

BEFORE THE GOVERNING BOARD
OF THE ALHAMBRA UNIFIED SCHOOL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

In the Matter of the Layoff of

CERTIFICATED EMPLOYEES OF THE
ALHAMBRA UNIFIED SCHOOL
DISTRICT,

Respondents

OAH No. 2009031195

PROPOSED DECISION

This matter came on regularly for hearing before Janis S. Rovner, Administrative Law Judge of the Office of Administrative Hearings, State of California, in Alhambra, California, on April 22, 2009.

Fagen, Friedman & Fulfroost, by James Fernow and Carlos Villegas, Attorneys at Law, represented the Alhambra Unified School District (District).

Rothner, Segall, Greenstone & Leheny, by Jean Shin, Attorney at Law,¹ represented Tony Bonura, David Chavez, Raul Duarte, Joseph Frederico, Andrew Herrera, Jon Keller, Joe Khouzam, Christopher Pak Yin Kwan, Nicole Manalang, Nicholas Nguyen, Trieu Nguyen, Tiffany Parker, Jennifer Rivera, Carrie Smith, Steven Struckmeyer, Carlos Rodriguez, and Karen Keller (Respondents).

Oral and documentary evidence, and evidence by way of stipulation, was presented and received. The record was left open until April 29, 2009, to permit the parties to submit post-hearing briefs. Respondents' brief was filed on April 28, 2009, and is identified as Exhibit A. The District's brief was filed on April 29, 2009, and is identified as Exhibit 14. The matter was submitted for decision on April 29, 2009.

¹ At certain times during the hearing, Ms. Shin withdrew temporarily as attorney for some Respondents when they asserted claims that she perceived created a conflict of interest in relation to other Respondents.

SUMMARY OF PROPOSED DECISION

The Governing Board of the Alhambra Unified School District (Board) determined to reduce or discontinue particular kinds of services provided by certificated employees for budgetary reasons. The Board’s decision to reduce or eliminate services was not related to the competency and dedication of the District’s certificated employees.

District staff carried out the Board’s decision by using a selection process involving review of credentials, seniority, “bumping,” “skipping,” and breaking ties between certificated employees with the same first dates of paid service. The selection process was in accordance with the requirements of the Education Code.

FACTUAL FINDINGS

Jurisdiction and Governing Board’s Actions

1. Donna Perez is the Superintendent of the District.

2. Before March 11, 2009, Superintendent Perez gave written notice to the Board, and to certificated employees of the District (including Respondents), recommending that notice be given to the certificated employees informing them their services would not be required for the 2009-2010 school year due to the reduction or elimination of particular kinds of services. The written notice (March 15th notice) included the reasons for the recommendation.

3. On March 10, 2009, the Board adopted Resolution No. 08-09-36, in which it resolved to reduce or discontinue the following particular kinds of services for the 2009-2010 school year:

<u>Kind of Service</u>	<u>Full-Time Equivalent (FTE) Positions Eliminated</u>
Career Pathways	11.0
Health and Safety	12.0
Math	1.0
Biology	1.0
Social Science	2.0
French	1.0

Art	2.0
Physical Education	3.0
Psychological/Gateway to Success Program	1.0
Home Schooling	2.0
Alternative Education (Independence HS)	.5
Alternative Education (Independent Study Program)	.5
Instructional Specialists	1.8
Total Full Time Equivalent Reduction:	<hr/> 38.8

4. The Board took action to reduce or discontinue the services set forth in Factual Finding 3 due to the District's fiscal crisis and need to reduce services to balance its budget for the welfare of students. The State's budget crisis and unprecedented budget cuts have impacted the District's ability to meet its financial obligations for the next school year. The District estimates that for the 2009-2010 school year, it will incur a deficit of \$11 million without this reduction in services.

5. Certificated employees of the District, including Respondents, timely filed a written request for hearing to determine if there is cause for not reemploying them for the 2009-2010 school year.

6. Superintendent Perez filed the Accusation in her official capacity. The Accusation was timely and properly served on the 21 certificated employees who had requested a hearing.

7. Respondents filed a notice of defense, and were notified of the hearing date.² This proceeding ensued. All prehearing jurisdictional requirements have been satisfied.

² The District rescinded the March 15th notices of Hun Ly, Jocelyn Castro, Christopher Cosby and Linh Hoac before the hearing. As a result, the District will retain those four certificated employees. One employee, Jennifer Ishida, did not file a notice of defense and did not appear at the hearing.

8. Respondents are probationary or permanent certificated employees of the District.

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

10. The District's seniority list contains certificated employees' seniority dates (first date of paid service), current assignments and locations, credentials, and authorizations. The District used the seniority list to develop a proposed layoff list of the least senior employees currently assigned in the various services being reduced. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by known vacancies, and determined the impact on incumbent staff in inverse order of seniority.

11. The Board's Resolution No. 08-09-36 established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service to the District on the same date. The District used information from the District's seniority list to apply the tie-breaker criteria. The criteria were reasonably conceived and applied based on the needs of the District and its students.

Seniority Dates

12. At the hearing, Respondents Struckmeyer, Bonura, Chavez and Rivera contended that their first date of paid service with the District as reflected on the District's seniority list was incorrect. The District agreed and readjusted the seniority dates as follows: Respondent Struckmeyer (September 7, 1994); Respondent Bonura (September 23, 1996); Respondent Chavez (September 8, 1997); and Respondent Rivera (September 1, 2004). The new seniority dates have no affect on the proposed layoffs in this proceeding. The Respondents did not prove that they were entitled to seniority dates earlier than those stated above.

Skipping of Certificated Employees

13. (A) The District skipped junior teachers who possessed English Learner (EL) authorizations,³ such as CLAD, BCLAD, CTEL and SDAIE.⁴ The District articulated a need for the authorizations based on the number of English learners in its schools, and the necessity of providing these students with teaching methods designed to give them access to the curriculum. The District asserts that it is legally obligated to use only teachers who possess the authorization in its classrooms.

³ The term "authorizations" as used herein includes certifications.

⁴ This is the acronym for Specially Designed Academic Instruction in English certificate.

(B) The District sent a March 15th notice to Respondent Andrew Herrera. His current teaching assignment with the District is high school history according to the seniority list, although his current assignment may also include social science and advanced placement psychology. He received notice as part of the District's reduction of two FTE positions in social science. Mr. Herrera is the most junior teacher who does not have an EL authorization. His first date of paid service with the District was September 12, 1973. There are numerous teachers currently teaching social science who are junior to Respondent Herrera. The District did not send March 15th notices to any of the junior social science teachers (with the exception of Respondent Manalang) because they all possess the proper EL authorizations.

(C) Respondent Herrera has secondary credentials to teach History, Spanish and Sociology. Early in his career, he interned as a teacher in bilingual and bicultural classes. He also had other experience teaching bilingual and bicultural students earlier in his career. He has been recently attempting to obtain an EL authorization, but he concedes that he does not possess one at this time. A District representative spoke to him personally about the necessity of obtaining a CLAD, BCLAD, or equivalent authorization, in the Fall of 2007. As early as May of 2006, the District delivered correspondence to all teachers who did not have an EL authorization alerting them of the need to obtain it. The District delivered similar correspondence on other occasions in 2006 and 2007. In the fall of 2007, the local union newsletter also informed its members of the necessity for an authorization. When the District began notifying its teachers, it had about 150 teachers without authorization; it now has only 15 teachers without EL authorization.

(D) The District demonstrated that it has a specific need for teachers with EL authorizations. The District properly skipped junior employees who possessed the required authorization; and, while unfortunate, it properly issued a March 15th notice to Respondent Herrera.

Bumping Rights and Competency

14. As part of Resolution 08-09-36, the Board adopted competency standards for teaching in the District's continuation (alternative education) high schools. A senior teacher who asserts bumping rights must meet the following definition of competence in order to be regarded as competent to teach at the continuation high schools:

To be considered competent, an employee must have academic training and one semester of full-time experience within the last five (5) years in alternative education at the grade level to which the District would be able to assign him/her within the scope of his/her credentials. For purposes of this standard, self-contained classrooms and departmentalized programs are treated as separate competencies.

The district reserves the discretion to retain less senior regular credential holders over individuals serving under waivers, and individuals serving under internship credentials or certificates.

15. (A) The District skipped teachers⁵ whose current assignment is teaching in its continuation high schools, Independence High and Century High. The District demonstrated that it has a specific need to retain teachers who teach in the alternative education high schools. The type of student that teachers must teach in the alternative schools, as opposed to the comprehensive high schools, is different. The students tend to be “at-risk” students who often have behavioral and psychological problems. They do not follow instructions, lack study skills, and have little self-discipline.

(B) In making hiring decisions for the continuation schools, the District values recent experience teaching in alternative education. The alternative education teachers also attend specialized training sponsored by the association of continuation schools. The instructional strategies that are used in alternative education schools are different from those used in comprehensive high schools. Teachers must also be advisors. They monitor the Individual Learning Plan for each student and they teach four to six courses at multiple levels. The school day is longer and the progress of each student is monitored more closely. The instructors use a collaborative teaching model that includes parents, students and teachers. The teachers also use professional learning communities. With the alternative education curriculum changing so significantly in the last four to five years, the need for teachers who have recent experience in alternative education is even more manifest.

(C) Some Respondents assert that they are credentialed and competent to teach in the District’s alternative education schools and should therefore bump into those teaching positions. Generally, the credentials necessary to teach in the District’s comprehensive high school and the continuation high schools are the same. The question is not whether their credential is sufficient; it is whether Respondents are competent to teach in alternative education. Competence refers to their skills and qualifications to do so.

(D) Respondents Bonura, Struckmeyer and Chavez did not show they are competent to teach in alternative education. They have not taught in alternative education at all; they have only taught physical education. They have no prior experience in alternative education.

(E) Respondent Keller teaches physical education at a high school in the District. His first date of paid service is September 8, 1998. Respondent Frederico teaches health and safety at high school. His first date of paid service with the District is September 4, 2001. Both Respondents taught pupil support services at the comprehensive high school during the 2001 and 2002 school years. The students they taught are the same type of students who are at the continuation high schools. However, teaching in pupil support

⁵ Respondent Duarte is the one exception. However, the District states that it will rescind his March 15th notice if the proposed layoff is upheld.

services does not equate to teaching in alternative education within the District. In pupil support services, the curriculum is similar to the regular curriculum in the comprehensive high school. Respondents Keller and Frederico also taught classes at the continuation high school during the summer of 2002 for six-weeks. Respondent Frederico taught alternative education for over three years before he came to the District. The Respondents have not taught in alternative education during the last five years; and they do not satisfy the District's competency standard. They have no recent training or experience in alternative education. The District's competency standard aside, Respondents Keller and Frederico did not show they are competent to "bump" a more junior teacher at the continuation high school.

16. No permanent or probationary certificated employee with less seniority than respondents are being retained to render a service that respondents are certificated and competent to render.

LEGAL CONCLUSIONS

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

2. A school district may reduce services within the meaning of Education Code 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. The services identified in Board Resolution No. 08-09-36 are particular kinds of services that may 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.

4. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. Using a selection process involving review of credentials, seniority, "bumping," "skipping," and breaking ties between certificated employees with the same first dates of paid service, the District identified the certificated employees to whom it sent March 15th notices.

5. Pursuant to Education Code section 44955, subdivision (d)(1), a school district may deviate from strict seniority in layoffs and skip employees if it can demonstrate a "specific need" and that the employees have "special training and experience . . . which others with more seniority do not possess."

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.)

As provided in Factual Findings 13 and 15, the District acted in accordance with Education Code section 44955, subdivision (d)(1), in deciding to skip teachers possessing EL authorizations who were junior to Respondent Herrera. The District also acted in accordance with the statute in determining to “skip” continuation high school teachers. (See *Bledsoe v. Biggs Unified School District* (2009) 170 Cal.App.4th 127.) In *Bledsoe*, the court upheld a district’s decision to skip certificated employees teaching in an alternative education school based on their recent training and experience, while laying off a senior teacher with similar qualifications who did not teach in the alternative school. (*Id.* at pp. 137-139.) The court emphasized that “[i]n order to retain a certificated employee . . . a district must not only establish a specific need for personnel to teach a specific course of study, but [also] establish the certificated employee it proposes to retain “has special training and experience necessary to teach that course or course of study or to provide those services[.]” (§ 44955, subd. (d)(1).)” (*Id.* at p.138.) The facts in this case demonstrate that the District acted within the requirements of the statute in retaining the continuation high school teachers.

6. Section 44955, subdivision (b), provides, in pertinent part that “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.” (Emphasis added.)

“Certificated” is defined by the provisions of the Education Code as relating to credentials. “Competent” is not specifically defined. In *Forker v. Board of Trustees* (1994) 164 Cal.App.3d 13, 19, the court defined competence in terms of teachers’ skills and qualifications.

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.)

Education Code section 44955, subdivision (c), states that the “governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render.”

The District has the initial duty to examine a teacher’s academic and professional experience and make a determination of competency or lack thereof. Once the district finds the teacher lacks competence by way of skills and qualifications, the burden shifts to the teacher to present evidence of competency. (See *Davis v. Gray* (1938) 29 Cal.App.2d 403, 406-408; *Krausen v. Solano County Junior College District* (1974) 42 Cal.App.3d 394, 402-404.)

Courts have recognized a school district's discretion to establish rules defining teacher competency. In *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 565, the court wrote: Hence, from these authorities we conclude that a board's definition of competency is reasonable when it considers the skills and qualifications of the teacher threatened with layoff." (See *Martin v. Kentfield School District* (1983) 35 Cal.3d 294, 299-300.) In *Duax*, the board established a standard of competency that required one year's full time teaching in a subject area within the last ten years. The court found the competency standard reasonable because it was based on the skills and qualification of the teachers.

Similarly, the competency standard in this matter is reasonable and based on the skills and qualifications of the teachers. However, even if the standard was not reasonable, the Respondents referred to in Factual Finding 15 did not demonstrate that they were competent to bump into the District's continuation high schools for the reasons stated in that factual finding.

7. The contention that the proceedings should be dismissed because the District sent approximately five more March 15th notices than were required is not supported by law and is rejected. The District complied with the requirements of the Education Code.

8. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

ORDER

The Accusation is sustained as to all Respondents.⁶ The District may notify Respondents that their services will not be required for the 2009-2010 school year because of the reduction or elimination of particular kinds of services.

Dated: May 6, 2009

Janis S. Rovner
Administrative Law Judge
Office of Administrative Hearings

⁶ The District stated in its closing brief that if the proposed layoff is upheld, it intends to rescind the March 15th notices sent to Respondents Nicholas Nguyen, Trieu Nguyen, Nicole Manalang, Andrew Herrera, and Raul Duarte.