

**BEFORE THE
GOVERNING BOARD OF THE
OXNARD SCHOOL DISTRICT**

**In The Matter of the Layoff of

CERTIFICATED EMPLOYEES OF
THE OXNARD SCHOOL DISTRICT,

Respondents**

OAH No. 2009040036

PROPOSED DECISION

H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 16, 2009, at the Oxnard School District, Oxnard, California.

James R. Lynch and Ceclia N. Brennan, Attorneys at Law, represented the Oxnard School District.

Alexis Ridenour and Adam A. Acevedo, Attorneys at Law, represented respondents.

Respondent Loris Mullens did not file a Notice of Defense and did not appear at the hearing.

During the hearing, the District withdrew its Accusation against respondent Brad Tiemeyer.

The matter was submitted on April 16, 2009.

SUMMARY OF PROPOSED DECISION

The Governing Board of the Oxnard School District (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. The selection process was in accordance with the requirements of the Education Code.

FACTUAL FINDINGS

1. Janis Duran is the Interim Superintendent of the 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 Code 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 an inclusion of a copy of Resolution #08-13, noted that the Board had passed a Resolution reducing the certificated staff by 153.75 full time equivalent (FTE) positions.

3. Notice was served by certified mail, return receipt requested. 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. Notices of Defense were timely filed by or on behalf of 67 certificated employees (respondents).

6. Respondents in this proceeding are probationary or permanent certificated employees of the District.

7. On or before February 18, 2009, the Governing Board of the District was given notice of the Interim Superintendent's recommendation that 153.75 FTE employees be given notice that their services would not be required for the next school year and stating the reasons for that recommendation.

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8. Board Resolution No. 08-13, adopted on February 18, 2009, proposed a layoff of 153.75 FTE certificated employees. Specifically, Board Resolution 08-13 provided for the reduction or elimination of the following particular kinds of services:

Kind of Service Agency	Number of FTE Positions
K-6 Classroom Teacher	120.00
Categorically-Funded Teacher on Special Assignment, including but not limited to: Coach, Intervention Teacher, Reading Resource Teacher, Math and Reading Specialist, and Flex Reading Teacher	15.75
Categorically-Funded Elementary P.E. Teacher	2.00
Categorically-Funded Coordinator	3.00
Unrestricted General Fund-Coordinator	1.00
Categorically-Funded Language Arts Intermediate School Teacher	1.00
Learning Director	5.00
Senior Psychologist	1.00
School Psychologist	1.50
Senior Speech Therapist	1.00
Categorically-Funded BTSA Coordinator	0.50
Intermediate School Art Teacher	1.00
Intermediate School Survey Teacher (e.g., Teen Issues)	<u>1.00</u>
Total Full Time Equivalent Positions	153.75

9. Subsequent to adoption of the Board’s Resolution, the District identified vacancies in School Year 2009-2010 due to retirements, release of temporary teachers, and resignations. No positively assured attrition was demonstrated. In consideration of the lack of such attrition, the District concluded that the number of certificated employees required to be terminated pursuant to this proceeding was 153.75 FTE.

10. Board Resolution 08-13, adopted on February 18, 2009, 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.

12. Sean Goldman, the District’s Assistant Superintendent of Human Resources and Support Services, was responsible for implementation of the technical aspects of the layoff. To assure the accuracy of seniority dates and other data, affected employees were notified by mail of the District’s records of their first dates of paid service and credentials. The District made the Seniority List available to employees and requested the employees’ input regarding its accuracy.

13. 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.

14. The District used information from the District’s Seniority List to apply the tie-breaker criteria of Board Resolution No. 08-13.

15. During the hearing, the parties stipulated that respondent Irene Zavala holds a BCLAD certificate. At the request of the District’s counsel, adjustments were made to the Seniority List and to Ms. Zavala’s tie-breaker score based on her holding that certificate.

16. During the hearing, the parties stipulated that respondent Elizabeth Favila holds a 2042 authorization. At the request of the District’s counsel, that authorization was noted in the Seniority List.

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17. Exhibit A to Board Resolution No. 08-13 sets forth the “skipping” criteria the Board elected to use in determining which employees would be retained regardless of seniority (unless bumped by a more senior and competent employee). Exhibit A provided in part:

The District shall retain certificated employees in the particular kind of services identified in Board Resolution #08-13, regardless of their seniority (unless the employee is bumped by a more senior and competent employee), to the extent one or more of their 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 or equivalent, and are expected to teach one or more courses requiring a BCLAD for the District in the 2009-2010 school year.

[¶] . . . [¶]

The Superintendent or 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.

18. Assistant Superintendent Sean Goldman exercised the discretion granted to him by the Board in Exhibit A to Board Resolution #08-13 by interpreting Criterion #2 in the resolution consistently with Criterion #1. Specifically, Mr. Goldman determined that, in order to skip a more senior employee, a junior employee must not only hold a BCLAD certificate and be expected to teach one or more courses requiring a BCLAD in the upcoming school year, he/she must also be teaching one or more classes in the current school year that require BCLAD certification. He interpreted Criterion #2 in this manner because he recognized that the District could not skip all employees who held a BCLAD, and that those who were using their BCLAD certificates as required for their current assignments could reasonably be expected to continue to do so in the upcoming school year, and would therefore satisfy the Board’s criterion. The District therefore did not skip any teachers who held a BCLAD but were not teaching one or more classes requiring BCLAD certification in the current 2008-2009 school year.

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19. Education Code section 44955, states in pertinent part:

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

20. In the instant case, the District determined that the “special . . . experience” necessary to teach a course requiring a BCLAD certificate is the actual experience of teaching the course. Thus, a teacher with a BCLAD certificate, who is currently assigned to teach a specific course using that certificate, has special experience that is lacking in another teacher who, albeit similarly certificated, is not presently using the certificate in his/her assignment.

21. Further, the criterion of a present teaching position in a BCLAD-required course raises a reasonable inference that the same teacher will be teaching the same course again in the following school term. No other rationale was offered by either side to establish how the District could determine who would be “expected to teach one or more courses requiring a BCLAD for the District in the 2009-2010 school year.”

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22. By acting as he did, Mr. Goldman acted within his authority and within the discretion granted to him by the Board. His actions enabled the District to avoid skipping by junior teachers who held BCLAD certificates but were not using them in their present teaching assignments. It also enabled the District to use neutral criteria to limit the amount of necessary skipping. To have done otherwise may have meant the placement of a more senior teacher who has never used his/her BCLAD for any purpose, to bump a junior employee with first-hand experience teaching the same class he/she will teach in the upcoming school year. (See *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567, 576.) By skipping only teachers who were actually using their BCLADs, the Board acted reasonably in implementing the Board's resolution within the letter and spirit of the law.¹

23. Giorgina Zermeno is a probationary employee of the District who teaches social studies. She holds a BCLAD certificate. Ms. Zermeno's hire date is August 18, 2008. On or around that date, she was informed that an opening existed for a social studies teacher. During her interview, the school's principal told her a BCLAD was necessary for the position, and she was questioned about strategies for newcomer English learners. Ms. Zermeno argues that, based on those facts, she should have been skipped.

24. The District correctly determined that Ms. Zermeno should not be skipped. Regardless of the principal's representations, the determination of whether a BCLAD is required for a certain course is determined at the District level rather than at the school level. The school determines only if a non-BCLAD class is "bilingual preferred." Although Ms. Zermeno may have used her BCLAD in the social studies class, a BCLAD was not required by the District for her to teach that class. Further, it is presently unknown whether a BCLAD teacher will be required for that social studies class for the 2009-2010 school year.

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¹ Although the District acted properly in implementing the skipping criteria, an equitable result was not always ensured. For example, in the 2007-2008 school year, respondent Edith Rodriguez was teaching a class for which a BCLAD certificate was required. The District determined that no layoffs were necessary for the upcoming school year but, due to certain provisions in the collective bargaining agreement, Ms. Rodriguez was bumped from her position by a transferee. She subsequently applied for and occupied a vacant position during the current school year. However, that position does not require the use of Ms. Rodriguez's BCLAD certificate. Therefore, she cannot be skipped. Ms. Rodriguez's scenario represents an unfortunate anomaly. However, the retention of inexperienced teachers who hold a BCLAD certificate, and layoffs of teachers experienced in the BCLAD classroom, are far more likely scenarios if the skipping criteria are not upheld.

25. Respondent Kimiko Walrod is a permanent certificated employee of the District to whom the District assigned August 6, 2004, as her first date of paid service. During the 2003-2004 school year, Ms. Walrod worked for the District as a long-term substitute. In the course of that assignment, she worked more than 75 percent of the school days in the District's school calendar. She was subsequently awarded a probationary position for the following school year (2004-2005). Ms. Walrod is therefore entitled to credit as a probationary employee for the 2003-2004 school year, pursuant to Education Code section 44918, subdivision (a),² and her seniority date should be adjusted.

26. In closing argument, the District asserted that credit for school year 2003-2004 should not be afforded Ms. Walrod because she failed to notify the District of the error on the Seniority List when the District requested such information earlier this year. Ms. Walrod credibly testified that, at that time, she believed the seniority date assigned to her by the District was correct, and that she did not become aware of the error until the day of the hearing. Ms. Walrod's conduct does not constitute either a waiver or an estoppel of the rights afforded her by the Education Code as a certificated teacher.

LEGAL CONCLUSIONS

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

2. The services identified in Board Resolution #08-13 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.)

² Education Code section 44918, subdivision (a), states: "Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year."

4. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. The District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued.

5. Except as indicated in Factual Findings 17 through 22, 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 seniority date for respondent Kimiko Walrod was miscalculated. She shall be given credit as a probationary employee for the school year 2003-2004.

ORDER

1. The District shall comply with Legal Conclusion 7.

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.

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

DATED: April 22, 2009

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings