

**BEFORE THE BOARD OF EDUCATION
OF THE PLEASANT VALLEY SCHOOL DISTRICT**

**In the Matter of the Reduction In Force
of:**

OAH No. 2009030288

**CERTIFICATED STAFF OF
PLEASANT VALLEY SCHOOL
DISTRICT,**

Respondents.

PROPOSED DECISION

H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Camarillo, California on April 27, 2009.

Sharon L. Ormond, Attorney at Law, represented the Pleasant Valley School District.

Alexis Ridenour, Attorney at Law, represented all respondents except Marie French Risk and Brian Roberts.

Marie French Risk appeared in pro per.

Brian Roberts failed to appear despite having been properly served with the Accusation and notice of the date, time and place of the hearing.

At the commencement of the hearing, the parties stipulated to certain “last minute” changes to the seniority list. Those changes were noted in the record.

The record was held open to and including April 29, 2009, for the District to re-evaluate and verify the seniority dates on the seniority list, and to submit the results of the re-evaluation. The results were received by way of a letter from Ms. Ormond, which was marked and admitted as Exhibit 21. The record was closed on April 29, 2009, and the matter was submitted for decision.

///

///

SUMMARY OF PROPOSED DECISION

The Board of Education of the Pleasant Valley School District determined to reduce or discontinue particular kinds of services provided by teachers and other certificated employees for budgetary reasons. The decision was not related to the competency and 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. Except as noted below, the selection process was in accordance with the requirements of the Education Code.

FACTUAL FINDINGS

1. Luis C. Villegas, Jr., Ed.D. made and filed the Accusation in his official capacity as Superintendent of the Pleasant Valley School District (District).
2. On or before March 15, 2009, the District served on each respondent a written notice that it had been recommended that notice be given to respondents pursuant to Education Code¹ sections 44949 and 44955 that their services would not be required for the next school year. Each written notice set forth the reasons for the recommendation and, by enclosure of Board Resolution 09-04, noted that the Board had passed a Resolution reducing the certificated staff by 60.1 full time equivalent (FTE) positions.
3. Notice was served by personal service or by certified mail. Certificated employees timely requested, in writing, a hearing to determine if there is cause for not reemploying them for the ensuing school year.
4. 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.
5. Timely Notices of Defense were filed by or on behalf of 38 respondents.
6. Respondents in this proceeding are probationary or permanent certificated employees of the District.

///

¹ All statutory references are to the Education Code.

7. On or before February 19, 2009, the Governing Board of the District was given notice of the Superintendent’s recommendation that 71 employees be given notice that their services would not be required for the next school year and stating valid reasons for that recommendation. Of that number, the Superintendent recommended that 17 be given “precautionary” notices for the purpose of resolving tie-break, skipping and bumping issues.

8. Board Resolution No. 09-04, adopted on February 19, 2009, proposed a layoff of 60.1 FTE certificated employees. On March 12, 2009, on the Superintendent’s recommendation, the Board issued Board Resolution No. 09-10, which proposed a layoff of 63.1 FTE certificated employees instead of the original 60.1². Specifically, Board Resolution 09-10 provided for the reduction or elimination of the following particular kinds of services:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Reduce Music Teaching Services	0.5
Reduce 6th – 8th Grade Counseling Service	2.6
Reduce K – 3rd Classroom Teaching Service	55.0
Discontinue K – 5th Physical Education Teaching Services	1.0
Discontinue “CHEP” ^[3] Teaching Services	1.0
Discontinue Pre-School Teaching Services	<u>3.0</u>
Total Full Time Equivalent Reduction:	63.1

9. Subsequent to adoption of the Board Resolutions Nos. 09-04 and 09-10, the District identified vacancies in School Year 2009-2010 due to retirements, release of temporary teachers, and resignations.

10. Board Resolution 09-05 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 shall be based on the needs of the District and its students.

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. Respondents challenged the accuracy of certain portions of the seniority list.

² Copies of both Resolution 09-04 and Resolution 09-10 were included in the Accusation packets served on each respondent.

³ Camarillo Home Education Program.

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. As is more fully set forth below, certain certificated employees were not properly considered to determine whether they could “bump” more junior employees.

13. The District used information from its seniority list to apply the tie-breaker criteria of Board Resolution No. 09-05.

14. Upon re-evaluation between April 27 and April 29, 2009, the District determined the following:

The District has verified that training conducted before the start of school, if any, was unpaid and not mandatory. Thus, the seniority date of August 25, 2005, as applicable to employees with seniority numbers 283 through 300 (as listed on the seniority list, Exhibit 14) should be August 29, 2005.

The seniority date of August 24, 2006, as applicable to employees with seniority numbers 303 through 319, is correct. Like Cindee Hersey, seniority number 311, the following Respondents had contracts showing the first date of service as August 22, 2006 with the Board approved hire date listed as August 24, 2006: Elizabeth Brockett (304), Jessica Cisneros-Elliott (305), Kayce Betzel (306), and Sara Burke (315). The extra two days added to the contract were intended to include the two days of pre-service training. However, those days of training were unpaid and not mandatory. Accordingly, the first date of paid service is identified correctly as August 24, 2006.

The seniority dates of August 30, 2004, applicable to employee numbers 253 through 275, August 27, 2007, applicable to employee numbers 324 through 341, and August 22, 2008, applicable to employee numbers 344 through 352, are correct.

///

///

///

15. The District provides services for grades kindergarten through eight. Some of the sixth grade classes are taught in the traditional self-contained classroom setting while others, in the middle schools, are taught in what is referred to as the “block-scheduling” program. In the block-scheduling model, a teacher is assigned to teach a certain subject to more than one class for over 50 percent of the school day instead of teaching all subjects to only one class as he/she would do in the self-contained classroom. In addition to a multiple subject credential, a sixth grade block-scheduling teacher must hold an additional credential, credential authorization, or local Board authorization pursuant to Code section 44256, in the subject he/she is assigned to teach. Section 44256, subdivision (b), states in pertinent part:

The governing board of a school district by resolution may authorize the holder of a multiple subject teaching credential or a standard elementary credential to teach any subject in departmentalized classes to a given class or group of students below grade 9, provided that the teacher has completed at least 12 semester units, or six upper division or graduate units, of coursework at an accredited institution in each subject to be taught. The authorization shall be with the teacher's consent.

16. The 12 semester units required in order to be granted a Board authorization to teach in a sixth grade block-scheduling classroom include those credits earned toward the teacher's bachelor's degree.

17. Teachers who hold a Board authorization to teach in a sixth grade block-scheduling classroom hold that authorization for one school year. A teacher who has taught in a sixth grade block-scheduling classroom with a Board authorization, and who wishes to remain in that assignment for the following school year, must re-apply for Board authorization for the upcoming school year. The procedure for re-application is the same as that for a new application.

18. Board authorization pursuant to Code section 44256, subdivision (b) is granted on the basis of the District's need for sixth grade block-scheduling teachers. The Board grants an authorization solely on the recommendation of the District's Director of Certificated Personnel, Julie Cavaliere, Ed.D. Dr. Cavaliere decides whether to recommend a teacher for Board authorization based on whether the teacher has acquired the requisite number of units as reflected on the teacher's transcripts.

19. There is no difference in the sixth grade curriculum between that taught in a self-contained classroom and that taught in the block-scheduling program, and no disparate training or qualifications are necessary for teachers in the two programs. The only difference in sixth-grade education between the two programs is the manner by which instruction is delivered.

///

20. Several of the District’s teachers, who hold clear multiple subject credentials, and who are senior to sixth grade teachers in the block-scheduling program, claim they should be permitted to transition into that program instead of being laid off.

21. In its Resolution No. 09-10, the Board set forth its “skipping” criteria, pursuant to Code section 44955, subdivision (d), as follows:

WHEREAS, Resolution No. 09-04 remains in full force and effect, except that due to the specific need of the District to hire and retain teachers who possess Single Subject Credentials authorizing instruction in all Special Education areas, and Math, Science, Social Science, and Language Arts, the Superintendent and/or his designee is authorized to deviate from terminating certificated employees in order of seniority in instances where the less senior employee possesses a currently valid clear or preliminary California teaching credential as listed above . . .

22. Sixth grade block-scheduling teachers were not included in the Board’s skipping criteria. Therefore, the issue turns on whether elementary teachers in a self-contained classroom may “bump” junior teachers in the block-scheduling program.

23. Code section 44955, subdivision (b), states in relevant part:

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.

24. The Board set forth its competency criteria for the purpose of determining bumping rights in its Resolution No. 09-04 as follows:

WHEREAS, in order for an employee serving in a position identified for reduction or discontinuance to be eligible for reassignment to a position held by an employee with less seniority, the senior employee must be both credentialed and competent to render the service currently being performed by the junior employee pursuant to Education Code Section 44955. “Competency” shall be determined based on current possession of a clear or preliminary credential in the subject matter or grade level and an appropriate EL authorization . . .

///

///

25. The District failed to determine whether any self-contained classroom teacher holding a clear or preliminary multiple subject credential is competent to bump a junior teacher in the sixth grade block-scheduling program and, if so, whether he/she is eligible for Board authorization pursuant to Code section 44256, subdivision (b).

26. Sarah Perry, Paula-Jeanne Feinberg⁴, Jessie Tennessen, and Faith Tarca are sixth grade block-scheduling teachers who may be subject to bumping by more senior teachers who hold multiple subject credentials and are eligible for Board authorization.

27. The District argues that the teachers presently teaching in sixth grade block-scheduling classes may not be bumped because more senior teachers in self-contained classrooms do not presently hold Board authorizations. In its Pre-Hearing Brief, the District wrote:

It has long been held that Districts are not required to base the layoff analysis on credentials or authorizations to teach which a certificated employee might obtain in the future or in fact does obtain after layoff notices are issued. (*Degener v. Governing Bd.* (1977) 67 Cal.App.3d 689, 698 [136 Cal.Rptr. 801].) Indeed, the logic [is] quite clear. School boards may only authorize teachers to teach within their credentials held. When a district prepares layoff notices, it must analyze the number of employees to be laid off, the seniority order of employees, and the credentials and qualifications of the individuals. If a certificated layoff is to occur, districts must give notice to the affected employees by March 15. Once March 15 passes, a district may not add to [the] layoff list or notify additional employees that they may be terminated. (*Ibid.*) For the same reason, the analysis traditionally has focused on the current assignments being performed and not what the assignment might be in the ensuing school year.

///

⁴ At the hearing, Dr. Cavaliere testified that Paula-Jeanne Feinberg has a Board authorization to teach English and social science in the block-scheduling program, but is teaching math and science in that program instead. Dr. Cavaliere explained that Ms. Feinberg lacks the required number of credits for Board authorization in the math/science block, and is therefore mis-assigned. Respondents argue that Ms. Feinberg should not be permitted to remain in her current position because of her lack of Board authorization eligibility. However, Ms. Feinberg's eligibility for Board authorization to teach math/science in the block-scheduling program is not at issue in this case. The issue to be decided is whether a more senior, properly certificated and competent teacher may bump a junior sixth grade block-scheduling teacher, regardless of whether the latter is eligible for Board authorization.

There will be no dispute that none of the Respondents potentially seeking to bump into block scheduled assignments *currently possess* single subject credentials or local authorizations to teach the subjects being taught by more junior employees in a departmentalized setting. Even if these Respondents consented to such assignments, any such Respondent would be mis-assigned if placed in any of the current block scheduled assignments. Whether they may be able to obtain Board authorizations in the future is not considered, and given the discretionary nature of board authorizations, Respondents certainly cannot claim some “entitlement” to receive such authorizations under any circumstances. Accordingly, they should not be permitted to bump into these positions. (Emphasis in text.) (Exhibit 19, page 9.)

28. The District’s argument is not persuasive for the following reasons:

a. The District’s reliance on *Degener v. Governing Board, supra*, is misplaced. In *Degener*, the appellant teacher claimed he attained seniority over another teacher after he earned a credential that would place him ahead of the other teacher on the seniority list. However, he earned that credential after his district issued the preliminary notices of layoff. The Court ruled that the seniority determination must be made based on the credential(s) held by a teacher on or before March 15. That is not applicable to the case *sub judice* because, unlike *Degener*, this case does not involve a credential issued by the State Board of Education. It involves a local waiver of a State-issued credential by a governing board.

b. The Board authorization is valid for only one school year. At the end of the school year, every teacher potentially eligible for a Board authorization stands on equal footing. Those who have not taught in a block-scheduling classroom, and those who have done so, must apply for the position through the very same procedure. To the extent that Board authorization is discretionary, that discretion applies equally to teachers who have spent the school year in a self-contained classroom and those who have spent it in a block-scheduling classroom.

c. To the extent that the Board has discretion in deciding which teachers are given Board authorization, it does not exercise that discretion. Dr. Cavaliere testified that the Board bases its decision on her recommendation, and that the Board has never denied an authorization she has recommended. Dr. Cavaliere bases her decision whether to recommend a teacher for Board authorization solely on the teacher’s transcripts.

d. The Board did not consider sixth grade block-scheduling assignments to require the type of special training and experience necessary to teach sixth grade that would justify the skipping of teachers currently in that assignment. (See, Ed. Code, § 44955, subd. (d).)

e. The Board limited its competency criteria to “current possession of a clear or preliminary credential in the subject matter or grade level and an appropriate EL authorization.” Thus, teachers with a clear or preliminary multiple subject credential and appropriate EL authorization are eligible to teach sixth grade, provided they have accrued the number of credits necessary for a Board authorization.

f. Were the District’s argument valid, a great number of California teachers, presently eligible to bump junior colleagues, would be precluded from doing so simply because they are not presently teaching in the junior colleague’s subject area. For example, a teacher with single subject credentials in English and science, who is presently teaching English, could not bump a more junior science teacher because, albeit correctly certificated and competent, the more senior teacher is not presently teaching a science class. In the instant case, some self-contained classroom teachers are properly certificated and competent to bump a junior teacher, and may be eligible for Board authorization, but the Board argues that they cannot bump a junior teacher in a block-scheduling class because they do not presently teach in that program and do not presently hold a Board authorization. In light of the facts that (1) Board authorization is valid for only one school year, (2) the curriculum is the same in both programs, and (3) no special training or qualifications are required for the transition, the District’s argument is not convincing.

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 Resolutions 09-04 and 09-10 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 neither arbitrary nor capricious, and was a proper exercise of its discretion. 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 section 44949.

3. A District may reduce services within the meaning of 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.)

///

///

4. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. Except as referenced in Factual Findings 14 through 28, above, the District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued.

5. Except as referenced in Factual Findings 14 through 28, above, no junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

6. 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.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.)

7. The District mis-calculated the seniority dates for certificated employees Nos. 283 through 300. The District shall re-calculate the seniority list in accordance with the correct seniority dates.

8. The District failed to take into account the bumping rights of self-contained classroom teachers with multiple subject credentials who may be eligible for Board authorizations to teach in the sixth grade block-scheduling program. The District shall re-evaluate those bumping rights forthwith in proper compliance with Education Code section 44955, subdivision (b), and shall retain the four most senior employees who are properly certificated and competent to teach in the sixth grade block-scheduling program, and who are also eligible for Board authorization to teach in that program.

9. All other contentions and claims not specifically mentioned were considered and are denied.

ORDER

1. The District shall comply with Legal Conclusions 7 and 8.

///

///

///

2. Except as noted above, notices shall 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 to respondents in inverse order of seniority.

DATED: May 4, 2009

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings