

BEFORE THE
BOARD OF EDUCATION
STOCKTON UNIFIED SCHOOL DISTRICT

In the Matter of the Non-Reemployment of
Certificated Employees of the Stockton
Unified School District:

OAH No. 2009110492

Persons Occupying
230 Certificated Full Time Equivalent
Positions.

Respondents

PROPOSED DECISION

Administrative Law Judge Ann Elizabeth Sarli, Office of Administrative Hearings (OAH), State of California, heard this matter in Stockton, California, on April 19, 20 and 21, 2010.

Diana D. Halpenny and Marie A. Nakamura, Attorneys at Law, Kronick, Moskowitz, Tiedemann & Girard, represented the Board of Education, Stockton Unified School District.

At hearing, several respondents were dismissed from the proceeding due to: (1) failure to file a timely notice of defense; (2) entry into a written stipulation to withdraw the Notice of Defense; and/or (3) the District's rescission of the Notice of Non-Reemployment. The respondents remaining in the action are listed in Exhibit 18 A, which is attached hereto and incorporated herein.

Respondents were represented at hearing as follows:

Ernest H. Tuttle, IV, Attorney at Law, Law Offices of Ernest Tuttle, IV, represented Isabel Olivas.

Heidi Primack Talbot, Attorney at Law, of the Talbot Law Group, represented Diane Fender. Diane Fender's Notice of Non-Reemployment was rescinded at hearing on April 21, 2010, and she is no longer a respondent in the action.

Jose Cardenas represented himself.

Andres Uyeda represented himself.

Thomas J. Driscoll, Attorney at Law, Driscoll & Associates, represented the remaining respondents.

Oral and documentary evidence was presented and the parties offered oral closing arguments. The record was then closed and the matter was submitted for decision on April 21, 2010.

FINDINGS

1. Steve Vaczovsky is the Interim Superintendent of the Stockton Unified School District (District). Robert Thompson is the Interim Assistant Superintendent, Human Resources, of the District. Their actions, and those of the District's governing body, the Board of Education (Board), were taken solely in their official capacities.

2. The District serves approximately 38,000 students in 52 schools. There are 43 kindergarten through eighth grade (K-8) schools, four comprehensive high schools, and four alternative high schools. The District's student population is ethnically diverse and includes substantial numbers of English language learners (ELL). Seven of the District Schools have been categorized by the State under No Child Left Behind (NCLB) as lowest performing schools in the State and 28 of the schools have been categorized as the second lowest performing.

3. The District currently has a \$336 million budget and is facing a budget shortfall for the 2010-2011 school year of at least \$28.1 million.

4. On February 23, 2010, the Board adopted Resolution No.09-45, reducing or eliminating particular kinds of services (PKS), affecting 200 Full Time Equivalent certificated positions (FTE).

5. On March 2, 2010, the Board amended Resolution No. 09-45. The amendment further reduced PKS, affecting an additional 30 FTE positions.

6. Resolution No.09-45 and its amendment (Resolution) were based on the Interim Superintendent's recommendation that it was necessary to reduce or discontinue particular kinds of services no later than the beginning of the 2010-2011 school year.

7. The Resolution states that the Board determined that it was necessary to reduce the following PKS of the District not later than the beginning of the 2010-2011 school year:

| <u>Services</u> | <u>Number of FTE Positions</u> |
|---|--------------------------------|
| 1. Administrative Services | |
| A. Central Office- Assigned Elementary Assistant Principals | 4.00 FTE |
| 2. Counseling Services | |
| A. K-8 Counseling Services | 3.00 FTE |
| 3. Teaching Services | |
| A. Elementary Teaching Services | 192.00 FTE |
| B. Program Specialist- Gifted and Talented | 1.00 FTE |
| C. K-8 Program Specialists Teaching Services | 3.00 FTE |
| D. High School Business Teaching Services | 2.00 FTE |
| E. High School English Teaching Services | 9.00 FTE |
| F. High School Social Science Teaching Services | 2.00 FTE |
| G. High School Math Teaching Services | 2.20 FTE |
| H. High School Spanish Teaching Services | 1.00 FTE |
| I. High School Biology Teaching Services | 2.00 FTE |
| J. High School Physics Teaching Services | .40 FTE |
| K. Edison High School Block Schedule Science Physics (.66) Field Research Problems (.33) Teaching Program | 1.00 FTE |
| L. Edison High School Block Schedule Child Development (.833) and High School Intro Consumer Science (.167) Teaching Program | 1.00 FTE |
| M. High School Chemistry Teaching Program | .20 FTE |

