

BEFORE THE  
SUPERINTENDENT OF SCHOOLS  
OF THE  
RIVERSIDE COUNTY OFFICE OF EDUCATION  
STATE OF CALIFORNIA

In the Matter of the Accusation Against  
Certificated Employees:

LOUVIE BENITEZ-TAITANO,  
DIANE JACOBY,  
CAROL MUSULAS,

Respondents.

OAH No. 2009061362

**DECISION**

Greer D. Knopf, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Riverside, California on July 20, 2009.

Mark W. Thompson, Atkinson, Andelson, Loya, Ruud & Romo, Attorneys at Law, represented the Riverside County Office of Education.

Ronald G. Skipper, Attorney at Law, represented respondents Louvie Benitez-Taitano, Diane Jacoby, and Carol Musulas.

The matter was submitted on July 20, 2009.

**FACTUAL FINDINGS**

1. Patrick Kelleher, Executive Director, Division of Personnel Services, with the Riverside County Office of Education, made and filed the Accusations in his official capacity as the designee of Kenneth M. Young, Superintendent of Schools (Superintendent) of the Riverside County Office of Education (RCOE). At the outset of the hearing, RCOE dismissed its accusation as to respondent Diane Jacoby. The proceeding went forward as to the two remaining respondents, Louvie Benitez-Taitano and Carol Musulas (Respondents) only.

2. Respondents are both certificated employees of RCOE.

3. On June 25, 2009, in accordance with Education Code section 44955.5, the Superintendent determined that RCOE's total funded revenue limit per unit of average daily attendance (ADA) for the 2009-2010 fiscal year has not increased by at least two percent as compared to fiscal year 2008-2009. To the contrary, the total revenue limit per unit of ADA for fiscal year 2009-2010 reveals a decline of 1.27 percent from fiscal year 2008-2009. Based on the needs of RCOE and its students, the Superintendent has determined that it is necessary to reduce or discontinue particular kinds of services for the upcoming school year.

4. On June 26, 2009, in accordance with Education Code sections 44949 and 44955, Patrick Kelleher (Kelleher), the Executive Director, Division of Personnel Services of RCOE notified the Superintendent of the RCOE in writing of his recommendation that Respondents be notified that their services would not be required after August 14, 2009 for the ensuing school year. Kelleher stated the reasons for the recommendation. The recommendation that Respondents be terminated from employment was not related to their competency as teachers.

5. On June 26, 2009, a written notice of the recommendation of termination was delivered to each Respondent, either by personal delivery or by depositing the notice of termination in the United States registered mail, postage prepaid and addressed to the Respondent's last known address. The written notices of termination specifically stated that Respondents' services would not be required after August 14, 2009 for the 2009-2010 school year. Each notice set forth the reasons for the recommendation.

6. Each notice advised Respondents of his or her right to a hearing, that each Respondent had to deliver a request for a hearing in writing to the person sending the notice of termination by a date certain, which was more than seven days after the notice of termination was served, and that the failure to request a hearing would constitute the waiver of the right to a hearing. Each appearing Respondent timely filed a written request for a hearing to determine if there was cause for not reemploying that Respondent for the ensuing year.

7. Accusations were timely served on Respondents thereafter. Each Respondent appearing in this matter filed a timely Notice of Defense. All prehearing jurisdictional requirements were met.

8. The Superintendent of RCOE took action to reduce or discontinue the following particular kinds of services for the 2009-2010 school year:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Alternative Education Teaching Services	3 FTE positions
Total Certificated Positions	<u>3 FTE positions</u>

The proposed reductions total three full-time equivalent (FTE) positions.

9. The services were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The Superintendent’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

10. The 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 Superintendent.

11. RCOE staff prepared a certificated seniority list that includes all of the certificated probationary and permanent employees and sets forth each employee’s credentials and current assignment. Certificated employees were identified for layoff in each particular kind of service in order of seniority considering each employee’s certifications and special qualifications. No certificated employee junior to either Respondent was retained to perform any services that either of the Respondents is certificated and competent to render.

12. In arriving at the order in which certificated employees should be given notice of layoff, the superintendent used the seniority list of certificated employees to determine who the least senior employees are. In some instances, senior employees may have the right to “bump” into other positions held by junior employees. However, due to the criteria of competency established herein by the Superintendent, there was no need to apply the practice of bumping in this matter.

13. The RCOE may deviate from the order of seniority in determining which certificated employees should be given notice of layoff where it demonstrates a specific and immediate need to retain certain personnel with special training and experience. In some instances, junior employees hired after Respondents are being retained. The district demonstrated a specific and immediate need to retain personnel who are credentialed to teach special education in Specialized Academic Instruction classes and personnel who have appropriate security clearances to staff the RCOE’s school programs in jails. RCOE’s need for such employees is based on a stipulated settlement agreement it previously entered into with the federal government’s Office of Civil Rights regarding the need to hire and retain such teachers. Respondents are either enrolled or are in the process of enrolling in educational programs to obtain the necessary training in special education, but that training has not yet been completed so it was not considered by RCOE in deciding the proper order of layoff. The more junior employees being retained by RCOE have the special training, experience, and security clearances necessary to teach such programs which others with more seniority did not possess.

14. At the outset of the hearing, RCOE dismissed the accusation against respondent Diane Jacoby (Jacoby). RCOE dismissed Jacoby from this proceeding due to the fact that she was the most senior employee when compared to a certificated employee, Jose Bustos (Bustos), who RCOE recently hired and mistakenly failed to notice for layoff. Jacoby was the only employee who was prejudiced by RCOE’s hiring of and failing to notice Bustos for layoff since she would have been the only employee who would have otherwise been

retained. RCOE properly dismissed the accusation as to Jacoby. Respondents request that the so-called “domino effect” be applied to dismiss the accusation as to all remaining respondents, but the failure to notice Bustos for layoff had no prejudicial effect on the remaining Respondents. Even if Bustos had been noticed for layoff, the Respondents would have still been given notice as well. When its mistake was discovered, RCOE properly moved to retain Jacoby and proceeded against the remaining Respondents who were properly given notice that their services would no longer be required for the ensuing school year.

## LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949, 44955 and 44955.5. All notices and jurisdictional requirements contained in those sections were satisfied.

2. Education Code section 1294.5 provides that:

“Whenever, in those provisions, a duty or power is imposed upon or granted to the governing board of a school district or community college district or an employee thereof, the power or duty shall, for the purposes of this section, be deemed to be granted to or imposed on the county superintendent of schools or his or her employee, respectively. When ‘District’ is used in those provisions, it shall, for the purposes of this section, be deemed to mean ‘county superintendent of schools.’”

3. Education Code section 44955.5 provides in pertinent part as follows:

“During the time period between five days after the enactment of the Budget Act and August 15 of the fiscal year to which that Budget Act applies, if the governing board of a school district determines that its total revenue limit per unit of average daily attendance for the fiscal year of that Budget Act has not increased by at least 2 percent, and if in the opinion of the governing board it is therefore necessary to decrease the number of permanent employees in the district, the governing board may terminate the services of any permanent or probationary certificated employees of the district, including employees holding a position that requires an administrative or supervisory credential. The termination shall be pursuant to Sections 44951 and 44955 but, notwithstanding anything to the contrary in Sections 44951 and 44955, in accordance with a schedule of notice and hearing adopted by the governing board.”

4. The Superintendent properly determined that RCOE’s total revenue limit per unit of ADA for the fiscal year 2009-2010 has not increased by at least two percent and, in fact, it has declined. Thereafter, the Superintendent properly determined that it was necessary to decrease the number of permanent employees under the requirements of Education Code section 44955.5, as set forth in Findings 1-14.

5. Cause exists under Education Code sections 44949, 44955, and 44955.5 for the RCOE to reduce or discontinue particular kinds of services. The cause for the reduction

or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. A preponderance of the evidence sustained the charges set forth in the accusation, as set forth in Findings 1-14. It is recommended that the Superintendent give Respondents notice before August 15, 2009, that their services are longer required by the RCOE.

6. Respondents contend that RCOE has not made a showing that it is financially necessary to reduce these certificated employees. Education Code section 44955.5 authorizes the RCOE to proceed with layoffs where there is the necessary showing of the total revenue limit per unit of ADA for the fiscal year. The law does not appear to require any additional showing of fiscal necessity as argued by Respondents. The determination of the necessity to reduce or discontinue particular kinds of services is reserved for the Superintendent. The policymaking decisions of a district's governing board (or Superintendent) should not be subject to arguments as to the wisdom of the decision to make the reductions. (*California Teacher's Assn. v. Huff* (1992) 5 Cal.App.4<sup>th</sup> 1513, 1529.) The Superintendent's action need only be reasonable under the circumstances. (*Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796.) RCOE made a sufficient showing that the requirements of Education Code sections 44949, 44955, and 44955.5 have been met, as set forth in Findings 1-14.

7. The RCOE mistakenly failed to give notice to one certificated employee who was junior to Jacoby and Respondents in this action. Therefore, RCOE dismissed the accusation as to Jacoby. Respondents argue that the "domino effect" should be applied to dismiss the accusation as to all remaining respondents. However, this failure to notice one junior employee had no prejudicial effect on the remaining two Respondents. Education Code section 44949, subdivision (c)(3) provides that: "Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors." The domino effect theory argued by Respondents was also rejected by the Court of Appeal in *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567, 576 where the Court declined to force a school district to retain all employees that were senior to junior employees who mistakenly were not given notice. The Respondents herein were not prejudiced by RCOE's error so they do not need to be retained, as set forth in Findings 1-14.

ORDER

The Accusations served on the Respondents Louvie Benitez-Taitano and Carol Musulas are sustained. Notice shall be given to Respondents before August 15, 2009 that their services will not be required because of the reduction or discontinuation of particular services as indicated.

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

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GREER D. KNOPF  
Administrative Law Judge  
Office of Administrative Hearings