BEFORE THE
GOVERNING BOARD OF THE
WALNUT CREEK ELEMENTARY SCHOOL DISTRICT
STATE OF CALIFORNIA

In The Matter Of The Accusations Against: JEANINE BARTLEY ADCOX, JAMIE H. BEEVER, MARCIA EILER, KEVIN HARRISON, COURTNEY L. HESSE, JENNIFER SANDERSON, AND BETH H. UNLAND, Respondents.	OAH No. 2009030202

PROPOSED DECISION

Administrative Law Judge Diane Schneider, Office of Administrative Hearings, State of California, heard this matter on April 15, 2009, at the Walnut Creek Elementary School District, Walnut Creek, California.

Chesley D. Quaide, Attorney at Law, represented the School District.

Teague P. Paterson, Attorney at Law, represented all respondents. Respondents Marcia Eiler and Jennifer Sanderson were present at the hearing. Respondents Jeanine Bartley Adcox, Jamie H. Beever, Kevin Harrison, Courtney L. Hesse, and Beth H. Unland were not present.

The matter was submitted on April 15, 2009.

SUMMARY

The Governing Board of the Walnut Creek Elementary School District determined to reduce or discontinue particular kinds of services provided by certificated employees for budgetary reasons. The decision was not related to the competency or dedication of the individuals whose services are proposed to be reduced or eliminated.

District staff carried out the Board's decision by using a selection process involving review of credentials and seniority, "bumping," and breaking ties between employees with the same first dates of paid service. As set forth below, the selection process was in accordance with the requirements of the Education Code.

PRELIMINARY MATTERS

Respondent Eiler's motion to exclude Exhibit 1, Tabs 13 and 14 is denied. Tabs 13 and 14 consist of respondent Eiler's signed resignation letter dated May 1, 2006, and the School Board's acceptance of it, respectively. The District learned about the existence of these documents during the week of April 5, 2009, and did not provide them to respondent prior to the hearing. Because Eiler wrote the resignation letter and was aware that the Board had accepted it, she failed to establish that she was prejudiced by the District's failure to provide her a copy of such documents.

At the hearing, counsel for respondents requested permission to file a post-hearing brief. That request was denied. One day later, respondent submitted a post-hearing letter brief. That same day, the District filed a responsive letter brief. Inasmuch as respondent's request to file a post-hearing brief was denied, respondent's brief, as well as the District's responsive letter brief, were not considered and were returned to both parties.

FACTUAL FINDINGS

1. The Walnut Creek Elementary School District ("the District") operates elementary schools.

2. Patty Wool, Ed.D, is the Superintendent of the District.

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

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4. On March 2, 2009, the District's Governing Board adopted Board Resolution No. 08-09-15, which proposed to reduce or discontinue particular kinds of service for the 2009-2010 school year, solely for the welfare of the schools and the pupils. Specifically, the Board Resolution provided for the reduction or elimination of the following particular kinds of services: "K-8 Multiple Subject Teachers." An unsigned copy of the resolution is attached hereto as Appendix A and incorporated herein by reference.

5. On or before March 15, 2009, the Superintendent personally served on each respondent a written notice that she had recommended that notice be given to respondents pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year. The reasons for the recommendations were set forth in these preliminary layoff notices.

6. Respondents timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year.

7. The Superintendent made and filed Accusations against each of the certificated employees who requested a hearing. The Accusations with required accompanying documents and blank Notices of Defense were timely served on those certificated employees.

8. Notices of Defense were timely filed by respondents.

9. Before issuing the preliminary layoff notices, the District took into account all positively assured attrition.

10. The Board Resolution established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. It provided that the order of termination was to be based on the needs of the District and its students in accordance with the following:

a. Possession of a currently valid and properly filed clear credential (not preliminary), and possession of a currently valid and properly filed CLAD.

b. Possession of a Master's Degree or supplemental credential.

c. If a tie still exists after application of the foregoing criteria, the tie shall be broken by lot. Numbers shall be drawn with the lowest number drawn winning the tie and continuing until all remaining tied individuals are ranked in order.

11. The District maintains a Seniority List which contains employees' seniority dates (first date of paid service), current assignments and locations, advanced degrees, credentials, and authorizations. Credential and authorization data are obtained from the records of the County Office of Education, at which certificated employees must register such documents.

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

13. Superintendent Wool worked with Laura Canaya, the District's Human Resource Specialist, to ensure the accuracy of the Seniority List. In Wool's words, "all Seniority Lists are a work in progress." The Seniority List was revised a number of times, as new data became available.

14. According to the District's Seniority List, 10 certificated employees shared the seniority date of August 16, 2006. After the District employed tie-breaking criteria, it determined that five of the employees were subject to lay-off.

Respondent Marcia Eiler

15. During the 2005-2006 school year, Eiler worked as a temporary employee for the District in a 0.4 FTE position in Kindergarten. In a letter to the Walnut Creek District School Board dated May 1, 2006, Eiler stated that she was resigning from her position, effective June 9, 2006 (the last day of the school year), because a tenured teacher was going to assume that position in the Fall. At the hearing, Eiler explained that once she found out that her 0.4 FTE position would not be available for Fall 2006, she inquired about other employment possibilities. Eiler testified that she was advised that it would "make things easier" if she resigned from her 0.4 FTE position before getting hired into another position. It was not clear why she was given such advice. She did, however, believe that her resignation would make her eligible to be rehired. She was not told that resigning would affect her seniority date. It was not established, however, that anyone involved with Eiler from the school knew that a resignation would change her seniority date. In her resignation letter, Eiler expressed interest in employment with the District in another position. Eiler was reemployed by the District for the 2006-2007 school year to teach in a 0.5 FTE position as a third grade teacher.

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16. As recently as March 3 of this year, District records reflect Eiler's seniority date as August 17, 2005. Some time between March 3 and March 10, the District was advised by counsel that once Eiler resigned, her seniority needed to be changed to the date that she was reemployed. Based on this advice, the District's Seniority List was changed to reflect Eiler's seniority as August 16, 2006.

17. Pursuant to Education Code section 44848, when a certificated employee resigns, and is thereafter reemployed, the date of employment is the date in which the employee first rendered paid service after reemployment. In the instant case, because Eiler resigned and was subsequently rehired for the 2006-2007 school year, her seniority date is August 17, 2006, the day on which she first rendered paid service after she was reemployed by the District.

18. Eiler contends that her seniority date should be August 16, 2005. First, she argues that her resignation was not "real" and that the provisions contained in Education Code section 44848, therefore, do not apply. She contends that her resignation should not be given the force or effect of a "real" resignation because she submitted it at the suggestion of the District with the understanding that she would be hired back in the Fall. This argument is without merit. The evidence submitted regarding the circumstances surrounding Eiler's resignation was vague. For example, the party or parties who suggested that Eiler resigned were not at the hearing. It was not clear why this suggestion was made to Eiler. Additionally, the evidence did not establish that Eiler received a formal job offer from the District for the 2006-2007 school year prior to the time that she resigned. Accordingly, the

evidence failed to demonstrate that Eiler's resignation was a sham, or that the District procured it in bad faith.

19. Next, Eiler argues that the District should be estopped from asserting that her seniority date is August 17, 2006, because the District's records provided to Eiler, including its Seniority List, incorrectly listed Eiler's seniority date as August 16, 2005. This argument is also without merit. The elements of estoppel are (1) a representation or concealment of material facts (2) made with knowledge of the facts (3) to a party ignorant of the truth (4) with intention that the latter act upon it and (5) the party must have been induced to act upon it. (See 7 Witkin, Summary of Cal. Law (1974 ed.), Equity § 132, p. 5352, and cases cited therein.) "Where one of these elements is missing there can be no estoppel." (*California School Employees Assn. v. Jefferson Elementary School District* (1975) 45 Cal.App.3d 668, 692.) No showing was made that District intentionally concealed a known material fact with the intent that Eiler act on it to her detriment, or that Eiler was induced to act upon it to her detriment. Rather, the evidence simply established that the District labored under a misapprehension regarding her correct seniority date. Once the District was made aware of the legal effect of Eiler's resignation with regard to seniority calculations, the District changed her seniority date.

20. Eiler also argues that even if her seniority begins on her first date of paid service in the 2006-2007 school year, that her seniority date should be August 16 and not August 17, 2006. On August 16, 2006, a number of employees new to the District attended a new teacher orientation. Eiler had already attended the orientation for new hires in August 2005. Eiler was told by the District not to attend the new hire orientation on August 16, 2006, because she was a "re-hire and not a new hire." The new hire orientation in August 2006 covered matters that she was already familiar with, such as District policies and benefits.

21. Eiler claims that the principles of equitable estoppel preclude the District from asserting that her seniority date is August 16, 2006. This argument lacks merit. Eiler's seniority date is set by the Education Code, which provides that a certificated employee's seniority begins with the date that the employee "first rendered paid service in a probationary position." (Ed. Code, § 44845.) As Eiler testified, the District determined that Eiler's attendance at the orientation was not mandatory because Eiler was a re-hire and not a new hire. Accordingly, the District was correct in determining that Eiler's first date of paid service was the first day of school, August 17, 2006.

Respondent Jennifer Sanderson

22. In March 2007 Shama Shumney, who was then the District's Human Resource Specialist, assisted Sanderson with the process of obtaining a CLAD certification. The process was delayed by several factors. Although Shumney began the process, she did not complete it. Sanderson followed up with Shumney once, at the end of 2007, to ascertain the status of her certification. In October 2008, Sanderson received an email from Shumney's replacement, Laura Canaya, inquiring as to the progress that Sanderson had made in obtaining her CLAD certification. Canaya informed Sanderson that she was "out of

compliance" and needed to obtain a CLAD certification as soon as possible. Sanderson responded to Canaya's email immediately, and continued the process of collecting the documents necessary for obtaining her certification. Sanderson obtained her teaching credential in Arizona. Sanderson attempted to obtain syllabi from the classes she took in Arizona, which she believed would count towards her certification. The first time that she obtained the syllabi and forwarded them to the state, her syllabi materials were sent back as insufficient. She was eventually able to obtain the correct syllabi, and ultimately obtained her CLAD, effective March 19, 2009.

23. The tie-breaking criteria were applied on March 11, 2009. Considering that Sanderson did not possess a currently valid and properly filed CLAD certificate at the time that the tie-breaking criteria were employed, the District did not err when it excluded her from the tie-breaking lottery. (*Degener v. Governing Board* (1977) 67 Cal.App.3d 689, 698.)

24. Sanderson contends that the District is responsible for the delays involved in obtaining her CLAD, which resulted in her receiving it after the tie-breaking criteria were employed. Sanderson reasons that the District, therefore, should not be allowed to exclude her from the tie-breaking lottery. Sanderson's argument lacks merit. First, the evidence established that the reasons for the delay in certification were due to a variety of factors and not solely due to Shumney's inaction. Moreover, while the District may assist its employees with obtaining CLAD certifications, ultimately, it is the employee's responsibility.

25. All contentions made by respondents not specifically addressed above are found to be without merit and are rejected.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met.

2. The services identified in Board Resolution 08-09-15 are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Board's decision to reduce or discontinue the identified services was within the guidelines set forth in Education Code section 44955. The Board's decision was neither arbitrary nor capricious, and was a proper exercise of its discretion.

3 Cause exists because of the reduction of particular kinds of services pursuant to Education Code section 44955 to give notice to respondents that their services will not be required for the 2009-2010 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of section 44949.

ORDER

Notice may be given to respondents that their services will not be required for the 2009-2010 school year because of the reduction or discontinuation of particular kinds of services. Notice shall be given in reverse order of seniority.

Dated: _____

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DIANE SCHNEIDER
Administrative Law Judge
Office of Administrative Hearings

APPENDIX A

WALNUT CREEK SCHOOL DISTRICT
Walnut Creek, California

RESOLUTION OF THE GOVERNING BOARD OF THE WALNUT CREEK ELEMENTARY SCHOOL DISTRICT REGARDING THE REDUCTION OR DISCONTINUANCE OF PARTICULAR KINDS OF SERVICE (CERTIFICATED LAYOFF)

Resolution 08-09-15

WHEREAS, the Governing Board of the Walnut Creek Elementary School District has determined it is necessary to reduce or discontinue particular kinds of services of the District for the 2009-2010 school year in accordance with Education Code sections 44949 and 44955; and

WHEREAS, due to the reduction or discontinuance of services, the Governing Board has determined that it is in the best interest of the District that the number of regular certificated employees of the District be reduced; and

WHEREAS, the Governing Board has considered all positively assured attrition, including all deaths, resignations, retirements, non-reelections, and other permanent vacancies for 2009-2010 and, but for attrition already assured, the Governing Board would have found it necessary to reduce additional services; and

WHEREAS, the Governing Board is authorized by Education Code section 44955 to establish criteria based upon the needs of the District and its students for determining the order of termination as between certificated employees with the same seniority date; and

WHEREAS, Education Code section 44955 provides that the services of no permanent employee may be terminated while any probationary or other employee with less seniority is retained to render a service which the permanent employee is certificated and competent to render; and

WHEREAS, Education Code section 44955 authorizes the District to deviate from terminating certificated employees in order of seniority where the District demonstrates a specific need for personnel to teach a specific course or courses of study, or to provide services authorized by a services credential with a specialization in pupil personnel services, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

NOW, THEREFORE, BE IT RESOLVED by the Governing Board of the Walnut Creek Elementary School District:

1. That the particular kinds of service set forth below be reduced or discontinued no later than the beginning of the 2009-2010 school year:

K-8 Multiple Subject Teachers --6.8 FTE

2. That "competency" for the purpose of Education Code section 44955(b) 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 the employee will be assigned at the beginning of the 2009-2010 school year at least one (1) semester in the past ten (10) years.

3. That, except as required by law, the order of termination shall be based solely on the needs of the District and its students as determined by the following criteria which shall be applied to resolve ties in seniority between certificated employees. These criteria are listed in priority order and each criterion shall be used only if the preceding criteria do not determine the order of termination:

a. Possession of a currently valid and properly filed clear credential (not preliminary), and possession of a currently valid and properly filed CLAD.

b. Possession of a Master's Degree or supplemental credential.

c. If a tie still exists after application of the foregoing criteria, the tie shall be broken by lot. Numbers shall be drawn with the lowest number drawn winning the tie and continuing until all remaining tied individuals are ranked in order.

4. Pursuant to Education Code section 44846, for persons having a statutory reemployment preference, the order of rehire as between employees who first rendered paid service on the same day shall be determined according to the same criteria described in paragraph number 3, above.

5. That the Superintendent or designee is directed to send appropriate notices to all employees whose positions may be affected by virtue of this action in accordance with the provisions of the Education Code and to afford all such employees all rights to which they are entitled under law.

PASSED AND ADOPTED by the following vote of the members of the Governing Board of the Walnut Creek Elementary School District of Contra Costa County, State of California, this 2nd day of March, 2009.

AYES:	Clarke, Peña, Pennington, Walden, Borchardt
NOES:	None

ABSTENTIONS: None
ABSENT: None

I hereby certify that the foregoing resolution was duly introduced, passed and adopted at the meeting of the Governing Board of the Walnut Creek School District held on this 2nd day of March, 2009.

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PATRICIA WOOL, Ed.D.
Superintendent and Secretary to the Governing Board of the Walnut Creek School District of Contra Costa County, State of California