| | |
|--|----------------|
| N. High School Earth Science Teaching Program | .60 FTE |
| O. Middle School Science Teaching Program (6 th Grade (0.4)) and (8th Grade (0.4)) | .80 FTE |
| P. High School Introduction Consumer & Family | .40 FTE |
| Q. High School Foundations in Literacy Teaching Program | .60 FTE |
| R. High School Foods & Nutrition Teaching Program | .80 FTE |
| S. High School WASC Teaching Program | .20 FTE |
| T. High School Home Economics Teaching Program | 1.00 FTE |
| U. High School Health and Drivers Education Teaching Services | 1.00 FTE |
| V. High School Accounting Teaching Services | .20 FTE |
| W. High School Multi- Media Teaching Services | .60 FTE |
| Total | <u>230 FTE</u> |

8. As a result of the above PKS reductions and/or eliminations, the Board determined that it was necessary to decrease 230 FTE positions for certificated employees in the District at the close of the 2009-2010 school year, in accordance with Education Code section 44955.¹

9. On March 12, 2010, the Interim Superintendent gave the Board written notice of his recommendation that notice be given to respondents that their services would not be required for the ensuing school year, and the reasons therefore. The Board directed the Interim Superintendent to take all appropriate action needed to effectuate the PKS reductions and/or eliminations, including the sending of appropriate notices to all employees whose positions would be affected by virtue of this action.

¹ All statutory references are to the California Education Code unless otherwise indicated.

10. On March 12, 2010, Robert Thompson timely served a letter entitled “Subject: Recommendation That Services Will Not Be Required” (Preliminary Notice) on each of the permanent and probationary certificated employees affected by the PKS reductions and/or eliminations set forth in the Resolution.² The Notice advised that Mr. Thompson had recommended to the Board that the recipient be given preliminary written notice that his/her services might not be required for the 2010-2011 school year, due to reductions in PKS.

11. All the respondents in this action³ timely filed a Request for Hearing to determine whether there was cause for not reemploying them for the 2010-2011 school year.

12. On March 30, 2010, Robert Thompson made and filed the Accusation, and caused it to be served on respondents or their legal counsel. Respondents timely filed Notices of Defense.

Process for Identifying Certificated Employees Subject to Layoff

13. In anticipation of a “dire” budget shortfall and PKS reduction, Mr. Vaczovsky and Mr. Thompson directed staff to begin updating the District’s computerized seniority list in December 2009. In December, the seniority list was posted on the District website and presented to all bargaining units. Each certificated employee was sent a verification sheet, listing his or her seniority date, status and credentials. The verification sheet advised that any changes to this information should be returned to the District office by January 8, 2010. Multiple certificated employees responded with additional information. The District staff researched this information and when appropriate, updated the seniority list. District staff took into account known attrition by retirement and resignation.⁴

14. After the Resolution was adopted, District staff identified the individuals serving in the positions affected by the PKS reductions. District staff used the updated seniority list to identify the least senior persons occupying the positions affected by the PKS reductions.

15. When the least senior persons occupying the positions affected by the PKS reductions were identified, District staff looked at each individual’s credentials to determine whether he or she could displace any less senior certificated employees. District staff conducted this inquiry for each affected employee in each service area

² “Precautionary” Preliminary Notices were also served on certain employees whom the District classified as temporary and on other employees whom the District believed were not legally entitled to a Preliminary Notice.

³ See Exhibit 18 A.

⁴ The District has offered employees a retirement incentive. It will not be known for at least two months from the date of the hearing how many certificated employees wish to accept the offer and whether the incentives would be cost effective.

identified in the Resolution, and in the same order the service area was set forth in the Resolution. District staff completed a “bumping chart” which documents the results of the displacement process. On March 12, 2010, District staff served the Preliminary Notice identified in Finding 10, on the most junior employees affected by the PKS reduction.

Challenges to Counseling Reductions Affecting Andres Uyeda and Jose Cardenas

16. Pursuant to Resolution item 2 A., 3.00 FTE in Counseling Services- K-8 Counseling Services were reduced. District staff identified the least senior school counselors occupying 3.00 FTE in K-8 counseling. They are: Isabel Olivas, Vicki Zeyen and Carly Moore.

Isabel Olivas is the least senior certificated employee assigned to K-8 counseling services. She is a permanent employee, has a seniority date of August 18, 2004, and is assigned as an elementary school counselor. She holds a pupil personnel services (PPS) credential. Ms. Olivas is unable to displace any junior employee. There are no junior employees being retained to provide services which Ms. Olivas is certificated to provide. She is subject to layoff and was served a Preliminary Notice.

Vicki Zeyen was the next least senior certificated employee assigned to K-8 counseling services. She is a permanent employee, with a seniority date of August 16, 2004. She holds a PPS credential. The District determined that she is senior to Jose Cardenas and could displace him. Mr. Cardenas has a seniority date of August 11, 2005. He holds a PPS credential and is a permanent employee. He holds the position of Guidance Chairperson at a District high school.

Carly Moore was the next least senior certificated employee assigned to K-8 counseling services. She is a permanent employee, with a seniority date of December 10, 2003, and is assigned as an elementary school counselor. Ms. Moore holds a PPS credential. The District determined that she is senior to Andres Uyeda and could displace him. Mr. Uyeda has a seniority date of August 9, 2006. He holds a PPS credential and is a permanent employee. He holds the position of guidance chairperson at a District high school.

17. Mr. Uyeda and Mr. Cárdenas maintain that the PKS reduction of 3.00 FTE K-8 Counseling Service does not specify a reduction in the service of “Guidance Chairperson” or “Guidance Chairperson at a District High School.” Therefore, they maintain that since they occupy guidance chairperson positions, they are not subject to layoff. However, Mr. Uyeda and Mr. Cárdenas were not directly affected by the PKS reduction of K-8 counseling services. Rather, as noted above, each was displaced by a senior certificated employee.

18. Mr. Uyeda and Mr. Cárdenas maintain that the senior certificated employees who are displacing them are not certificated or competent to displace them. They maintain that there are substantial distinctions between the positions of guidance chairperson and K-8 counselors, and that the collective bargaining agreement that covers the District’s counselors recognizes these distinctions. They also point to the fact that, pursuant to the collective bargaining agreement, guidance chairperson positions must be filled by an “interview and select” process.

These arguments are not persuasive. The PPS credential authorizes its holder to perform counseling services in grades K-12. There are no additional credentials or authorizations required for the PPS credential holder to serve as a high school guidance chairperson. Accordingly, senior employees Carly Moore and Vicki Zeyen hold the certification required to displace Mr. Uyeda and Mr. Cardenas. There is no evidence that either Carly Moore or Vicki Zeyen lack competency to perform as high school guidance chairpersons. Ultimately, the District may fill the high school guidance chairperson positions through an internal competitive process, pursuant to the collective bargaining agreement. However, the certificated employees who comprise the District’s applicant pool of PPS credential holders, including Carly Moore and Vicki Zeyen, are senior to Mr. Uyeda and Mr. Cárdenas.

19. Mr. Uyeda and Mr. Cárdenas further maintain that they should be “skipped” from the layoff because they have special skills and qualifications which more senior employees do not possess. They cite section 44955, subdivision (d)(1), as authority for this proposition. This section provides in pertinent part:

(d)... *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 ... provide services authorized by a services credential with a specialization in ... pupil personnel services... and that the certificated employee has special training and experience necessary to ... provide those services, which others with more seniority do not possess. (Italics added)

Although Mr. Uyeda and Mr. Cárdenas may be very well-qualified to occupy their positions as high school guidance chairpersons, the District is not required to retain them and release more senior certificated employees. Conversely, the District has an affirmative obligation to reassign senior teachers who are losing their positions. Pursuant to section 44955, subdivision (d)(1), only the District may seek to “skip” a junior employee, under the limited circumstances set forth therein. A junior employee has no legal right to insist that he or she be skipped.

20. There are no junior employees being retained to provide services which Mr. Cárdenas is certificated and competent to provide.

21. There are no junior employees being retained to provide services which Mr. Uyeda is certificated and competent to provide.

Service of Accusation on Andres Uyeda

22. Mr. Uyeda maintains that the District failed to properly serve him with the Accusation, and therefore his Preliminary Notice should be rescinded. The District served attorney Ernest H. Tuttle, IV, with the Accusation against Mr. Uyeda, after Mr. Tuttle advised the District that he was serving as Mr. Uyeda's counsel. Mr. Tuttle timely filed a Notice of Defense on Mr. Uyeda's behalf. After Mr. Tuttle and Mr. Uyeda reached an impasse about the nature and extent of representation, Mr. Tuttle forwarded the Accusation to Mr. Uyeda. Mr. Uyeda received the Accusation no later than April 16, 2010. Mr. Uyeda claims he never authorized Mr. Tuttle to serve as his counsel, and therefore the District should have served the Accusation upon him, and did not.⁵

23. The Education Code does not mandate that the employee subject to layoff be personally served with the Accusation by a particular date. The inference may be properly drawn that since the employee is required to file a Notice of Defense within five days after service of the Accusation (section 44949, subdivision (c)(1)), there would be at least five days elapsing between the time the employee receives the Accusation and the date the hearing commences. However, a Notice of Defense was filed on Mr. Uyeda's behalf and the timely filing of a Notice of Defense is not at issue. Mr. Uyeda had timely received the Preliminary Notice, had timely filed a Request for Hearing and was aware of the hearing dates. The evidence was persuasive that Mr. Uyeda, shortly before the hearing was set to commence, decided he should seek counsel or obtain different counsel. The appropriate remedy for a party who finds himself unrepresented on the eve of hearing, either because of misunderstanding with counsel or counsel's withdrawal, is to seek a continuance. Mr. Uyeda did so and the Administrative Law Judge declined to continue the entire hearing while Mr. Uyeda sought counsel. Mr. Uyeda participated fully in the hearing. He presented his case on the final day of hearing. At that time, he was unable to identify any evidence that he would require additional time to locate. His renewed request for continuance was denied.

⁵ No additional evidence was taken on the history of Mr. Tuttle's representation of Mr. Uyeda, because Mr. Tuttle represents other respondents in this proceeding, and because of the application of the attorney-client privilege.

Skipping Certain Alternative Education Teachers

24. Julio Lopez is a probationary employee with a seniority date of July 28, 2008. He holds a single subject credential in social sciences, with a BCLAD in Spanish. Mr. Lopez is currently assigned to teach at the District's only continuation high school, Jane Frederick Continuation High School (Jane Frederick). He teaches independent study, consisting of multiple classes, including English, world history, earth science, algebra, math, seasonal sports, US history, American government, biology, economics, algebra and humanities. Mr. Lopez was not noticed for layoff.

25. Christina Katen is a probationary employee with a seniority date of July 9, 2008. She is assigned to teach secondary education. She holds a multiple subject credential, with authorizations in intro social sciences-grades 9 and below and intro English grade 9 and below. Her Bachelor's degree is in Liberal studies and she holds a Master's degree in education administration. She is assigned to teach introductory English 9th grade and below at Merlot High School, a small alternative high school themed around environmental education. Because Merlot High School is small, the District maintains that it is easier for staffing and programming to retain a teacher like Ms. Katen, who has more than one subject authorization. Scheduling is very tight and teachers usually teach in more than one subject area. Ms. Katen was not noticed for layoff.

26. Susan Lockman is a probationary employee with a seniority date of July 9, 2008. She is assigned as a secondary teacher and holds a multiple subject credential. Her Bachelor's degree is in general studies and she has a master's degree in education. She is assigned to teach English at the Stockton Alternative High School. She is NCLB compliant in English. When the District was recruiting, it attempted to hire someone holding a single subject English credential, but received no applications. Ms. Lockman was selected because of her No Child Left Behind (NCLB)/HOUSSE⁶ compliance in English. Ms. Lockman was not noticed for layoff.

27. There are four respondents who are senior to Mr. Lopez, Ms. Katen and Ms. Lockman and who maintain that they should bump into the skipped positions.

A. Joseph Shelby is a probationary employee with a seniority date of September 10, 2007. He is employed by the District as an intermediate school teacher and holds a multiple subject credential, with a CLAD authorization. He is assigned to teach fourth through sixth grades at the Stockton Intermediate Alternative School, a school which primarily serves students who have had behavioral or attendance issues at their home schools.

⁶ HOUSSE Qualification is granted when sufficient evidence is presented that the teacher has demonstrated competence in the K-12 content standards pertaining to the teaching assignment (core academic assignment) and has met California Standards for the Teaching Profession 3 and 5.1.

B. Michelle Munoz is a permanent employee of the District with a seniority date of July 25, 2007. She is employed as an intermediate school teacher and holds a multiple subject credential with a CLAD authorization. Ms. Munoz has no supplemental authorizations except CLAD. Ms. Munoz teaches fourth grade at Wilhelmina Henry Elementary School, and has done so for the three years of her employment with the District. She has experience teaching in alternative education settings. She worked for San Joaquin Office of Education in their alternative and court schools for four years and taught grades seven through 12. She also taught for one year at a Tracy School District alternative education site, in grades seven through 11. She has also worked in the field of probation for a year.

C. Clinton Earle Stoddard is a permanent employee of the District with a seniority date of September 4, 2007. He is employed as an intermediate school teacher and holds a multiple subject credential with an ELL authorization. In the current school year, he has been assigned to teach science, and then history, at Roosevelt Elementary School. He is NCLB qualified in multiple subjects and has HOUSSE qualification in 11 subject areas, including mathematics, English, reading and language arts, science, geography, economics, civics and government and history. He has taught at a K-12 charter school, in all subjects for five years. Although he has not taught specifically in alternative education, he has taught for 30 years.

D. Jeannine Huffman is a probationary employee of the District with a seniority date of July 25, 2007. She is employed as an intermediate teacher, teaching eighth grade and holds a multiple subject credential. She does not yet have a CLAD authorization. She has no supplemental authorizations, although she holds a CTE (California Technical Education) credential in business and finance, with marketing and sales pending. This credential allows her to teach technical education to high school and adult students. She is authorized to teach the trade subjects of business, marketing and entrepreneurship. Although she has no specific experience with working in alternative education, she works on an “intensive level” with students who have problems with gangs, violence and drugs. She uses ELL and other techniques designed to teach difficult student groups. She teaches all subjects at Hoover Intermediate School, including algebra, high school equivalent physical science, English language arts, US history and bilingual Spanish.

28. *Skipping Julio Lopez* - The District maintains that Mr. Lopez was skipped for several reasons and should not be bumped. The District acknowledges that a certificated employee holding a multiple subjects credential is certificated to teach in a continuation high school. However, the District maintains that it has a specific need for Mr. Lopez to teach the high school subjects he teaches at Jane Frederick. The No Child Left Behind Act requires that teachers assigned to teach core subject areas either hold a single subject in the subject area or be NCLB

qualified to teach in the subject area. The District maintains that Mr. Lopez's single subject credential in social sciences enables him to teach several core subject areas, such as world and US history, American government and economics. The District is attempting to have continuation schools staffed by NCLB qualified and single subject credential holders, so that it has greater flexibility in staffing. Additionally, Mr. Lopez's BCLAD in Spanish permits them to teach in that language. Jane Frederick has a significant population of students whose first language is Spanish. Although Mr. Lopez is not NCLB qualified in all subject areas he teaches, he is highly qualified in several subjects due to his single subject credential, and this flexibility is valuable to this small continuation high school.⁷

29. Mr. Shelby, Ms. Munoz and Ms. Huffman each have multiple subject credentials with no supplemental authorizations and no NCLB qualifications in core subject areas. Although they have experience teaching in alternative education settings, the District has demonstrated that it is vital for teachers at the District's only continuation high school to hold either single subject credentials, or be NCLB qualified in core areas. Accordingly, Mr. Shelby, Ms. Munoz and Ms. Hoffman may not bump into the position held by Mr. Lopez.

30. However, Mr. Stoddard is NCLB qualified in multiple subjects and has HOUSSE/NCLB qualification in 11 subject areas, including core academic areas. Although he has not taught specifically in alternative education, he has taught for 30 years, in multiple settings. He has ELL certification, which enables him to teach a population with a large number of English-language learners. He is thus able to teach several core subject areas and has the flexibility required to teach in the continuation high school.

31. Although Mr. Lopez may have been and may still be the "best candidate" to fill his position, the Education Code does not permit districts in a layoff proceeding to weigh the qualifications of teaching staff and retain junior employees it believes have superior skills. The District must show that the skipped teacher has special training and experience *necessary to teach* the specific course. The District has established that the special training and experience *necessary to teach* continuation high school consists of highly qualified status in multiple subject areas. Mr. Stoddard has this special training and experience and is senior to Mr. Lopez. Accordingly, Mr. Stoddard may displace Mr. Lopez.

⁷ The District advanced several other arguments supporting its skip of Mr. Lopez, that do not have merit. For instance, the District maintained that Mr. Lopez had ties to the community, was a callback from the prior year layoff reinstatement list, and that other teachers had not applied for his position at the time it was advertised. The only relevant issues to the determination of whether an employee should be skipped are whether the District has a specific need for the employee's special training and experience and whether others with more seniority possess that training and experience.

32. *Skipping Susan Lockman* - Mr. Shelby, Ms. Munoz and Ms. Hoffman maintain that they can bump into Ms. Lockman's English teaching position at Stockton Alternative High School. But, as noted in Findings 29, Mr. Shelby, Ms. Munoz and Ms. Huffman do not hold single subject credentials and are not NCLB qualified in core areas. Ms. Lockman is NCLB qualified in the English courses she teaches. Accordingly, Mr. Shelby, Ms. Munoz and Ms. Hoffman may not displace Ms. Lockman.

33. *Skipping Christina Katen* - Mr. Shelby, Ms. Munoz and Ms. Hoffman maintain that they can bump into Ms. Katen's 9th grade English position at Merlot High School.⁸ Ms. Katen holds authorizations in intro social sciences-grades 9 and below and intro English grade 9 and below. As set forth in Findings 29 and 32, Mr. Shelby, Ms. Munoz and Ms. Hoffman may not displace Ms. Katen.

Skipping Arts Resource Teacher

34. Kathy McCarron is a permanent employee with a seniority date of August 27, 2007. She is assigned as an arts resource teacher (visual arts) at Harrison Elementary School. She holds a multiple subject credential with authorizations in English and in intro Social Sciences grade 9 and below. She also holds a single subject credential in English and a single subject credential in social science. She earned a liberal arts baccalaureate degree, with a concentration in art. When she was hired into this position she was in a master's program for curriculum and instruction in art education. On November 10, 2009, the Board passed resolution No. 09- 20 authorizing Ms. Mc Carron to teach art outside of her credential area, pursuant to section 44256, subdivision (b). The resolution identifies several teachers teaching outside of their credential area for the 2009-2010 school year. Respondents argue that this resolution does not apply to the upcoming school year and that therefore there is no resolution in place allowing Ms. McCarron to teach art in 2010-2011.

35. Donna Mittlestedt is a permanent employee assigned as an intermediate school teacher. She has a seniority dated July 21, 2007. She holds a multiple subject credential with a supplemental authorization for business grades 9 and below. She teaches fifth grade at a magnet school at John Marshall Elementary School. The magnet school program is designed to expose students to science and math. Ms. Mittlestedt is senior to Kathy McCarron. Ms. Mittlestedt received a Preliminary Notice as part of the layoff of 192 FTE Elementary Teaching Services. Ms. Mittlestedt maintains that she should displace Ms. McCarron as an arts resource teacher.

⁸ During respondents' closing argument, counsel apparently acknowledged that respondents could not bump into Ms. Katen's position. The issue is addressed herein because evidence was taken on the issue and counsel's argument did not constitute a clear waiver.

36. Ms. Mittlestedt has 21 units of fine art education and 15 units of other arts related classes, including ceramics, sculpture, painting, drawing color and design. She attained these units by taking classes at Delta College between 1999 and 2000, for personal enrichment. Ms. Mittlestedt's baccalaureate degree does not include a concentration or emphasis in art. She has not sought an authorization in art, nor has she requested a Board resolution allowing her to teach art outside of her credential. When she applied for her current position, she included transcripts from Delta College showing credits accumulated in art classes.

37. Ms. McCarron is qualified to teach art in 2009-2010 by virtue of the Board resolution authorizing her to do so and her baccalaureate concentration in art. Ms. Mittlestedt claims that she, too, is authorized to obtain a Board resolution enabling her to teach art, because she has accumulated units of art education. Essentially, she maintains that she and Ms. McCarran are in the same position for the 2010-2011 school year in that each has over 12 units of art education, and neither will have a resolution in effect authorizing her to teach outside of her credential.

38. The District maintains that Ms. McCarron's baccalaureate concentration in art and the fact that she has already obtained a Board resolution enabling her to teach art for three years, and she can thus obtain a Board Resolution for the following year, qualifies her for the arts resource position. The District maintains that Ms. Mittlestedt is not qualified without Board authorization to teach art resources and it is speculative whether she will be able to obtain Board authorization for the upcoming year.

39. The District's argument is persuasive. Reductions in force pursuant to the Education Code necessarily require the District to consider employees' credentials and qualifications as they exist at the time the Preliminary Notices are issued. Credentials and qualifications include Board resolutions authorizing teaching outside a credential area. Ms. Mittlestedt is currently not qualified to teach art resources, while Ms. McCarron is. Ms. Mittlestedt may not bump into the arts resource position held by Ms. McCarron.

Retaining Numeracy Specialist

40. Heather Espitia is a permanent employee with a seniority date of November 1, 2007. She holds a multiple subject credential with a CLAD authorization. She is assigned to Fremont Middle School as a numeracy specialist. This is a non-teaching position in which she coaches elementary teachers on strategies and skills designed to result in more effective classroom teaching of math. Ms. Espitia's services are being terminated pursuant to the 192 FTE reduction in elementary teaching services.

41. Ms. Espitia contends that she is not subject to lay off, because the resolution did not identify numeracy specialists as a particular kind of service for reduction. Ms. Espitia also maintains that if arts resource teachers were not a PKS identified in the resolution, then numeracy should not be considered a PKS. The District responds that Ms. Espitia is subject to layoff because she is one of the least senior multiple subject holders and is within the range of layoff of 192 FTE Multiple Subject holders providing elementary teaching services. The District explains that the arts resource teachers were skipped because of their skills and experience in art, not because arts resource teachers were not identified as a PKS. The District was persuasive. Employees involved in the layoff process testified that there was discussion and agreement that arts resource teachers should be skipped because of the District's specific need for teachers with these skills, and because of the great difficulty the District had encountered in filling these positions. Further, Ms. Espitia makes too fine a distinction between classroom teaching services and her services teaching classroom teachers. The PKS reduces elementary teaching services, and she is an elementary teacher.

General Challenges

Skipping Process

42. Respondents argue that there is a "fundamental flaw" in the procedure the District utilized in skipping certain teachers. There was no Board resolution authorizing skipping and the District did not provide information to teachers as to whom would be skipped and why, so that senior teachers could assert that they too have the special skills required by the District to fill the positions that are skipped. Respondents also maintain there is an affirmative duty upon the District to review the backgrounds of senior employees who are subject to layoff, when retaining a junior employee pursuant to section 44955, subdivision (d)(1).

43. The Education Code does not require that the governing body of a school district adopt a resolution respecting its intent to skip certificated employees under section 44955, subdivision (d)(1). Nor are there notice requirements in the Education Code designed to ensure that persons subject to layoff are aware of a skip and have an opportunity to challenge it.

44. Section 44955, subdivision (d)(1), places the burden upon the District to demonstrate a specific need for personnel to teach a specific course or course of study and to demonstrate that the certificated employee skipped has special training and experience necessary to teach that course or course of study, *which others with more seniority do not possess*. Clearly then, the District has an affirmative duty to examine the qualifications of senior employees to fill the positions it proposes to skip. It cannot determine that there are no senior employees with necessary skills without conducting an inquiry. In a District the size of Stockton Unified School District, that task can be onerous, especially when the special training and experience the District

requires to fill the position does not come in the form of a credential. A District may choose to utilize a procedure similar to the procedures used to update seniority lists. A District may advise all senior employees that it proposes to skip certain junior employees, and the reasons therefore, and give senior employees an opportunity to present written evidence that they have the special training and experience necessary to teach the skipped position.

45. However, here the District's failure to advise senior employees that it intended to skip junior arts resource teachers and certain junior alternative education teachers was not a deprivation of due process. In *Bledsoe v. Biggs Unified School District (Bledsoe)* (2008) 170 Cal.App.4th 127, 138, Bledsoe challenged the District's decision to serve him with a preliminary lay off notice while retaining junior employees pursuant to section 44955, subdivision (d)(1), to teach Community Day School. The court found that "[s]ubdivision (d)(1) of section 44955 expressly allows a district to demonstrate its specific 'needs' and there is nothing in the statute that requires such needs to be evidenced by formal, written policies, course or job descriptions, or program requirements." The court explained, however, that in order for a school district "to retain a certificated employee under section 44955, subdivision (d)(1), ... a district must not only establish a specific need for personnel to teach a specific course of study, but 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[.]'" (*Ibid.*)

46. The *Bledsoe* court stated: "Of course, we agree the District should have assessed Bledsoe's qualifications [to teach Community Day School] prior to giving him the first layoff notice. However, while such failure is an error, it was not prejudicial in this case as Bledsoe requested a hearing, the District timely served an accusation, notice of hearing, and notice of defense form on Bledsoe, who timely filed a notice of defense, and a full hearing on the merits followed. The ALJ issued a detailed proposed decision, which was considered by the Board and adopted. Only then was a final layoff notice sent to Bledsoe. That is, Bledsoe's discharge occurred after the Board considered his competency to remain." (*Id.* at 143)

47. As in *Bledsoe*, and as set forth in the Findings above, those senior employees who have challenged retention of junior arts resource teachers and alternative education teachers have had a full hearing on the merits. Each was given the opportunity to provide evidence he or she believed qualified him or her to teach the courses the District proposes to skip. The burden of proof remains with the District to show both that the junior teachers have special training and experience specifically needed by the District and that the challenging senior teacher does not possess the special training and experience necessary. Here, there has been no deprivation of due process rights.

Applicability of Competency Criteria

48. The Board adopted “competency criteria” (Resolution No. 09-44) which a senior employee must meet in order to bump into a position held by a junior employee. The competency criteria requires that the senior employee hold credentials authorizing provision of instruction to English-language learners and requires that the employee hold a regular credential and not a provisional credential. There were no challenges to application of the competency criteria in this proceeding.

49. However, respondents argue that since the Board has adopted these competency criteria, it has acknowledged that these are the only criteria necessary to teach in the District. Accordingly, the argument goes, the District cannot assert under section 44955, subdivision (d)(1), that it requires personnel with special training and experience to teach any particular course. This argument lacks merit. The Education Code imposes an affirmative duty on the District to assign and reassign senior employees so that junior employees are not retained while a senior employee, who is *competent* and certificated to perform the same duty, is laid off. Competency criteria allow the District to apply uniform standards to the determination of competency to displace. Notably, section 44955, subdivision (d)(1), gives the District the right and opportunity to exempt certain positions requiring special training and experience from the seniority rules. Competency criteria are irrelevant to the determination whether a certificated position should be exempted from layoff.

Other Defenses

50. Any other assertions raised by respondents at hearing which are not addressed above are found to be without merit.

LEGAL CONCLUSIONS

1. As set forth the Findings, all notice and jurisdictional requirements set forth in sections 44944 and 44945 were met. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide them due process. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) The description of services to be reduced, both in the Board Resolution and in the notices, adequately describe particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838. See, also, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

2. The Governing Board may reduce, discontinue or eliminate a particular kind of service and then provide the needed services to the students in another manner. (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571; *California Teachers Association v. Board of Trustees of Goleta Union School Dist.* (1982) 132

Cal.App.3d 32.) A school board may reduce services within the meaning of the statute either by determining that a certain type of service shall not be performed at all or by reducing the number of district employees who perform such services. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.)

3. The services identified in PKS Resolution No. 09-45 are particular kinds of services that may be reduced or discontinued under sections 44949 and 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 discontinuance of services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949.

4. As set forth in the Findings and Legal Conclusions as a whole, and with the exception noted in Findings 30 and 31 (Clinton Stoddard), the District has established that no employees junior to respondents are being retained to perform the services which respondents are competent and certificated to render.

5. The District's reductions and discontinuances of particular kinds of services relate solely to the welfare of its schools and pupils.

RECOMMENDATIONS

1. The District shall rescind the Preliminary Notice issued to Clinton Stoddard.

2. The District may give notice to the remaining respondents in the inverse order of seniority that it will not require their services for the 2010-2011 school year.

DATED: May 6, 2010


ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings