

BEFORE THE
GOVERNING BOARD OF THE
SANTA ANA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Certificated Employees of the Santa Ana
Unified School District,

Respondents.

OAH Case No. 2010011287

PROPOSED DECISION

Administrative Law Judge Susan L. Formaker of the Office of Administrative Hearings heard this matter on April 29, 2010, in Santa Ana, California.

Eric Bathen, Attorney at Law, represented Complainant Jane Russo (Russo), Superintendent of the Santa Ana Unified School District (District).

Marianne Reinhold, of Reich, Adell & Cvitan (Certain Respondents' counsel), represented the Respondents listed on Exhibit A, which is incorporated herein as if set forth in full. Respondent Seth Liebman represented himself. Respondents Fabiola Berber, Catherine Ladd, Eleanor Moore, Marin Pitman, Robin Post, Monica Presby, Alvaro Quezada-Cano, and Katherine Stahle did not appear and were not represented.

Oral and documentary evidence was received at the hearing. The record was left open until May 10, 2010, for the submission of written closing argument by the District and the Respondents represented by Certain Respondents' counsel (Respondent Liebman having chosen to make his closing argument orally). The District's closing brief was timely submitted and marked for identification as Exhibit 19; the closing brief of the Respondents represented by Certain Respondents' counsel was timely submitted and marked for identification as Exhibit E. On May 12, 2010, the Respondents represented by Certain Respondents' counsel submitted and served an "Addendum to Post Hearing Brief of Certain Respondents," which sought to clarify one sentence contained in their closing brief. No objection to consideration of this Addendum was submitted by the District or by Liebman. The Addendum was marked for identification as Exhibit F. The record is hereby deemed to have been reopened for consideration of the Addendum. The matter was submitted for decision on May 12, 2010.¹

¹ By order dated February 16, 2010, the hearing in this matter had been continued from April 14, 2010, to April 29, 2010. The dates prescribed in Education Code sections 44949, subdivision (c), and 44955, subdivision (c), were thereby extended for a period of 15 days.

FACTUAL FINDINGS

Motion to Disqualify Certain Respondents' Counsel

1. At the outset of the hearing, Respondent Seth Liebman (Liebman) made an oral motion to disqualify Certain Respondent's counsel. Certain Respondents' counsel was hired by the Santa Ana Educators' Association (SAEA), the union representing non-management certificated employees of the Santa Ana Unified School District, to represent such employees in the instant proceeding pursuant to the California Teachers' Association Group Legal Services Program. Liebman asserted that Certain Respondents' counsel had a conflict of interest in representing other Respondents and should be disqualified from representing such other Respondents when he was not provided with representation for his own separate interests.

2. Liebman's attempt to disqualify Certain Respondents' counsel because of an alleged conflict of interest was based on three interrelated arguments. First, Liebman asserted that Certain Respondents' counsel improperly took the position in the instant and two years' prior layoff proceedings that seniority rights should be based on the "provisional hire date" (i.e., the first date of paid service with the District in a probationary capacity) of each certificated employee, rather than the credential date of each employee. According to Liebman, the position taken by Certain Respondents' counsel was different from the position initially taken by such counsel in a prior layoff proceeding in 2008 (when Certain Respondents' counsel had represented him) and was based on a reading of *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2007) 145 Cal.App.4th 1260 (*Bakersfield*). Certain Respondents' counsel allegedly pressured the District in 2008 and/or 2009 to alter the order of seniority to abide by the ruling in *Bakersfield*. Liebman asserted that the alleged change in position worked to his detriment, since he was hired after some other employees but obtained his credential before those employees. He further contended that *Bakersfield*, as an appellate court case, was still subject to being overruled by the California Supreme Court. Because the position taken by Certain Respondents' counsel favored some Respondents to Liebman's detriment, Liebman argued that Certain Respondents' counsel had a conflict of interest² and could not represent any of the Respondents. Second, Liebman contended that SAEA improperly failed to provide him with representation of his separate interests and therefore denied him his right to legal representation as an SAEA member under the Educational Employment Relations Act (EERA) (Gov. Code § 3540 et seq.). Finally, Liebman appeared to suggest that Certain Respondents' counsel should be disqualified for bias, or potential bias, against him because he had filed a State Bar complaint against Certain Respondents' counsel on April 7, 2010, and an Unfair Practice Charge with the Public Employment Relations Board (PERB) against SAEA on March 15, 2010, based, respectively, on the alleged conflict of interest and denial of legal

² Liebman contended the conflict of interest also constituted a breach of fiduciary duty and legal malpractice.

representation.

3. Liebman's contentions are insufficient to merit disqualification of Certain Respondents' counsel. As an initial matter, such counsel's assertion regarding the order of seniority among certificated personnel is consistent with the statutory scheme pertaining to teacher layoffs. Education Code section 44845 makes clear (and has for decades) that seniority for any probationary or permanent employee employed after June 30, 1947, shall be determined as of the date the employee "first rendered paid service in a probationary position." This date, and not the date a credential is obtained, has been the operative one for seniority purposes since long before the decision in *Bakersfield, supra*, 145 Cal.App.4th 1260. *Bakersfield* centered on whether certain employees had improperly been classified as temporary, rather than probationary, when they held less than preliminary or clear credentials. Liebman made no showing that the issues involved in *Bakersfield* had any bearing upon the instant proceeding, even if those issues were somehow relevant to the determination of a conflict of interest or disqualification.

4a. In support of his claim with the State Bar that Certain Respondent's counsel had a conflict of interest, Liebman submitted a letter dated March 25, 2010, sent to him by Certain Respondents' counsel. (See Exhibit B.) In that letter, Certain Respondents' counsel declined to represent Liebman in the current case. Liebman presented no evidence that any prior case in which Certain Respondent's counsel represented him is still pending. Because such counsel do not now represent Liebman in the instant proceeding or any other pending proceeding, the only remaining issue concerning the asserted conflict of interest is whether any prior representation of Liebman would prevent Certain Respondents' counsel from representing other Respondents in this case.

4b. Rule 3-310 of the Rules of Professional Conduct, pertaining to the avoidance of the representation of adverse interests, provides:

(B) A member [of the State Bar] shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter;
or

(2) The member knows or reasonably should know that:

(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the member's representation; or

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

As stated in the discussion comments accompanying Rule 3-310, the rule “is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has [*sic*] arisen in different cases, unless representation of either client would be adversely affected.”

4c. Subdivisions (B), (C), and (D) of Rule 3-310 govern Certain Respondents’ counsel’s relationships with their current clients, not with Liebman. Liebman thus has no standing to assert a violation of subdivisions (B), (C) or (D). Subdivision (E) does not apply

because there was no showing that Certain Respondents' counsel obtained confidential information during their representation of Liebman that would be material to their representation of other Respondents in the current case. (See also Bus. & Prof. Code § 6068, subd. (e)(1) [requiring attorneys to maintain client confidences].)³ Liebman cannot show that Certain Respondents' counsel's prior representation of him would be adversely affected by counsel's current representation of other Respondents. There is no current conflict of interest.

5. Liebman's contention that SAEA improperly failed to provide him with representation of his separate interests, and therefore denied him his right to legal representation as an SAEA member, is outside the jurisdiction of the Administrative Law Judge and the Governing Board in this proceeding. PERB has "exclusive jurisdiction" over the initial determination of unfair practice charges under the EERA. (Govt. Code § 3541.5.) Similarly, any violation of the Rules of Professional Conduct that Liebman contends may have occurred in any prior proceeding would be under the jurisdiction of either the State Bar or the superior court, depending upon the nature of the claim.

6. To the extent Liebman suggested that Certain Respondents' counsel should be disqualified for bias, or potential bias, against him because of his State Bar complaint against them and because of his PERB charge against SAEA, any such argument must fail. Certain Respondents' counsel do not represent Liebman and have no obligation to protect his interests in this proceeding. Any personal animosity Certain Respondents' counsel or SAEA representatives may feel towards Liebman arising out of his State Bar and PERB complaints cannot serve as a basis for Liebman's disqualifying Certain Respondents' counsel from representing other Respondents in this proceeding.

7. Finally, the timing of Liebman's assertion that Certain Respondents' counsel should be disqualified was troubling. Liebman admitted he is an inactive member of the State Bar. As such, he is familiar with the concept of prejudicial delay. Many of Liebman's assertions arose from long-standing issues he has had with Certain Respondents' counsel, but he waited until the hearing in this matter was underway to move to disqualify Certain Respondents' counsel. Liebman's motion was thus untimely.

8. As stated during the hearing, and for the reasons more fully explained in Findings 1 through 7, Liebman's motion to disqualify Certain Respondents' counsel was and is denied.

The Layoff Proceeding

9. Chad Hammitt (Hammitt), Executive Director of Human Resources for the

³ It should be noted that Liebman submitted attorney-client privileged communications with Certain Respondents' counsel, and waived the privilege regarding those communications, in support of his claim of a conflict of interest.

District, acting in his official capacity, caused all pleadings, notices and other papers to be filed and served upon Respondents pursuant to the provisions of Education Code sections 44949 and 44955.

10. Respondents are certificated employees of the District.

11. On February 23, 2010, the Governing Board of the District (Governing Board) adopted Resolution Number 09/10-2826, reducing full-time equivalent (FTE) positions for the 2010-2011 school year, as follows:

. . . 12 FTE reduction due to a reduction of physical education programs, 6 FTE reduction due to a reduction of social science programs, 3 FTE reduction of business programs, 3 FTE reduction due to a reduction of health programs, 2 FTE reduction due to reduction of home economics programs, 36 FTE reduction in multiple subject due to student enrollment in grades K-5, 3 FTE reduction in multiple subject due to student enrollment in grades 6-8, 15 FTE reduction in multiple subject due to leave of absence [positions displaced as a result of teachers returning from leaves of absence], 4 FTE reduction due to reduction of Spanish programs, 27 FTE reduction due to reduction of English programs, 1 FTE reduction due to reduction of history programs, 4 FTE reduction due to reduction of art programs, 1 FTE reduction due to reduction of industrial technology programs, 1 FTE reduction due to reduction of sociology programs, 8 FTE reduction due to reduction of elementary music programs for a total of 126 FTE reductions of particular kinds of services in grades K-12.

12. Pursuant to Resolution Number 09/10-2826, the Governing Board exempted from the order of layoff certificated personnel “considered necessary to meet the District’s program staffing needs.” The Governing Board’s resolution stated that “[s]uch employees shall be retained based upon their qualifications and credentials and include, but are not necessarily limited to, special education teachers, speech and language specialist, nurses[,] psychologists, adapted physical education, library media services, and math teachers.”

13. Resolution Number 09/10-2826 authorized Russo or her designee to initiate and pursue procedures necessary not to reemploy the equivalent of 126 FTE positions pursuant to Education Code sections 44949 and 44955.

14. The District maintains a seniority list (Exhibit 10) which contains employees’ names, seniority dates (first date of paid service, designated “provisional hire date”), indications as to whether employees are probationary or tenured (“permanent”), and current assignments, credentials, authorizations, and FTE. Certificated employees were provided the opportunity to review the list and confirm its accuracy, and the District modified the seniority list to take account of information provided by employees that was verified by the District.

15. On February 9, 2010, the Board adopted Resolution 09/10-2825, which established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. The tie-breaker criteria were based on the needs of the District and its students. While the District did not provide evidence of how the tie-breaker criteria were applied, there was no evidence or argument submitted by Respondents to indicate that the tie-breaker criteria were misapplied.

16. After adoption of Resolution Number 09/10-2826, the District decided not to reduce the 27 FTE in English. In addition, subsequent to adoption of the Governing Board's Resolution, the District identified vacancies for the 2010-11 school year due to any positively assured attrition (confirmed resignations or retirements) and release of temporary certificated employees. The District used the seniority list to develop a proposed layoff list of the least senior employees currently assigned in the various services being reduced. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by 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. At the hearing, the District failed to specifically identify how most of the vacancies created by attrition and by release of temporary employees would be accounted for in the order of layoff.

17. On or about March 12, 2010, the District provided notice to Respondents that their services will not be required for the 2010-2011 school year due to the reduction of particular kinds of services. A total of 54 certificated employees were served with preliminary notices of layoff.

18. The District waived any failure of a Respondent to have requested a hearing for jurisdictional purposes.

19. On or about March 26, 2010, the District filed and served the Accusation. Fifty-four certificated employees, including Respondents, were served with the Accusation. The District waived any failure of any Respondent to have filed a Notice of Defense for jurisdictional purposes.

20. All prehearing jurisdictional requirements have been met.

21. The District rescinded the notice of intent to layoff served on 16 certificated employees. The rescissions occurred for various reasons including, but not limited to, the opening of additional vacant positions, the reinstating of programs, and the availability of funding for certain positions. As of the time of the hearing, 38 Respondents remained subject to layoff notices. Of those 38 teachers, 33 were subject to layoff based on their holding multiple

subject or standard elementary credentials.⁴

22. Of the 33 Respondents subject to layoff based on their holding multiple subject or standard elementary credentials, nine teach in intermediate school (grades six through eight) positions. Thus, despite the wording of Resolution Number 09/10-2826 indicating that three multiple subject credential layoffs were required because of a reduction in student enrollment in grades six through eight, the implementation of the layoffs resulted in a greater impact on intermediate school teachers. As reflected in the testimony of Rosie Rosales (Rosales), a District administrative secretary responsible for overseeing and implementing the layoff list, it was the credential held by such Respondents that drove their being provided layoff notices, rather than the positions they held. If a junior teacher identified for layoff because of his or her position on the seniority list was teaching in a position using his or her multiple subject or standard elementary credential, if that teacher could not “bump” a more junior teacher by teaching in a departmentalized setting using an alternative credential, and if the teacher could not “skip” a more senior teacher because of special skills or credentials, he or she received a layoff notice.⁵ The teachers holding multiple subject or standard elementary credentials identified for layoff included intermediate school teachers teaching in “block core” settings and self-contained classrooms, elementary school teachers, teachers on special assignment at elementary schools, a curriculum specialist, an assistant principal who would have been assigned to teach in a classroom during the 2010-2011 school year, and two school readiness coordinators.

23. Liebman and the Respondents represented by Certain Respondents’ counsel argue that the District improperly provided layoff notices to Respondents, including Liebman, who are qualified to teach classes for which less senior teachers are being retained to teach. In particular,

⁴ The District considered a teacher holding a standard elementary teaching credential as equivalent to a teacher holding a multiple subject credential for layoff purposes under the wording of Resolution Number 09/10-2826. The standard elementary teaching credential was the precursor to a multiple subject credential. When the District’s wording in Resolution Number 09/10-2826 regarding “multiple subject” instruction is discussed below, it will include instruction by those holding standard elementary teaching credentials.

⁵ Two of the Respondents slated for layoff based on their teaching under multiple subject credentials, Patricia Allen (employee number 2005 on the seniority list) and Eleanor Moore (employee number 2284), hold supplemental authorizations (in English and Math, respectively). The District contended that because these supplementary authorizations were not No Child Left Behind (NCLB) compliant, these Respondents could not teach in departmentalized classes authorized by their credentials without it being considered a misassignment under relevant federal and state requirements. Respondents did not dispute the need for NCLB compliant supplementary authorizations to teach pursuant to those authorizations. They therefore waived any objection to the District’s assertion that NCLB compliance was necessary.

such Respondents contend that certain teachers with multiple subject or standard elementary credentials teaching “block core” or self-contained classroom programs in the District’s intermediate schools are subject to layoff, when certain junior teachers with single subject English or Math credentials or supplemental authorizations in those subjects are not subject to layoff despite being assigned to teach block core classes.

24. A block core setting consists of two or more classes taught by one teacher to the same group of students in an intermediate school. To teach in a core setting, a teacher must have a credential authorizing service in a self-contained classroom (a multiple subject or standard elementary teaching credential) or credentials authorizing the teaching of both core subjects in a departmentalized setting. (See Ed.Code § 44258.1;⁶ see also portions of the Commission on Teacher Credentialing’s Administrator’s Assignment Manual attached as Ex. 1 to Post Hearing Brief of Certain Respondents.) A departmentalized setting exists where a single subject is taught by a teacher with an appropriate credential to different groups of students over the course of a school day. Such an assignment requires that a teacher hold a single subject credential authorizing the teaching of that subject area or, if the class is offered in grade nine or below, the teacher may hold a supplemental authorization for instruction in that subject area. To teach in an intermediate school self-contained classroom setting, a multiple subject or standard elementary credential is required. (Code §§ 44256, subds. (a) and (b), and 44258.)

25. All English/Language Arts classes taught in the District’s intermediate schools are structured as block core classes.⁷ There are no departmentalized English courses in the District’s intermediate schools. The block core model for English/Language Arts was adopted for the District’s intermediate schools because approximately 70 percent of the District’s intermediate school students are not proficient in English and needed reinforcement in English and Language Arts. A preponderance of the evidence indicated that math is taught both as a departmentalized course and as part of a block core in the District’s intermediate schools.

26. Respondents represented by Certain Respondents’ counsel argue that the

⁶ All further statutory references are to the Education Code.

⁷ The District’s seniority list (Exhibit 10) suggests that some teachers with credentials authorizing them to teach in departmentalized settings are assigned to teach English or Language Arts in the intermediate schools. Respondents showed through their witnesses that the seniority list was inaccurate in this respect and that it was inconsistent in describing the same block core assignment (English/Language Arts) among different teachers. The seniority list contained additional errors. For example, Respondent Leonardo Figueroa (employee number 2197 on the seniority list) shows as currently teaching an English Language Arts/Social Science block core. He only teaches the English/Language Arts block core.

District's retention of junior employees arose because the District improperly designated the particular kinds of services to be reduced in Resolution Number 09/10-2826; such Respondents imply that to the extent the Resolution referred to reducing those holding multiple subject credentials rather than reducing certain courses or courses of study, it failed to identify a particular kind of service. This argument is persuasive to the extent the Resolution purported to identify reductions of multiple subject "positions" outside the elementary school context.

27. School districts have broad discretion in defining positions within the district and establishing requirements for employment. (*Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 299-300.) Similarly, school districts have the discretion to determine particular kinds of services that will be eliminated, "even though a service continues to be performed or provided in a different manner by the district." (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571, 1582-1585; *Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.)

28. What amounts to a particular kind of service for layoff purposes varies according to the circumstances and must in each case be determined in light of the specific facts. A particular kind of service may be a certain subject, it may be the teaching of the subject for a particular purpose, or it may be a particular manner of teaching the subject. (*Walsh v. Board of Trustees of Redlands High School Dist.* (1934) 2 Cal.App.2d 180; *Fuller v. Berkeley School Dist. of Alameda County* (1934) 2 Cal.2d 152; *Gallup v. Board of Trustees, supra*, 41 Cal.App.4th at 1571.) *CTA v. Goleta Union School District* (1982) 132 Cal.App.3d 32, holds that elementary teaching is a distinct particular kind of service. In *Gallup*, the court specifically noted that the issue is not *who* will perform the services, but *how* the services will be performed. (*Gallup, supra*, at 1588.) Where the service will continue to be performed in the same manner, but by a different person, there is no reduction or discontinuation of a particular kind of service. (*Santa Clara Federation of Teachers, Local 2393 v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 843-844.)

29. As noted in Finding 11, 36 FTE of the reductions in particular kinds of services were related to kindergarten through fifth grade multiple subject instruction. In that elementary instruction has been held to be a distinct particular kind of service, as set forth in Finding 28, this designation was not improper in Resolution Number 09/10-2826. However, the remaining 18 FTE proposed reductions in service associated with what was referred to by the District as multiple subject instruction (either because of reduced enrollment in grades six through eight or because of positions displaced by those returning from leaves of absence) are problematic. Such reductions are based upon the type of credential held, rather than a particular kind of service, thus focusing on who is performing the service rather than how the service will be performed.

30. The District contends it retained teachers with credentials or authorizations allowing them to teach in departmentalized classes (primarily English classes) over teachers with multiple subject or standard elementary credentials because it anticipates a large number of

reassignments for the 2010-2011 school year in the District's four high schools and two intermediate schools classified as "persistently low achieving" schools by the state. Hammitt testified that the District will be required to adopt a restructuring model from the state to address the persistently low achieving school classification for these six schools, pursuant to which up to 50 percent of the teachers will need to be reassigned to other schools in the District. Hammitt credibly testified that the District thus believes it needs to retain teachers authorized to teach single subjects, particularly English, in all the intermediate and high schools so that there will be sufficient flexibility to reassign teachers to the persistently low achieving schools in any restructuring that might occur.

31. Although the District might justifiably anticipate needing to retain teachers authorized to teach single subjects, particularly English, this justification failed to eliminate the deficiencies in how particular kinds of services were defined with respect to multiple subject teaching outside the elementary school context. Hammitt acknowledged that the percentage of teachers requiring reassignment could vary widely, depending upon the restructuring model adopted. Thus, it is not clear how many of the junior teachers holding credentials authorizing departmentalized teaching, particularly in English, will be required for reassignment. Moreover, Hammitt testified that while the District is considering eliminating some of the block core classes as part of the restructuring, no decisions in this regard have been made. Another option being considered is moving the sixth grade back to the elementary schools. Hammitt noted that the restructuring decision will not be made until June of 2010. The effect of this uncertainty is that junior teachers with credentials authorizing departmentalized teaching could be retained to teach block core classes which many of the Respondents (regardless of whether they currently teach block core classes or where they are teaching) are credentialed and competent to teach.

32. The District contends that Respondents have failed to prove that junior teachers will be retained to teach positions that more senior teachers are certificated and competent to teach. The District relies on the testimony of Rosales, who stated in conclusory fashion that no junior teachers were being so retained. However, the District misapprehends the burden of proof. The District has the burden of proving compliance with section 44955. (*Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 136-137.) It provided no evidence as to the reassignments of junior teachers holding credentials authorizing departmentalized English or Math teaching who are currently teaching block core classes. The District also failed to offer any evidence showing the planned elimination or reduction of block core classes or self-contained classroom teaching at the District's intermediate schools beyond Hammit's testimony that the District is contemplating a possible reduction in core block classes and the movement of sixth grade to the elementary schools. Any assessment of reassignments of teachers or reductions in core block classes would thus be speculative. By failing to show how the District specifically accounted for openings created by positive accrued attrition, the District exacerbated the difficulty in assessing its proposed retention of teachers. In short, the District failed to meet its burden to show consideration of the "bumping" rights of senior employees. (See Code § 44955, subs. (b) and (c) [requiring the retention of senior employees and their reassignment

to render any service which their seniority and qualifications entitle them to render].)

33. To the extent the District seeks to avoid the issues concerning the definitions of particular kinds of services by asserting that it properly “skipped” junior employees, the District’s contention is flawed. In order to justify skipping a junior employee in a reduction in force, a District must demonstrate a specific need for personnel with special training and experience to teach a specific course of study or to provide certain services, which others with more seniority do not possess. (Code § 44955, subd. (d).) As relevant here, the District’s “skipping” criteria, set forth in Finding 12, allow for the retention of “math teachers” and others “considered necessary to meet the District’s program staffing needs.” There was no evidence presented as to what these terms meant to the Governing Board when it adopted the skipping criteria as part of Resolution Number 09/10-2826. Thus, it is unclear whether “math teachers” refers to persons currently teaching Math, either as a departmentalized subject or in a block core, or whether it means persons with credentials or authorizations allowing them to teach Math in a departmentalized setting. Moreover, if the District is relying on the broad language in the skipping criteria allowing for the retention of teachers “considered necessary to meet the District’s program staffing needs” in retaining junior teachers authorized to teach Math or English in a departmentalized setting, even if they are currently teaching block core classes, the District’s reliance is misplaced. As noted in Findings 31 and 32, the District has failed to show that teachers currently teaching block core classes in the intermediate schools who are authorized to teach Math or English in a departmentalized setting will, in fact, be teaching in a departmentalized setting in the 2010-2011 school year. In *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d, 567, the Court of Appeal considered whether special language abilities forming the basis to skip an employee must be used to qualify as valid skipping criteria. The Court of Appeal found that “[o]ne of the [t]eachers sought to show that a teacher retained because of language skills was not *using* the language ability. Counsel for respondent objected that ‘[w]hether she uses the language ability or not is irrelevant.’ We disagree.” (*Id.*, at p. 576.) Accordingly, because the District has not shown that teachers currently teaching block core classes in the intermediate schools who are authorized to teach Math or English in a departmentalized setting will be teaching in a departmentalized setting in the 2010-2011 school year, their special credentials or authorizations cannot provide a basis for skipping over more senior teachers with multiple subject or standard elementary credentials.

34. Based primarily on the seniority list, Respondents established, pursuant to Findings 21 through 33, that the following 24 junior employees teaching block core classes in intermediate schools were improperly retained for services that senior employees with multiple subject or standard elementary credentials were certificated and competent to teach⁸:

⁸ The employees are listed by name, employee number on the seniority list, and seniority date for ease of reference.

Gregory Dennis (#2075 - 09/03/04)
Patricia Kempe (#2118 - 01/10/05)
Gregory Celestino (#2211 - 08/30/06)
Isabel De Quesada (#2253 - 11/06/06)
Mauricio Barriga (#2265 - 01/08/07)
Geraldine Humphrey (#2267 - 01/10/07)
Veronica Farber (#2307 - 8/29/07)
Carol Frankel (#2309 - 8/29/07)
Carl Johnson (#2313 - 8/29/07)
Lara Johnson (#2348 - 8/30/07)
Clara Lo (#2358 - 9/19/07)
Sarah Cook (#2375 - 10/29/07)⁹
Sherri Conferti (#2387 - 1/15/08)
Christina Thomas (#2391 - 2/04/08)
Jenifer Weiman (#2392 - 08/25/08)
Haley Boyce (#2393 - 8/25/08)
Stephanie Thatcher (#2394 - 8/26/08)
Douglas Mulitsch (#2438 - 8/27/08)
Julie Lombino (#2448 - 8/27/08)
An Nguyen (#2452 - 8/27/08)
Sarah Pardee (#2478 - 10/20/08)
Sarah Winant (#2489 - 1/13/09)
David Drayer (#2498 - 8/28/09)
Laurie Hendricks (#2542 - 8/31/09)

⁹ Sarah Cook originally received a layoff notice, which was rescinded based on her having a single subject credential in English (which was not reflected on the seniority list). Ms. Cook was designated for an English/Language Arts block core position created by positive assured attrition.

35. As a result of Finding 34, the Accusation should be dismissed as against the 24 most senior Respondents scheduled for layoff as a result of their teaching pursuant to multiple subject or standard elementary credentials. Those Respondents are¹⁰:

Patricia Allen (#2005 - 11/06/02)

Monica Presby (#2006 - 11/07/02)

Marjorie Cardenas (#2007 - 11/22/02)

Joanne Brown (#2008 - 12/2/02)

Araceli Villa (#2009 - 12/2/02)

Isela Gonzalez (#2011 - 12/6/02)

Katania Marrufo (#2017 - 1/13/03)

Jennifer Cervantes (#2025 - 9/4/03)

Stephanie Collins (#2026 - 9/4/03)

Patricia Cushing (#2049 - 10/3/03)

Seth Liebman (#2053 - 10/13/03)

Michael Mediola (#2056 - 11/5/03)

Marin Pitman (#2058 - 12/11/03)

Catherine Ladd (#2020 - 8/10/04)

Lindsay Yee (#2071 - 8/13/04)

Leslie Murillo-Paz (#2084 - 9/8/04)

Matthew Simon (#2097 - 9/20/04)

¹⁰ The affected Respondents are listed by name, employee number on the seniority list, and seniority date.

Robin Post (#2103 - 10/14/04)

Karen Hernandez (#2107 - 11/01/04)

Maria Rubio (#2112 - 11/10/04)

Alvaro Quezada-Cano (#2116 - 1/3/05)

Patricia Chavez (#2117 - 1/4/05)

Fabiola Berber (#2138 - 8/29/05)

Katherine Stahle (#2140 - 9/2/05)¹¹

36. All of the services set forth in Finding 11, other than the three FTE reduction in “multiple subject” credentialed teachers due to student enrollment in grades six through eight and the 15 FTE reduction in “multiple subject” credentialed teachers due to leave of absence, are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.

37. The decision to reduce the particular kinds of services identified in Finding 36 is neither arbitrary nor capricious but is rather a proper exercise of the District’s discretion.

38. The reduction of particular kinds of services identified in Finding 36 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 Governing Board.

39. Except with respect to the Respondents identified in Finding 35, no certificated employee junior to any Respondent was retained to render a service which any Respondent is certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of Findings 9 through 11 and 13 through 20.

2. 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,

¹¹ The seniority list reflects that Ms. Stahle was senior to another affected employee, Daniel Taylor, by virtue of the uncontested tie-breaker criteria.

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.) The three FTE proposed reductions in service associated with what was referred to by the District as “multiple subject” instruction based on reduced enrollment in grades six through eight, and the 15 FTE proposed reductions in service associated with positions displaced by those returning from leaves of absence are determined not to be particular kinds of services within the meaning of section 44955, by reason of Findings 21 through 31. Cause therefore does not exist to reduce or discontinue such services.

3. By reason of Findings 22 through 28 and 36 through 38, the remaining proposed reductions in service are particular kinds of services within the meaning of section 44955. Cause exists under sections 44949 and 44955 for the District to reduce or discontinue such particular kinds of services, which cause relates solely to the welfare of the District’s schools and pupils.

4. 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. (§ 44955, subds. (b) and (c); *Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469, 473-474; *Krausen v. Solano County Junior College District* (1974) 42 Cal.App.3d 394, 402.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess special credentials or needed skills, capabilities, or experience which their more senior counterparts lack. (§ 44955, subd. (d) (1); *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831, 842-843.)

5. In determining the order of seniority among employees who first rendered paid service to the District on the same date, the order of termination shall be “solely on the basis of needs of the district and the students thereof.” (§ 44955, subd. (b).) The District’s tie-breaking criteria met this standard.

6. By reason of Findings 9 through 39 and Legal Conclusions 1 through 5, cause does not exist to terminate the services of the Respondents identified in Finding 35, but cause does exist to terminate the services of the remaining Respondents.

ORDER

The Accusation is sustained and the District may notify all Respondents, other than those identified in Finding 35, in inverse order of seniority, that their services will not be needed during the 2010-2011 school year due to the reduction of particular kinds of services. The Accusation is dismissed as against the Respondents identified in Finding 35.

Dated: May 20, 2010

SUSAN L. FORMAKER
Administrative Law Judge
Office of Administrative Hearings