

BEFORE THE
GOVERNING BOARD
WILSONA SCHOOL DISTRICT
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

In the Matter of the Layoff of:

Dolores A. Abrams, and other
certificated employees of the Wilsona
School District,

Respondents.

OAH Case No. L2009030802

PROPOSED DECISION

Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 7, 2009, in Lake Los Angeles, California.

Peter C. Carton, Attorney at Law, represented David Andreasen, Superintendent of the Wilsona School District (District).

Richard Schwab, Attorney at Law, represented Dolores A. Abrams (Abrams), Maria G. Aguilar, Michael Aktutay, Tracie Banner, Lorrie J. Bauder, Lori Bernfeld, Diana L. Bertram, Rachelle Briggs, Tina Escue (Escue), Kristin Fall, Keith Faulkner, Ruth Guess (Guess), Lorrie Jones (Jones), Kathryn Kendrick-White (Kendrick-White), Kimberli Lengning (Lengning), Kyela Love, Pat McGuire, Darcel A. Nilsson, Jodene J. Paris, Deborah Poor, Danielle L. Portillo, Cecilia Rico, Marcia Saldana, Wendee K. Schoonover, Kelly Shuey (Shuey), Anne M. Stanley, Glenda Steele (Steele), Raymond Strasser-King (Strasser-King), and Cecilyn Zoubek (Respondents).

District has decided to reduce or discontinue certain educational services and has given Respondents notice of its intent not to reemploy them for the 2009-2010 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2009-2010 school year.

Oral and documentary evidence was presented at the hearing, and the matter was submitted for decision.

FACTUAL FINDINGS

1. Superintendent Andreasen filed the Accusation in his official capacity.
2. Respondents are certificated employees of the District.

3. On March 4, 2009, the Governing Board of the District (Governing Board) adopted Resolution Number 2008-09-12, reducing or discontinuing the following services for the 2009-2010 school year:

<u>Service</u>	<u>FTE¹ Reduction</u>
Self-Contained Classroom Instruction, Grades K-5	15.00
Support programs, Grades K-5	
EL Coordinator	.50
Literacy Coach	2.00
Elementary Administrative Assistant (teacher position)	1.50
Core Team Instruction, Middle School, Grades 6-8	
Language Arts/Social Studies	9.00
Math/Science	4.00
Science	1.00
Math	1.00
Physical Education	2.00
Electives	
Industrial Technology	1.00
Remedial math	1.00
District-Wide Programs	
Special Day Class	1.00
Resource Specialist Program	1.00
Psychologist	1.00
Administration	2.00
Wilsona Achievement Academy, Self-Contained Classroom Instruction, Grades 1-8	<u>4.00</u>
Total	47.00

4. Superintendent Andreasen thereafter provided written notice to the Governing Board and to Respondents that he recommended the termination of Respondents' services for the 2009-2010 school year due to the reduction of particular kinds of services.

5. On March 9 through 13, 2009, the District provided notice to Respondents that their services will not be required for the 2009-2010 school year due to the reduction of particular kinds of services. Respondents filed timely requests for hearing.

¹ Full-time equivalent position.

6. On or about March 25, 2009, the District filed and served the Accusation and other required documents on Respondents. Respondents thereafter, through their attorney, timely filed a joint notice of defense, seeking a determination of whether cause exists for not reemploying them for the 2009-2010 school year.

7. All prehearing jurisdictional requirements have been met.

8. The services set forth in factual finding number 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.²

9. The layoff of Respondents and other certificated staff who did not request a hearing will reduce the total number of certificated employees by approximately 30 percent and will result in increased class sizes. However, the Governing Board's decision to reduce or discontinue the services set forth in factual finding number 3 is not arbitrary or capricious but is rather a proper exercise of the District's discretion.

10. The reduction of services set forth in factual finding number 3 is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

11. In determining the number of layoff notices to issue, the District took into account the anticipated retirement of one certificated employee, and expects to take into account the possible retirements of two others.

12. On March 2, 2009, the Governing Board adopted Resolution 2008-09-13, setting forth its tie-breaking criteria for employees with the same seniority date. In pertinent part, the Resolutions provides: "THIS BOARD RESOLVES that the order of termination as between employees who first rendered paid service to the District on the same date shall be based solely on the needs of the District and the students thereof. The specific criteria used in determining this need shall be as follows, but not necessarily listed in order of importance: [¶] Credentialing [¶] Experience [¶] Special Education Needs [¶] Competence [¶] Evaluations [¶] NCLB Highly-Qualified status [¶] BCLAD/CLAD/Bilingual Credential Needs [¶] Training [¶] Extracurricular Activities."

13. Superintendent Andreasen applied the tie-breaking criteria to select Respondents Abrams, Lengning, and Jones for layoff, choosing to retain Bruce Galler (Galler), Joan Hammond (Hammond), and LaShone Scott (Scott). All six have the seniority date of August 23, 2002. Abrams started working for the District as a long term substitute, in March 2002, and would like this service to be added to her seniority; she was not provided any written statement that she was employed as a temporary employee when first hired.

² All further references are to the Education Code.

Superintendent Andreasen explained that he chose to retain Galler, Hammond, and Scott because they had multiple credentials. Galler holds a single subject (social studies) credential and a supplemental authorization in English. Hammond holds a multiple subject credential and a supplemental authorization in English. Scott holds a multiple subject credential and supplemental authorizations in English and mathematics. Respondents Abrams, Lengning, and Jones, on the other hand, hold multiple subject credentials, but no supplemental authorizations or additional credentials. Respondents Adams, Lengning, and Jones have sufficient post-graduate coursework to obtain supplemental authorizations, but had not actually obtained them at the time of the hearing. Gallen is presently teaching an assignment that requires his supplemental authorization, but Hammond and Scott are not.

Superintendent Andreasen did not employ any point system or other verifiable objective system ranking the six teachers on the basis of all pertinent criteria. He testified that all six teachers were equal on two criteria, highly qualified status within the meaning of the federal law No Child Left Behind and bilingual teaching ability. He did not know how all six teachers compared with respect to the other criteria (experience, special education, competence, evaluations, training, or extracurricular activities). Respondents Abrams, Lengning and Jones provided evidence at the hearing regarding the criteria not examined by Andreasen, but no evidence was presented regarding the three retained teachers.

Respondents Abrams, Lengning, and Jones are certificated and competent to teach in a self-contained elementary classrooms, services Hammond and Scott are being retained to perform.

14. a. Respondent Steele was hired on August 19, 1996. She holds a multiple subject credential and a library media services credential. She has worked in multiple assignments, including as an elementary classroom teacher and as a librarian (she is the only certificated employee in the District credentialed to work as a librarian).

b. Respondent Steele left her employment in September 2002 to pursue a doctorate degree at the University of Nevada, Las Vegas. Since the District did not allow her a leave of absence to pursue her studies, Respondent Steele resigned her employment. However, in late March 2003, then Superintendent McNabb asked her to return to teach that year, as the teacher who had taken Respondent's Steele's class had unexpectedly become seriously ill. McNabb promised to treat Respondent Steele's time away as a leave of absence, with no loss of benefits or seniority. In reliance of McNabb's statements, and desiring to help the District, Respondent Steele returned to teach her old class, starting in early April 2003. As a result of her sudden departure, Respondent Steele did not receive credit for the semester in progress and was financially penalized for breaching her one-year apartment lease in Las Vegas, Nevada. Respondent Steele did not receive any written documentation of McNabb's promise or of her status on her return.

c. Respondent Steele received a layoff notice for the 2008-2009 school year. It was then that she first realized that the District had changed her seniority date from August 19, 1996, to August 22, 2003. She immediately brought the matter up to McNabb, who claimed he only intended to offer the same pay but not to the old seniority. Respondent Steele persisted that she had been promised a leave of absence in place of the resignation. McNabb stated that they would discuss the matter later. They never did, as Respondent Steele was retained to teach for the 2008-2009 school year and McNabb retired. When Superintendent Andreasen sought to confirm and update District records in preparation for the 2009-2010 layoff, Respondent Steele again brought up the fact that she had been promised a rescission of her earlier resignation.

d. Respondent Steele is certificated and competent to teach in a self-contained elementary classroom, services several employees hired after August 19, 1996, are being retained to perform.

15. Respondent Escue has been assigned a seniority date of October 10, 2002, which she disputes. She worked as a substitute during the entire 2001-2002 school year, starting in September 2001. At the start of the following year, on September 11, 2002, she was informed that her assignment was that of a long-term substitute. On September 11, 2002, she was given her assigned class, but told that she had to wait until enrollment stabilized to receive her probationary employee contract. Such contract, the first written documentation of her status, was offered on October 10, 2002, and Respondent Escue continued to teach the same class. She holds a multiple subject credential and supplemental authorizations in English and home economics, and is certificated and competent to teach classes that employees hired after September 2001 are being retained to teach.

16. Respondent Strasser-King holds a clear multiple subject credential. He started working in April 2003, and was informed by District managers that his employment was temporary, but did not receive any employment contract or other document regarding his employment status. Respondent Strasser-King worked until the end of the 2003-2004 school year, and was re-hired, as a probationary employee, on January 21, 2004, the date the District views as his seniority date.

17. Respondent Guess also contests her seniority date. In February 2003, she started working as a long-term substitute, although she was not informed in writing of her temporary status at that time. She was retained in a probationary capacity on August 22, 2003.

18. The District did not issue a layoff notice to its most junior employee, Romayn Jones, because she provides a service, speech therapy, which is not being reduced or discontinued and which no other Respondent is certificated or competent to render.

19. The District is reducing special education services by 2 FTE positions, and has

given layoff notices to its two most junior teachers who can teach the subject matter, Respondent Kendrick-White, who has a seniority date of August 3, 2007, and Respondent Shuey, who has a seniority date of August 25, 2006.

20. The District did not retain any certificated employee junior to Respondents Maria G. Aguilar, Michael Aktutay, Tracie Banner, Lorrie J. Bauder, Lori Bernfeld, Diana L. Bertram, Rachelle Briggs, Kristin Fall, Keith Faulkner, Guess, Kendrick-White, Kyela Love, Pat McGuire, Darcel A. Nilsson, Jodene J. Paris, Deborah Poor, Danielle L. Portillo, Cecilia Rico, Marcia Saldana, Wendee K. Schoonover, Shuey, Anne M. Stanley, Strasser-King, or Cecilyn Zoubek, to render a service which these Respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 7.

2. The services listed in factual finding number 3 are determined to be particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 3 and 8.

3. Cause exists under sections 44949 and 44955 for the reduction of the particular kinds of services set forth in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 10. Respondents argue that the drastic reductions in services and the increases in class sizes resulting from the Governing Board's decision to reduce or discontinue services is not consistent with the welfare of the District and its pupils and that, therefore, the entire layoff should be invalidated. However, no evidence was presented that services will be reduced below mandated levels, and the Governing Board has properly exercised its discretion in the face of funding challenges. Moreover, Respondents have not presented any authority in support of their argument, in the existing circumstances, that the entire layoff should be invalidated because of its likely impact on services.

4. Section 44955, subdivision (c) provides, in pertinent part: "[t]he governing board shall make assignments and reassignments in such manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render." The statute, in subsection (b), gives preference to permanent employees: "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."

5. Section 44955, subdivision (b), provides that, "[a]s between employees who first rendered paid service to the district on the same date, the governing board shall determine the

order of termination solely on the basis of the needs of the district and the students thereof. . . .” The tie-breaking criteria adopted by the Governing Board is based on the needs of the District and its students and, therefore, may be used to rank teachers with a seniority date of August 23, 2002. However, the criteria were not properly applied to break the ties involving Galler, Hammond, and Scott, and Respondents Abrams, Lengring, and Jones.

The Governing Board directed the superintendent to determine the order of termination by application of nine criteria. Superintendent Andreasen applied some of the criteria, but did not explain the reason(s) for not applying others. Because the Governing Board resolution did not rank the criteria in order of importance or gave them any particular weight, it is necessary for the superintendent to clearly explain how all the criteria were applied, or the reason(s) they were not applied, both to ensure adherence to the statutory requirement that application be consistent with the needs of the District and its pupils as well as to assure all affected employees that the criteria were fairly and reasonably applied. In this case, Superintendent Andreasen did not employ any objective ranking of the employees by all pertinent criteria. In fact, other than the criteria on which the employees differed, he did not state what, if any, other criteria were evaluated or deemed relevant. Nor did he know how the six individuals ranked in terms of six of the nine criteria. Thus, it is not known whether three teachers were retained based on a less important criteria or whether the Respondents scored higher on more important criteria. In these circumstances, the District did not establish that Respondents Adams, Lengring, or Jones should lose the tie-breaker to Gallen, Hammond, or Scott.

Superintendent Andreasen did not apply the tie-breaking criteria at the hearing, and there is insufficient record evidence for the undersigned to fairly apply the criteria. Accordingly, cause does not exist to terminate the employment of Respondents Adams, Lengring, or Jones, while retaining three equally senior and certificated employees.

6. The doctrine of equitable estoppel is available in certain circumstances to those who detrimentally rely on representations made by another. In order for equitable estoppel to apply, the following requirements must be met: “(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true facts; and (4) he must rely upon the conduct to his injury.” (*Lentz v. McMahan* (1989) 49 Cal.3d 393, 399, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) Although the doctrine should be applied against the government “where justice and right require it,” it cannot be applied against the government where to do so would effectively nullify a “strong rule of policy, adopted for the benefit of the public” (*City of Long Beach v. Mansell, supra*, 3 Cal.3d at p. 493.) Nor can estoppel be applied where to do so would enlarge the power of a governmental agency or expand the authority of a public official. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28.)

Respondent Steele has established the elements of equitable estoppel. Former Superintendent McNabb asked Respondent Steele to return to work and told her that her

absence would be treated as a leave of absence, which leave would not result in a break in service. He was fully apprised of the facts and she did not have any contrary information. Respondent Steele relied on McNabb's representations, which resulted in loss of educational credit and financial injury. Allowing the District to rescind Respondent Steele's resignation neither nullifies a strong public policy nor expands an agency's authority because it is within the District's power to decide whether to accept its employees' resignations before the end of the school year (§ 44930) and whether to permit leaves of absence (§ 44962).³ Moreover, both McNabb, in asking for her return to the District, and Steele, in accepting, acted out of concern for the pupils of the District. Therefore, the District is estopped from denying what its duly appointed superintendent promised, rescission of the prior resignation and conversion into a leave of absence. Respondent Steele's seniority date is August 19, 1996, and because she is more senior than many employees retained to provide elementary school teaching services, services which Respondent Steele is certificated and competent to perform, cause does not exist to terminate her services for the 2009-2010 school year.

7. The Education Code (Code) permits certificated employees to be classified in one of four ways: permanent, probationary, substitute, or temporary. (*Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, 916 (*Kavanaugh*)). A certificated employee is classified as permanent, i.e., acquires tenure, if, after having been employed for two complete successive school years in a position requiring certification qualifications, he or she is reelected for the following year. (§ 44929.21, subd. (b); *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1278-1279 (*Bakersfield*)). Probationary employees are "those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees." (§ 44915.) Substitutes are "those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service. . . ." (§ 44917.) Temporary employees are those requiring certification qualifications, other than substitute employees, who are employed for limited assignments, as defined in the Code, such as in sections 44918, 44919, 44920, and 44921. (*California Teachers Association v. Vallejo City Unified School District* (2007) 149 Cal.App.4th 135, 146 (*Vallejo*)).

Because an employee's classification impacts the employment rights of certificated employees, districts are required to provide them with written notice of their classification when first hired. (§ 44916; *Kavanaugh, supra*, 29 Cal.4th 911.) Section 44916 provides: "The classification [of a certificated employee] shall be made at the time of employment and thereafter in the month of July of each school year. At the time of initial employment during each academic year, each new certificated employee of the school district shall receive a written

³ *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 641, is distinguishable, as that case did not involve equitable estoppel or a return to work within the same school year.

statement indicating his employment status and the salary that he is to be paid. If a school district hires a certificated person as a temporary employee, the written statement shall clearly indicate the temporary nature of the employment and the length of time for which the person is being employed. If a written statement does not indicate the temporary nature of the employment, the certificated employee shall be deemed to be a probationary employee of the school district, unless employed with permanent status.” Failure to provide notice of temporary employment as required by section 44916 results in probationary service as a matter of law. (*Kavanaugh, supra*, 29 Cal.4th at p. 926.)

Employment as a substitute or other temporary status may also become employment in a probationary capacity in other circumstances. Thus, “A year of employment as a temporary teacher may, in some cases, be treated as a year of probationary service for purposes of attaining permanent status if the employee is rehired for the following year ‘as a probationary employee in a position requiring certification classifications’ (§ 44909); ‘in a position requiring certification qualifications’ (§ 44917); ‘as a probationary employee’ (§ 44918); or ‘in a vacant position requiring certification qualifications, (§ 44920). . . .” (*Bakersfield, supra*, 145 Cal.App.4th at p. 1279, fn 11.)

The seniority date of a certificated employee is defined as the date the employee “first rendered paid service in a probationary capacity.” (§ 44845.) If an employee is misclassified as a temporary teacher, or if the date on which the employee first rendered paid service in a probationary capacity is otherwise incorrect, the employee’s seniority date may need to be adjusted to reflect the earlier first date of probationary service. (*Bakersfield, supra*, 145 Cal.App.4th at p. 1273.)

Respondents Abrams, Escue, Guess, and Strasser-King argue that they should have a higher seniority date by reason of earlier service mischaracterized as temporary. Inasmuch as Respondents Abrams, Escue and Guess were not informed, in writing when they first rendered paid service, that they were being hired as temporary employees, they are deemed probationary employees as of March 2002, September 2001 and February 2003, respectively, because they were each hired the following year in a probationary capacity. The specific dates of hire were not established at the hearing, but such precision is not necessary in this hearing to address issues pertaining to their order of termination. Even if it assumed that Respondent Guess’ seniority date is the first of the month, she is still junior to several other Respondents. In Respondents Abrams’ and Escue’s cases, on the other hand, even if their seniority date is the last school day of March 2002 or September 2001, respectively, they have more seniority than several retained employees.

Respondent Strasser-King, while also not informed in writing about his temporary status when first hired in April 2003, did not remain continuously employed. When re-hired on

January 21, 2004, he received proper notification of his employment as a probationary employee. His seniority date has therefore been correctly calculated.

Respondent Escue's proper seniority date is September 2001 for an additional reason. She worked as a substitute for an entire school year in 2001 and was retained as a probationary employee for the 2002-2003 school year. (§ 44918; *Bakersfield, supra*, 145 Cal.App.4th at p. 1279, fn 11.)

8. Cause does not exist to terminate the services of Respondents Adams, Escue, Jones, Lengring, or Steele for the 2009-2010 school year due to the reduction of particular kinds of services, by reason of factual finding numbers 12 through 15, and legal conclusion numbers 4 through 7.

9. Cause exists to terminate the services of Respondents Maria G. Aguilar, Michael Aktutay, Tracie Banner, Lorrie J. Bauder, Lori Bernfeld, Diana L. Bertram, Rachelle Briggs, Kristin Fall, Keith Faulkner, Guess, Kendrick-White, Kyela Love, Pat McGuire, Darcel A. Nilsson, Jodene J. Paris, Deborah Poor, Danielle L. Portillo, Cecilia Rico, Marcia Saldana, Wendee K. Schoonover, Shuey, Anne M. Stanley, Strasser-King, and Cecilyn Zoubek, by reason of factual finding numbers 1 through 11, and 16 through 20, and legal conclusion numbers 1 through 4.

ORDER

1. The Accusation is dismissed with respect to Respondents Adams, Escue, Jones, Lengring, and Steele.

2. The Accusation is sustained and the District may notify Respondents Maria G. Aguilar, Michael Aktutay, Tracie Banner, Lorrie J. Bauder, Lori Bernfeld, Diana L. Bertram, Rachelle Briggs, Kristin Fall, Keith Faulkner, Guess, Kendrick-White, Kyela Love, Pat McGuire, Darcel A. Nilsson, Jodene J. Paris, Deborah Poor, Danielle L. Portillo, Cecilia Rico, Marcia Saldana, Wendee K. Schoonover, Shuey, Anne M. Stanley, Strasser-King, and Cecilyn Zoubek that their services will not be needed during the 2009-2010 school year due to the reduction of particular kinds of services.

DATED: _____

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings