED DECISION

Julie Cabos-Owen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 1, 2009, at the South Whittier School District Office in Whittier, California.

James C. Romo, of Atkinson, Andelson, Loya, Ruud & Romo represented the Whittier School District (District). Marianne Reinhold of Reich, Adell & Cvitan represented all Respondents except Richard Martinez. Respondent Richard Martinez was present and represented himself.

At the hearing, the District withdrew the Accusations against Joella Holbrook and April Jensen.

Oral and documentary evidence was received. The matter was continued until April 17, 2009, to allow the submission of a revised seniority list and closing briefs. A revised seniority list was timely filed and was marked and admitted as District's Exhibit 14. The District's and Respondents' closing briefs were timely filed and were marked as District's Exhibit 15 and Respondent's Exhibit C, respectively. The record was closed, and the matter was submitted for decision on April 17, 2009.

FACTUAL FINDINGS

1. Complainant, Erich Kwek, filed the Accusation while acting in his official capacity as the Superintendent of the District.

2. Respondents are certificated employees of the District.

3. On February 24, 2009, the Governing Board (Board) of the District adopted a resolution to reduce and discontinue the following particular kinds of services provided by the District no later than the beginning of the 2009-2010 school year:

1. Elementary School Principal	1.0 FTE
2. Principal on Special Assignment	1.0 FTE
3. Elementary School Assistant Principal	1.0 FTE
4. Teacher on Special Assignment	2.0 FTE
5. Opportunity Class	1.0 FTE
6. Middle School Home Economics	1.0 FTE
7. Middle School Art	1.0 FTE
8. Middle School Drama	1.0 FTE
9. Vocal Music	1.0 FTE
10. Instrumental Music	1.0 FTE
11. K-6 Physical Education	2.0 FTE
12. K-6 Classroom Teaching	29.0 FTE
TOTAL:	42.0 FTE

4. The Board further determined that the reduction in services necessitated a decrease in the number of certificated employees at the close of the 2009-2010 school year by a corresponding number of FTE positions, and directed the Superintendent to notify the appropriate employees to implement the Board's determination.

5. On or before March 15, 2009, the District gave notice to each Respondent of the potential elimination of his/her position for the 2009-2010 school year. On March 20, 2009, the District served the Accusation on each Respondent.

6. Respondents timely filed requests for hearing and Notices of Defense to determine if there was cause for not reemploying them for the 2009-2010 school year.

7. The services set forth in Factual Finding 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. The Board's decision to reduce or discontinue the identified particular kinds of services was neither arbitrary nor capricious, and constituted a proper exercise of discretion.

8. The reduction or discontinuation of particular kinds of services was related solely to the needs and welfare of the District and its pupils.

9. The Board considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

10. The District maintains a Seniority List which contains employees' seniority dates, current assignments, permanency description and credential and certificate information.

11. Respondents Tara Robison, Shawna Fleischer, Jenny Kim and Kathleen Kivi worked for the District as substitute teachers for up to several months of the school year, prior to their first date of paid service as probationary employees later that same school year. Although Respondents Tara Robison, Shawna Fleischer, Jenny Kim and Kathleen Kivi argued that their seniority dates should be the date they first worked as long term substitutes, this argument was not persuasive. None of these Respondents established that her months of substitute teaching (which did not constitute at least 75 percent of the days in the prior school year), mandated an earlier seniority date. (See Legal Conclusion 4(a).) Therefore, the District properly determined the seniority dates for Respondents Tara Robison, Shawna Fleischer, Jenny Kim and Kathleen Kivi.

12. Respondent Tracy Boeltl worked as a substitute teacher for the 2000-2001 and 2001-2002 school years, prior to becoming a probationary employee in September 2002. At the commencement of her probationary contract, the District credited her with an additional year of probationary service, based on her prior year of substitute teaching, and assigned her the seniority date of September 4, 2001. Although Respondent Tracy Boeltl testified that she worked in a temporary capacity for only one year (2000-2001), and that she was offered a probationary contract at the beginning of the 2001-2002 school year, these assertions were not established by the evidence. Thus, Respondent Tracy Boeltl's assertion that she should have been credited for her year of temporary service in 2000-2001 was unpersuasive. Moreover, Respondent Boeltl did not establish that she was entitled to more than one year's credit for her two years of temporary service. (See, also Legal Conclusion 4.) Therefore, the District properly determined the seniority date for Respondent Tracy Boeltl.

13. Respondent Sonya Brannan began working for the District in 1996, and achieved tenure status in 1998. In the Spring of the 1998-1999 school year she went on maternity leave and requested leave of absence for a year. It was not granted, and she resigned. After her resignation, she did not work for the District for at least eight weeks. She began a long term substitute teaching position with the District in August 1999. She then served in a day-to-day substitute position from early October 1999 until November 1999, when she began a temporary second grade full-time assignment. She remained in that assignment until March 2000, when she was offered a permanent contract. Following her resignation and re-employment, Respondent Brannan's date of employment is the date on which she first rendered paid service in a probationary position. (See Legal Conclusion 5.) Respondent

Brannan's assertion that she should have been credited for her months of temporary service, including day-to-day substitute teaching, at the beginning of the 1999-2000 was unpersuasive. Therefore, the District properly determined the seniority date for Respondent Sonya Brannan.

14. The District used its Seniority List to develop a proposed layoff list of the least senior employees currently assigned in the services being reduced. The District determined that nobody less senior than Respondents was being retained to render services Respondents are certificated and competent to render.

15(a). With respect to the 29 K-6 FTEs being reduced, the District initially failed to include David A. Gunderman (#156 on Exhibit 11) in the reduction in the 29 K-6 FTEs. Respondent Gunderman was an elementary school principal who was subject to layoff, who had previously served as a teacher for the District and who was being reassigned to the classroom. However, at the hearing, the District acknowledged that he could not bump any junior employees, so District would count him as one of the 29 K-6 FTEs to be reduced.

15(b). The two Teachers on Special Assignment (TOSA) who were subject to layoff, Kaylene Merrill (#12 on Exhibit 11) and Michiko Tanimoto (#17 on Exhibit 11), were able to bump less senior K-6 employees. Consequently, the District had initially determined that they could bump Respondent Amrita Hills (#136 on Exhibit 11) and Respondent Violent Avelar-Romo (#135 on Exhibit 11), respectively. However, at the hearing, the District acknowledged that, since David Gunderman would be counted in the 29 K-6 FTEs subject to layoff, Respondent Jean Beers (#137 on Exhibit 11) would not be counted in the 29 K-6 FTEs to be reduced. Nevertheless, Respondent Beers would still be subject to layoff, since Kaylene Merrill would now bump her and Michiko Tanimoto would now bump Respondent Hills. At the hearing, the District determined that Respondent Avelar-Romo would not be bumped by Michiko Tanimoto, and would not receive a final layoff notice. The District admitted that Respondent Avelar-Romo (#135 on Exhibit 11) had the same seniority date as Amrita Hills (#136 on Exhibit 11). However, the District had applied tie-breaking criteria, resulting in Respondent Avelar-Romo being ranked more senior to Respondent Hills. Consequently, Respondent Avelar-Romo should not receive a final layoff notice.

16. Respondent Greg Solis (#188 on Exhibit 11) was hired as a temporary teacher on September 14, 2006, and became a probationary teacher on September 4, 2007. He argued that, pursuant to the Education Code, his first probationary date should be September 14, 2006. This argument was persuasive (See Legal Conclusion 4(a).), and the District stipulated that Respondent Solis would move into position #186 on the seniority list. Nevertheless, his layoff notice status remains unchanged, since he is still being bumped by Noelle Heusser (#79 on Exhibit 11), and no certificated employee junior to Respondent Solis was retained to perform any services which he was certificated and competent to render.

17. Respondent Jean Beers (#137 on Exhibit 11) is a fifth grade teacher with a Ryan Multiple Subject Professional Clear Credential and a Supplementary Authorization in English. She argued that her Supplemental Authorization in English allows her to teach

English in seventh/eighth grade, thus allowing her to bump Patricia Lopez (#177 on Exhibit 11), a seventh/eighth grade English teacher with a Professional Clear Single Subject Credential in English. Respondent Beers admits that she is not compliant with the standards set forth in No Child Left Behind (NCLB), which is necessary for her to be able to bump Patricia Lopez. However, Respondent Beers asserted that, in prior discussions with the District, including a 2004 staff meeting, when evaluating for NCLB, her multiple subject credential was discussed, but she was not informed that she would need to address her supplementary authorization. Although she is now NCLB compliant for her multiple subject credential, she discovered that she would not acquire the necessary points to be NCLB compliant for her supplementary authorization. She argued that, if she had been told in 2004 that she was not yet NCLB compliant for her supplementary authorization, her deficiency “could have been prevented.” This argument is not persuasive. Respondent Beers did not establish that the District had an affirmative duty to foresee this situation and to advise her that her supplemental authorization was insufficient to make her NCLB complaint (and thus unable to bump less senior middle school English teachers). Since Respondent Beers is not credentialed and competent to perform the services that Patricia Lopez currently performs, Respondent Beers is not entitled to bump Patricia Lopez.

18(a). Respondent Lindsey White (#175 on Exhibit 11) is a first grade teacher with a Ryan Multiple Subject Professional Clear Credential and a Clear Special Instructional Credential in Reading. Respondent White argued that her Clear Special Instructional Credential allows her to teach English in seventh/eighth grade, thus allowing her to bump Patricia Lopez (#177 on Exhibit 11). Respondent White’s Special Instructional Credential in Reading authorizes her to do the following:

[A]ssist and support the classroom teacher in reading instruction and teaching strategies, select and adopt reading instruction materials, plan and conduct reading staff development, assess student progress and monitor student achievement in reading, provide direct reading intervention work with students, and develop and coordinate reading programs at the school site, school district, or county level in grades twelve and below, including preschool, and in classes organized primarily for adults.

18(b). Respondent White’s Clear Special Instructional Credential in Reading does not allow her to teach English at the seventh/eighth grade level. Since Respondent White is not credentialed and competent to perform the services that Patricia Lopez currently performs, Respondent White is not entitled to bump Patricia Lopez.

19. The District determined that David Crabtree (#185 on Exhibit 11) was able to bump Sandra Valencia (#189 on Exhibit 11). David Crabtree, was a principal on special assignment who was subject to layoff, who had not previously served as a teacher for the District and who is being reassigned to the classroom. His seniority date is earlier than that of Sandra Valencia (#189 on Exhibit 11), who has a Clear Single Subject Credential in Biological Science and who teaches seventh/eighth grade science. David Crabtree has a Clear Sin-

gle Subject Teaching Credential in Physical Education, with Supplementary Authorizations in Chemistry, in Computer Concepts and in Introductory General Science. David Crabtree's Supplementary Authorization in Introductory General Science allows him to teach introductory science in grades twelve and below "which is typically included for that subject in curriculum guidelines and textbooks for study in grades nine and below." This allows David Crabtree to teach seventh/eighth grade science, and thus bump Sandra Valencia. Consequently the District's determination that David Crabtree bumps Sandra Valencia was correct.

20. Taking into account the revisions acknowledged by the District in Factual Finding 15, no certificated employee junior to any Respondent was retained to perform any services which any Respondent was certificated and competent to render.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met. (Factual Findings 1 through 6.)

2. The services listed in Factual Finding 3 are each determined to be particular kinds of services within the meaning of Education Code section 44955. (Factual Findings 3 and 7.)

3. Cause exists to reduce the number of certificated employees in the District due to the reduction and discontinuation of particular kinds of services. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code sections 44955. (Factual Finding 8.)

4(a). Education Code section 44918 (Substitute or temporary employee deemed probationary employee; reemployment rights) provides, in pertinent part:

(a) Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year. (Emphasis added.)

4(b). Education Code section 44914 (Substitute and probationary employment in computation for classification as permanent employee), provides:

If an employee of a school district has served as a probationary employee of the district in a position requiring certification qualifications, for one complete school year, and in the year immediately preceding the service as probationary employee has served as a substitute employee, or as a substitute and probationary employee, serving in both

capacities during the same school year in the schools of the district, at least 75 percent of the number of days the regular schools of the district were maintained, the governing board of the district may count the year of employment as a substitute or as a substitute and probationary employee as one year of the probationary period which he is required by law to serve as a condition to being classified as a permanent employee of the district. (Emphasis added.)

4(c). Education Code section 44814 does allow districts to count a year of substitute service and a year of probationary service as two years of probationary service in the computation of a teacher's classification as a permanent employee. However section 44814 does not mandate that an employee who has served two years as a substitute be credited two years of probationary service.

5(a). Education Code section 44848 provides:

When any certificated employee shall have resigned or been dismissed for cause and shall thereafter have been reemployed by the board, his date of employment shall be deemed to be the date on which he first accepted reemployment (if reemployed before July 1, 1947) or rendered paid service (if reemployed after June 30, 1947) after his reemployment.

5(b). Education Code section 44845 (Employment dated from first acceptance of paid service in probationary position) provides:

Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position.

5(c). Taken together, sections 44848 and 44845 indicate that, when a teacher resigns and is reemployed, her date of employment shall be deemed the date after her reemployment on which she first rendered paid service in a probationary position.

6. Education Code section 44955, subdivision (b), provides, in pertinent part:

[t]he services of no permanent employee may be terminated . . . 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.

7(a). A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.)

7(b). As set forth in the Factual Findings above, other than those teachers identified by the District (Kaylene Merrill, Michiko Tanimoto, Noelle Heusser and David Crabtree), no Respondent is entitled to “bump” any junior employee in this case.

8. No employee with less seniority is being retained to render a service which any more senior employee is certificated and competent to render.

9. Cause exists within the meaning of Education Code section 44955 for terminating or reducing Respondents’ employment for the 2009-2010 school year, as set forth in Factual Findings 1 through 20.

ORDERS

I. The Accusations against Joella Holbrook, April Jensen and Violent Avelar-Romo are dismissed.

II. The Accusations served on all other Respondents are sustained. Notice may be given to those Respondents before May 15, 2009, that their services will be reduced or terminated for the 2009-2010 school year because of the reduction or discontinuation of particular kinds of services as indicated.

Dated: May 6, 2009

JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings