

BEFORE THE  
GOVERNNG BOARD OF THE  
SWEETWATER UNION HIGH SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:  
  
Respondents Listed on Exhibit "A"

OAH No. 20099030721

**PROPOSED DECISION**

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in Chula Vista, California on April 16, 2009.

E. Luis Saenz, Esq. and Marie C. Mendoza, Esq., Garcia Calderon Ruiz, LLP, represented Rita Sierra Beyers, Assistant Superintendent, Human Resources.

There was no appearance by or on behalf of Respondents Elizabeth Garcia, Oli Hadi and/or Tich Tran.

Fern M. Steiner, Esq., Tosdal Smith Steiner & Wax, represented Respondents listed on Exhibit "A" except for Respondents Elizabeth Garcia, Ola Hadi and Tich Tran.

The matter was submitted on April 20, 2009.<sup>1</sup>

**SUMMARY OF PROPOSED DECISION**

The Governing Board of the Sweetwater Union High 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," "skipping" and breaking ties between/among employees with the same first dates of paid service. Overall, the selection process was in accordance with the requirements of the Education Code.

---

<sup>1</sup> The hearing occurred on April 16, 2009. The record remained open for receipt of briefs. On April 20, 2009, the parties filed simultaneous briefs. The Closing Brief for the Sweetwater Union High School District was marked Exhibit 14; Posthearing Brief of Respondents was marked Exhibit C.

## FACTUAL FINDINGS

1. Rita Sierra Beyers made and filed Accusation, dated March 23, 2009, against Respondents, listed on Exhibit "A", in her official capacity as Assistant Superintendent, Human Resources (Assistant Superintendent), Sweetwater Union High School District (District).
2. Respondents are probationary or permanent certificated employees of the District.
3. The Assistant Superintendent notified the Governing Board of Sweetwater Union High School District (Board) and Respondents that she recommended that notice be given to Respondents that their services would not be required for the 2009-2010 school year.

On March 2, 2009, the Board adopted Resolution number 3876 that reduced or eliminated particular kinds of services for the ensuing school year and established skipping and tie-breaker criteria.

Respondents were served on or before March 15, 2009.

The written notice of termination stated that Respondents' services would not be required for the 2009-2010 school year and set forth the reasons for the recommendation. The recommendation that Respondents be terminated from employment was not related to competency. In addition, the notice advised Respondents of the right to hearing, that the request for hearing must be delivered to the Superintendent's office no later than March 20, 2009 and that the failure to request a hearing would constitute waiver of the right to a hearing.

An Accusation, Notice to Respondent, blank Notice of Defense form, relevant sections of the Education Code and Government Code was served on Respondents in a timely manner.

With the exception of Respondents Francine Moreno (Respondent Moreno), Jennifer Wayne-Schaeffer (Respondent Wayne-Schaeffer) and Suriya Stewart (Respondent Stewart), Respondents filed a timely Notice of Defense. The District waived objection to failure to timely file a Notice of Defense by Respondents Moreno, Wayne-Schaeffer and Stewart.

4. All prehearing jurisdictional requirements were satisfied.
5. There was no appearance by or on behalf of Respondents Elizabeth Garcia, Ola Hadi and/or Tich Tran.

6. On March 2, 2009, the Board adopted Resolution number 3876 and thereby took action to reduce or eliminate the following particular kinds of certificated services commencing the 2009-2010 school year as follows:

Particular Kinds of Services	Number of Full-Time Equivalent Positions (FTEs)
Art	8.7
English	24
Physical Education	22.3
Social Science	25
Spanish	13
Counselors	15
Nurses	1
TOTAL FTEs	109

The proposed reductions totaled 109 full-time equivalent (FTE) positions.

7. Prior to hearing, the District modified the number of the proposed reductions; as a result, the District rescinded notices issued to 54 Respondents. The remaining, participating Respondents submitted both (a) a Request for Hearing after receiving a Notice of Recommendation that Services Will Not Be Required and (b) a Notice of Defense after receiving an Accusation and **did not** receive a notice from the District rescinding the Notice of Recommendation that Services Will Not Be Required and are listed on Exhibit "A".

8. During the hearing, the District rescinded layoff notices previously issued to Respondents Bradford Burton, Daryl Butterfield, Leslie Ellis, Daniel Kray, Ella Rogosin, Laurie Rollins and Robert Tucker III.

9. The District considered all known attrition, including resignations and retirements, in determining the actual number of final layoff notices to be delivered to its certificated employees.

10. The Assistant Superintendent was responsible for implementing the technical aspects of the layoff. The District developed a seniority list that contained, among other matters, the teacher's name, seniority date, position/site, status and active credential list.

The seniority date was based on the first date of paid service rendered.<sup>2</sup> A teacher hired as a probationary employee who worked as a substitute or temporary employee for at least 75 percent of the school days during the previous year and who had performed the duties normally required of a certificated employee of the school district was deemed to have served a complete school year as a probationary employee if that individual was employed as a probationary employee for the following school year. The individual was entitled to have that earlier year counted as a year of probationary service. The prior year was “tacked” on for seniority purposes but only one year could be tacked.<sup>3</sup>

11. The District used the seniority list to develop a proposed order of layoff and “bumping” list to determine 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 that would entitle him or her to “bump” other junior employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions 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.

12. By adoption of Resolution No. 3876, dated March 2, 2009, the Board elected to skip and “... retain any certificated employees, regardless of their seniority, to the extent one or more of assignments meet any of the following criteria:

1. Employees, who possess a credential authorizing the teaching of special education classes, are teaching one or more special education classes for the District in the 2008-2009 school year, and are expected to teach one or more special education classes for the District in the 2009-2010 school year.
2. Employees, who possess a BCLAD<sup>4</sup> or equivalent, and are expected to teach one or more courses requiring a BCLAD or equivalent for the District in the 2009-2010 school year.
3. Employees, who possess a credential authorizing the teaching of math classes, are teaching one or more math classes for the District in the 2008-2009 school year and are expected to teach one or more math classes for the District in the 2009-2010 school year.
4. Employees, who possess a credential authorizing the teaching of science classes, are teaching one or more science classes for the District in the

---

<sup>2</sup> Education Code section 44845.

<sup>3</sup> Education Code section 44918

<sup>4</sup> Bilingual, Crosscultural, Language and Academic Development Certificate

2008-2009 school year, and are expected to teach one or more science classes for the District in the 2009-2010 school year.

Employees who meet any of the foregoing criteria for some but not all of their assignment(s) shall be retained only as to that portion of the assignment(s) in 2008-2009 that meets the foregoing criteria.

The Superintendent or his designee is authorized to determine which employees qualify to be “skipped” from the Reduction in Force and to determine the manner in which the foregoing criteria shall be applied to each employee.”

13. Paragraph G of Board Resolution 3876 states:

“In accordance with California Education Code section 44955(b), no permanent employees’ services 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. “Certificated” shall mean that an employee possesses a credential issued by the California Commission on Teacher Credentialing that authorizes him/her to render instruction or services in the subject matter area in which he/she claims to be entitled to render instruction or services, or has been lawfully exempted or received a waiver from the credential requirement. The criteria set forth in Exhibit C to this Resolution shall be used to determine whether an employee is competent to render services, and such criteria are incorporated as though fully set forth herein.”

Board Resolution 3876, Exhibit “C” states:

“‘Competent’ shall be defined as follows: (1) The employee has actually rendered instruction or services in the subject matter area in which s/he claims to be entitled to render instruction or services in or after the 2001-02 school year, whether for the District or another school district; and (2) the employee possesses a BCLAD, CLAD<sup>5</sup>, SB 1969, or other certificate authorizing him/her to instruct English Learner students.

Additionally, an employee who, as of March 13, 2009, possesses a BCLAD or its equivalent shall be deemed ‘competent’ to serve in any assignment for which possession of a BCLAD is required, regardless of whether the employee has previously served in such an assignment, provided the employee possesses all other certifications necessary to serve in such assignment.”

14. The District may deviate from terminating a certificated employee in order of seniority if the District demonstrates a need for personnel to teach a specific course or course

---

<sup>5</sup> Crosscultural, Language, and Academic Development Certificate

of study, and 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.<sup>6</sup>

15. The District skipped and retained certificated personnel who hold BCLAD Certificates or equivalent and are expected to teach one or more courses requiring a BCLAD or equivalent in the 2009 – 2010 school year.<sup>7</sup> Considering the foregoing, Respondents argued that the District improperly noticed certificated employees who hold CLAD Certificates.

BCLAD and CLAD Certificates authorize teachers to provide instruction to English Learners (ELs), Instruction for English Language Development and Specially Designed Academic Instruction Delivered in English (SDAIE). Only a BCLAD Certificate authorizes the teacher to provide “Content Instruction Delivered in Primary Language”.<sup>8</sup>

Given the facts in the foregoing paragraph, before the District can use BCLAD certification as a competency criterion for skipping purposes, it must establish that the junior teachers will be working with students where “Content Instruction Delivered in the Primary Language” will be part of the particular services junior teachers are being retained to perform. *Alexander v. Board of Trustees of the Delano Joint Union High School District* (1983), 139 Cal.App.3d 567, 188 Cal. Rptr. 705.

In this case, both the District’s Assistant Superintendent and Sandra Huevo, the District’s Director of Certificated Personnel (Director) testified that the District has a need for certificated personnel with BCLAD certification. The skipped employees are expected to teach one or more classes during the 2009 – 2010 school year that will require the possession of BCLAD certification. Approximately 40 percent of the District’s students are ELs; these students can be found at every grade level and in every subject taught by the District. The District has had a historical and has an ongoing need for teachers with single subject credentials and BCLAD certification.

No evidence was offered to establish the number or percentage students that require instruction in their primary language, the number or percentage of classes that require “Content Instruction Delivered in the Primary Language”, the number or percentage of the shortage of teachers that have BCLAD Certificates. The District offered no evidence to distinguish between BCLAD and CLAD Certificates and the reason that teachers who hold

---

<sup>6</sup> Education Code section 44955, subdivision (d)

<sup>7</sup> Board Resolution No. 3876 sets forth both “competency” and “skipping” criteria that require a BCLAD Certificate or equivalent. As between the two, the Administrative Law Judge relied on the “skipping” rather than competency criterion because it is more specific and is supported by the evidence.

<sup>8</sup> In their closing brief, Respondents requested that the Administrative Law Judge take judicial notice of the information regarding BCLAD and CLAD Certificates obtained from the Commission on Teacher Credentialing. Without objection by the Assistant Superintendent, pursuant to Government Code section 11515, official notice is taken of these facts.

CLAD Certificates are not competent to meet its needs. The District did not offer evidence to establish that the District is out of compliance with State standards regarding EL instruction or that certificated personnel with BCLAD certification are required to comply with State standards.

Considering the evidence in the record, the District established the need for certificated personnel who are authorized to provide instruction to ELs and that the retained junior teachers who hold BCLAD Certificates will, in fact, teach one or more courses in the 2009-2010 school year that require BCLAD certification. However, the District failed to establish that teachers with CLAD Certificates are not certificated and competent to meet the needs of EL students in the District.

Given the facts in the foregoing paragraphs of Findings 12, 13, 14 and 15, any Respondent who holds a CLAD Certificate, received a layoff notice and is senior to a certificated employee who was skipped because the junior teacher holds a BCLAD Certificate was improperly noticed; the notice should be rescinded, and said Respondent retained.

16. Respondent Gary Gilbert (Respondent Gilbert) argued that the District improperly issued him a layoff notice because a more junior teacher is being retained to perform services that he is certificated and competent to render.

Respondent Gilbert's seniority date is August 29, 2006; he is a permanent teacher with the District and holds a Single Subject Credential in English and Spanish and a CLAD Certificate. He is certificated and competent to teach English.

Jennifer Koob (Koob) received a layoff notice that was rescinded by the District prior to hearing. Her seniority date is January 8, 2007; she is a probationary employee with the District who holds a Preliminary Single Subject Credential in Introductory Art and a Single Subject Credential in English that authorizes her to teach English. The District anticipates that Koob will be assigned to teach English and Health Science during the 2009 – 2010 school year.

No evidence was offered to explain or justify rescinding the layoff notice to and retaining a more junior employee (Koob) to provide services that a more senior employee (Respondent Gilbert) is certificated and competent to render.

Given the facts in Finding 16, the layoff notice issued to Respondent Gilbert should be rescinded, and he should be retained.

17. In compliance with Education Code section 44955, subdivision (b), by adoption of Resolution No. 3876, dated March 2, 2009, the Board adopted tie-breaker criteria to determine the order of termination of employees with the same seniority date as follows:

“Employees sharing the same first date of paid probationary service to the District shall be awarded tiebreaking points on the following basis:

<b>Criterion</b>	<b>Points</b>
• Subject matter authorizations, including supplemental authorizations, on credential(s) authorizing service for the District	1 per authorization
• Possession of credential(s) authorizing service for the District	3 for each professional clear 2 for each preliminary 1 for each of any other credential
• Column placement on salary schedule	1 per applicable column
• Possession of Bilingual Cross-Cultural Language and Development certificate	1
• Prior school year(s) of service to the District in certificated or classified position	1 per school year or fraction thereof

Employees with a greater number of points shall be considered more senior than employees with a fewer number of points, for purposes of determining order of layoff and order of reemployment.

If application of the foregoing criteria fails to resolve a tie among two or more employees, among the employees who remain tied the employee with the earliest date of issuance of a preliminary or professional clear credential shall be considered the more senior employee. As among employees who remain tied who have never obtained a preliminary or professional clear credential, the employee with the earliest date of issuance of an intern credential shall be considered the more senior employee. As among employees who remain tied who have never obtained an intern, preliminary, or professional clear credential, the employee with the earliest date of issuance of an emergency or pre-intern credential, or short-term staff permit, shall be considered the more senior employee.

The Superintendent, or his designee, is authorized to determine the number of tiebreaking points to be awarded to each employee and to determine the manner in which the tiebreaking criteria shall be applied to each employee.”

17. Between the employees who first rendered paid service to the District on the same date, the Board determined their order of termination solely on the basis of the needs of the District and its students. The order of termination is based on the needs of the District and its students.

18. The services that the District proposed to reduce were “particular kinds of services” that can be reduced or discontinued within the meaning of Education Code section

44955. The Board's decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious but constituted a proper exercise of discretion.

19. The District's reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

20. With the exception of Respondents described in Findings 15 and 16, 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. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in these sections are satisfied.

2. 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)

3. Cause exists under Education Code sections 44949 and 44955 for the Sweetwater Union High School District to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuance of particular kinds of services is related solely to the welfare of the schools and the pupils thereof.

4. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he/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)

5. With the exception of Respondents described in Findings 15 and 16, no employee with less seniority than any Respondent is being retained to render a service which any Respondent is certificated and competent to render.

### ORDER

1. The layoff notice issued to Respondents Bradford Burton, Daryl Butterfield, Leslie Ellis, Daniel Kray, Ella Rogosin, Laurie Rollins and Robert Tucker III is rescinded. The Accusation against Respondents Bradford Burton, Daryl Butterfield, Leslie Ellis, Daniel Kray, Ella Rogosin, Laurie Rollins and Robert Tucker III is dismissed.

2. The layoff notice issued to any Respondent who holds a CLAD Certificate who is senior to a teacher with less seniority who is being retained because the junior teacher holds a BCLAD Certificate is rescinded; the Accusation against each of these Respondents is dismissed.

3. The layoff notice issued to Respondent Gary Gilbert is rescinded. The Accusation against Respondent Gary Gilbert is dismissed.

4. Except as provided in the foregoing paragraphs of this Order, the Accusation served on Respondents listed on Exhibit "A" is sustained. Notice shall be given to Respondents listed on Exhibit "A" before May 15, 2009 that their services will not be required for the 2009-2010 school year because of the reduction or discontinuance of particular kinds of services.

5. Notice shall be given in inverse order of seniority.

DATED: \_\_\_\_\_

---

VALLERA J. JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings

**Exhibit “A”**  
**Teacher Layoff Hearing**  
**Sweetwater Union High School District**  
**OAH No. 2009030721**  
**Revised List of Respondents**  
**4/15/09**

1	Acosta	Bobbi
2	Acosta	Jesus
3	Burton	Bradford
4	Bush	Renata
5	Butterfield	Daryl
6	Casas	Kristy
7	Croymans	Amber
8	De Leon	Lorena
9	Delos Reyes	Sarah
10	Degele	Melinda
11	Dominguez	Rick
12	Ellis	Leslie
13	Esperon	Eric
14	Felix	Oscar
15	Florence	Aimee
16	Garcia	Elizabeth
17	Garrison	Steven
18	Geyer	Bertha
19	Gilbert	Gary
20	Groff	Bruce
21	Hadi	Ola
22	Huerta	Gisela
23	Huerta	Sara
24	Juarez	Thomas
25	Kray	Daniel
26	Lambert	Matthew
27	Langridge	Heather
28	Lawler	Mary
29	Lopez	Luis
30	Love Jr	Richard
31	Lucero	Lorena
32	Marks	Heidi
33	Moreno	Francine
34	Norris	Jill
35	Norriss	Beverly
36	Olsen	Allyn
37	Orphanos	James
38	Ortiz	Rene
39	Rector	Robert
40	Reisenfeld	Jason

41	Rico	Vanessa
42	Rogosin	Ella
43	Rollins	Laurie
44	Salas	Teresa
45	Santoy	Rosa
46	Sherman	Christy
47	Sias	Rosamaria
48	Sias	Roberto
49	Skinner	Jessica
50	Tran	Tich
51	Tucker III	Robert
52	Tulao	Ronniel
53	Walton	Randy
54	Wayne-Schaeffer	Jennifer
55	Young	Lynette
56	Stewart	Syriya