

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

In the Matter of the Accusation Against:

OAH Case No. 2009060812

Certain Certificated Employees of the Rio  
School District,

Respondents.

**PROPOSED DECISION**

The hearing in the above-captioned matter was held on July 21, 2009, at Oxnard, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by Pamela A. Dempsey, Esq. Respondents were represented by Tareq M. Hismeh, Hathaway, Perrett, Webster, Powers, Chrisman & Guitierrez, excepting Respondents Lara Savage, Wendy Bjork, Maria Casimiro, Amber Gibson, and Brooke Rose, who represented themselves.

Oral and documentary evidence was received at the hearing,<sup>1</sup> the case was argued, and the matter submitted for decision on the hearing date. The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders, as follow.

**FACTUAL FINDINGS**

1. Complainant Sherianne Cotterell filed the accusations<sup>2</sup> in this proceeding in her official capacity as Superintendent of the Rio School District (District)

2. (A) The following persons are certificated employees of the District, and are hereafter referred to as Respondents:

Ruben Castillo, Sylvia Contreras, Angela Handly, Heather Knauer, Mariella

---

<sup>1</sup> The parties trial briefs are hereby identified as Exhibits 10 (Complainant's) and Exhibit F (Respondents').

<sup>2</sup> The term "accusation" refers to a type of pleading utilized under the Administrative Procedure Act, Government Code sections 11500 and 11503, which provides the procedural framework for hearings of this type. It should be made clear that the Respondents are not "accused" in the every-day sense of that word; they have done nothing wrong. Instead, it might be said that they are accused of not having enough seniority or qualifications to retain their positions with the District in the face of a resolution to reduce positions.

Placencia, Erica Rodriguez, Heriberto Rojas, Richard Valdivia, Fred Messecar, Jacqueline Coronado, Annette Lorenzana, Kreisten Steiner, Irene Carranza, Pablo Hernandez, Hernan Martinez, Jennifer Koslow, Aurora Zamudio, Alisha Shushan, Patricia Carbera, Diana Gomez, Maria Carranza-Casimiro, Lara Savage, Kyla Kay, Wendy Bjork, Amber Gibson, Brooke Rose, Crystal Rorex, Stephanie Devericks, Annie Graton, and Jacqueline Leal.

(B) During the course of the proceeding, the accusations against Respondents Heather Knauer, Sylvia Contreras, Mariela Placencia, Heriberto Rojas, and Richard Valdivia were dismissed by Complainant.

3. (A) On June 25, 2009, the Governing Board (Board) of the Rio School District adopted Resolution Number 0809/24, entitled “To Decrease the Number of Certificated Employees Due to Lack of Funds and Reduction or Elimination of Particular Kinds of Services and Programs As Authorized by Education Code Section 44955.5.” (Hereafter “Reduction Resolution.”) The purpose of the resolution was to reduce the number of certificated employees of the District, by eliminating particular kinds of services, in this case elementary teaching. The action was taken due to budgetary constraints. By the Reduction Resolution, the Board resolved to eliminate 23 Full Time Equivalents (FTE) of elementary teaching.

(B) Thereafter, on July 13, 2009, the Board adopted Resolution number 0910/01, which also pertained to reducing the number of certificated employees (July 13 Reduction Resolution.). This resolution was adopted because one employee, Respondent Leal, had not been noticed of the proceedings to reduce employees, making it necessary to adopt a second reduction resolution and scheduling of notice. This second resolution reiterated the Reduction Resolution.

4. Under the state budget act adopted in February 2009, the total revenue limit per average daily attendance for the fiscal year 2009-2010 has not increased by at least two percent. Such revenue will not increase, but will actually decrease at least 1.66 percent for that fiscal year, based on the February budget.<sup>3</sup>

5. The Board was of the opinion that it was necessary, because the total revenue limit per average daily attendance had not increased, to decrease the number of certificated employees in the District. The Board’s opinion is established by its Reduction Resolution, and other evidence received in this proceeding. The decision by the Board to decrease the number of certificated employees, and its decision to do so by reducing or discontinuing services was neither arbitrary nor capricious, but rather was a proper exercise of the District’s discretion given the decreased funding and the District’s financial resources.

---

<sup>3</sup> The evidence established that under the “May revisions,” in essence adjustments to the budget adopted in February 2009, the decline in revenue would be even worse, a reduction of over seven percent.

6. The Reduction Resolution was based, in part, on the recommendation of the Superintendent of the District that particular kinds of services be eliminated or reduced by August 17, 2009. The Board considered all positively assured attrition that had occurred through the date of the Reduction Resolution.

7. In the Reduction Resolution, the Board adopted tie-breaking criteria for use in the event that two or more teachers facing layoff had the same seniority date. The tie-breaking criteria were based on the needs of the District and the students of the District. The District did not abuse its discretion in the adoption of the tie breaking and competency criteria.

8. The services which the District seeks to discontinue or reduce are particular kinds of services that may be reduced or discontinued under section Education Code section 44955.<sup>4</sup>

9. The reduction and discontinuation of services 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 Board.

10. (A) In the Reduction Resolution and July 13 Reduction Resolution, the Board adopted a Schedule of Notice and Hearings which would set appropriate dates and deadlines for conducting the process of decreasing certificated employees.

(B) On June 26, 2009, each Respondent, excepting Respondent Leal, was given written notice that pursuant to Education Code sections 44949, 44955, and 44955.5, their services would not be required in the 2009-2010 school year. Respondent Leal received such notice on July 13, 2009. Such notices included copies of the Reduction Resolution, an accusation, and notice of hearing, along with forms for requesting a hearing and submitting a notice of defense to the accusation. Copies of applicable statutes were served on each Respondent as well.<sup>5</sup>

11. In the course of the reduction in force process, the District created a seniority list. That seniority list took into account a number of factors, the primary factor being each certificated employee's first date of paid service. However, other factors, such as credential types, current assignment, and information that would be pertinent to any tie-breaking were set forth on the seniority list.

12. (A) The District determined that certain junior teachers possessed superior skills, training, or capabilities which more senior teachers did not possess, which would allow the more junior teachers to be retained or "skipped." This step was authorized in the Reduction Resolution and the July 13 Reduction Resolution.

---

<sup>4</sup> All further statutory references are to the Education Code.

<sup>5</sup> The District "over-noticed" teachers, serving 30 teachers with notice and the accusations, so that it could be assured that it would be able to lay off 23 employees.

(B) The teachers that the District would skip are assigned to teach in a “dual immersion” program at Rio Real Elementary School. Those teachers are Pablo Hernandez, number 168 on the seniority list; Aurora Zamudio, number 169 on the seniority list, and Mariela Plascencia, number 157 on the seniority list. Each was made a Respondent in the case, and the issue of whether they could be skipped placed in issue. As noted in Finding 2(B), Mariela Plascencia was dismissed from the case during the proceeding.

(C) The dual immersion program is one where native English speakers and native Spanish speakers are placed together in a class to create a dual language class. The class is not state-mandated, but has been taught since approximately 2004, with the goal of educating students to speak two languages, English and Spanish. The teachers assigned to such classes must hold a BCLAD certificate, and they must attend a four-day training program before they can be assigned to teach in the class; they must attend that training program every year. Respondent Hernandez also taught in a dual immersion class in another school district, prior to working for the District; such experience is considered valuable training for someone desiring to teach in the class.

(D) During the hearing, no Respondents were able to show that they had the training required to teach in the dual immersion program, nor teaching experience in that program.

13. No certificated employee junior to any Respondent was retained by the District to render a service for which a Respondent was certificated and qualified to render.

### **LEGAL CONCLUSIONS**

1. (A) Jurisdiction was established to proceed in this matter, pursuant to sections 44949, 44955, and 44955.5, based on Factual Findings 1 through 5.

(B) The record establishes that after the passage of the February 2009 State Budget Act, and before August 15, 2009, the Board determined that the total revenue limit per average daily attendance for the fiscal year 2009-2010 had not increased by at least two percent, but in fact had decreased. Furthermore, the Board was of the opinion that it was necessary to reduce the number of certificated employees. Because that opinion was reached after consideration of alternatives, and because the Board action was not arbitrary or capricious, it can proceed with lay offs “pursuant to Sections 44951 and 44955.” (§ 44955.5, subd. (a).)

2. (A) Under sections 44955 and 44955.5, the District is not barred from using a reduction in particular kinds of services as the method for reducing the number of certificated employees.

(B) Section 44955.5, subdivision (a), provides that where there has not been an increase in the total revenue limit per average daily attendance and where the governing board is of the opinion that it is necessary to decrease the ranks of certificated employees, then it may terminate the services of “any” permanent or probationary employee, “including employees holding a position that requires and administrative or supervisory credential.” Nothing in the language of the statute requires the termination of administrative personnel; the language is permissive. Likewise, any employee is subject to termination.

(C) There is a limit placed on a school board’s ability to terminate “any” employee, including administrators: “the termination shall be pursuant to Sections 44951 and 44955.” To be sure, not every part of section 44955 controls, because section 44955.5 provides that layoff under that section shall be conducted on a schedule to be adopted by the school board, and not by the timelines set out in section 44955, which requires layoffs to be commenced by March 15 and completed by early May in each year. Section 44955 and the cases construing it set forth rules for how lay offs are to occur.

(D) Section 44955, at subdivision (b), has long authorized the reduction of a school district’s teaching force “whenever a particular kind of service is to be reduced or discontinued” and where the governing board is of the opinion that because of that lay offs are necessary. Here, based on the circumstances of a decline of the total revenue limit per average daily attendance, the board chose to reduce a particular kind of services, and such is authorized by the two statutes, sections 44955 and 44955.5.

(E) Respondents argued that taken together, the statutes must be read so that the four conditions set out in section 44955, subdivision (b), which allow, or “trigger” layoffs are effectively eliminated, and that the statute must be read so that the “trigger” set out in section 44955.5, of a failure to increase revenue limit per average daily attendance, is inserted in the place of the four conditions otherwise found in section 44955, subdivision (b).<sup>6</sup> Thus, Respondent’s argue, there is no authority to reduce particular kinds of services because that part of section 44955 is effectively superseded or repealed by the “trigger” provision of section 44955.5.

(F) As a matter of statutory construction, this argument must fail, because Respondents are arguing for repeal of portions of section 44955, subdivision (b), by implication, by the enactment of section 44955.5. Such repeals are wholly disfavored.

//

---

<sup>6</sup> As an aside, it should be noted that the “trigger” written into section 44955.5 is one that is based on actions that take place outside of a district, and outside of a district’s control; the trigger is purely financial. It appears that not all of the triggers set out in section 44955, subdivision (b), are financially driven; two pertain to curriculum issues, one being a curriculum change by the state, and the other being a curriculum change (reduction in PKS) made by the district. .

As stated by the Supreme Court:

“[All] presumptions are against a repeal by implication [Citation.]” (*Flores v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 171, 176 [113 Cal.Rptr. 217, 520 P.2d 1023].) Absent an express declaration of legislative intent, we will find an implied repeal “only where there is no rational basis for harmonizing two potentially conflicting statutes [citation], and the statutes are ‘irreconcilable, clearly repugnant, and so inconsistent that the two can not have concurrent operation.’” (In re White (1969) 1 Cal.3d 207, 212, [81 Cal.Rptr. 780, 460 P.2d 980].)

(*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476-477.)

(G) Here, the legislature tied the two statutes together, section 44955.5 referencing section 44955. This can hardly evince an intent by the legislature to repeal the “trigger” provisions of section 44955, subdivision (b). The broad language of section 44955.5, subdivision (a), that layoffs under that statute shall be “pursuant” to section 44955, is broad enough to encompass, but not eliminate the provisions of section 44955, subdivision (b). Of course, some become irrelevant; a decline in enrollment is no longer relevant once a school district must proceed under section 44955.5. But, since section 44955.5 allows the termination of “any” certificated employee, it is broad enough to cover those employees rendering a particular kind of service, i.e., “any” employee teaching in K through 3 classrooms.

(H) Under Respondents’ reading of the statutes, the District would simply have to release the most junior teachers, regardless of their assignment, rather than releasing teachers from assignments that would be eliminated in the process. This would threaten the orderly conduct of education, because a district might not be left with teachers qualified and certificated to replace those junior teachers eliminated under Respondents’ methodology. For example, if several junior teachers who held certificates authorizing them to teach a foreign language or math were laid off solely on the basis of seniority, and if more senior (surviving) teachers did not have the credentials to teach such classes, a district would have to hire such teachers with such credentials, or eliminate the classes, the latter option potentially against the law. It makes more sense to allow a district, in order to respond to the budgetary problems, to eliminate a PKS, according to the usual rules.

(I) Statutes are to be construed so as to place a reasonable and practical construction upon them, pursuant to the legislative intent. (E.g., *Costa Mesa v. McKenzie* (1973) 30 Cal.App.3d 763; *Anaheim Union Water Co. v. Franchise Tax Bd.* (1972) 26 Cal.App.3d 95.) There is nothing in the record or the law to indicate that the legislature intended to deprive a school district, acting under section 44955.5, of the ability to re-allocate its resources by eliminating a particular kind of service, once it learns that it will not receive an increase in revenue under the state budget. At the same time, there is nothing to indicate that the legislature intended to deprive school boards of their authority to control

curriculum not otherwise under the control of the state, nor is their evidence that the legislature intended to deprive school boards of the considerable discretion they are granted to control teacher assignments, including the authority to “skip” teachers in order to meet district needs. Given the strong presumption against repeal by implication, the two statutes must be read so that the District may proceed by reducing a particular type of service, and lay off teachers otherwise assigned to provide such services, subject to other applicable rules.

3. (A) A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated 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.) At the same time, junior teachers may be given retention priority over senior teachers—may be “skipped”—if the junior teacher possesses superior skills or capabilities not possessed by their more senior colleagues. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Governing Bd. of Santa Clara Unified School Dist.* (1981) 116 Cal.App.3d 831.)

(B) The District established that it has a specific need for personnel to teach a specific course, the dual immersion program, and it established that two certificated employees had special training and experience necessary to teach that course. Those two employees are Respondents Hernandez and Zemudio. Therefore, pursuant to section 44955, subdivision (d)(1), the District may skip those Respondents, that is, deviate from terminating them in order of seniority. This Conclusion is based on Factual Findings 12(A) through 12(C).

(C) No Respondent established that they had the right to bump a junior employee or that they should have been skipped, based on the foregoing rules, and Factual Finding 12(D).

4. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render, based on Factual Finding 13.

5. The District may lay off the remaining Respondents, in reverse order of seniority, as set forth on Exhibit 8, less Respondents Hernandez and Zemudio, who are to be skipped, and are therefore dismissed.

### **ORDER**

1. The Accusations are sustained, except as to Respondents Pablo Hernandez and Aurora Zemudio, and the accusations against those two respondents are dismissed.

//

2. Notice shall be given to the remaining Respondents that their services will not be required for the 2009-2010 school year.

July \_\_\_\_, 2009

---

Joseph D. Montoya  
Administrative Law Judge  
Office of Administrative Hearings