

BEFORE THE GOVERNING BOARD OF
LEMON GROVE SCHOOL DISTRICT

In the Matter of the Accusation Against:

Certificated Employees Listed on Exhibit A

Respondents.

OAH No. 2010030132

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in Lemon Grove, California on April 13, 2010.

William A. Diedrich, Esq., Atkinson, Andelson, Loyo, Ruud & Romo, represented the District.

Jon Y. Vanderpool, Esq. and/or Georgiana D'Alessandro, Esq., Tosdal, Smith, Steiner & Wax, represented Kristin Alianelli, Kevin Andreen, Jessica Barquenquast, Kathleen Carter, Pablo Chavarin, Esme Collier, Ellen Davis, Shari Erlendson, Susan Farnsworth, Michelle Fripp, Diane Gibson, Kaitlin Kremer, Kyle Griffith, Craig Kazaoka, Francisco Lacsamana, Kellie Lewis, Steven Nobel, William Otfinoski, Melvetta Owens, Cynthia Piligian, Brenda Reed, Silvia Sana, Michelle Silverio, Trish Stack and Adrienne Warren.

Respondent Paul Brazzel represented himself.

Respondent Edna Murrillo represented herself.

Respondents Theresa Moudry, Robyn Lefkowitz, Veronica Johnson, Susan Farnsworth, Esme Collier, Susan Nunez and Erin Walker failed to file a timely Request for Hearing, and there is no jurisdiction over these Respondents.

There was no appearance by or on behalf of Lori Feiner, Thomas Higdon, Craig Johnson, Robyn Lefkowitz, Kristina Rhoades and Anna Schen.

The matter was submitted on April 13, 2010.

SUMMARY OF PROPOSED DECISION

The Board of Education of the Lemon Grove School District determined to reduce or discontinue particular kinds of services provided by teachers for budgetary reasons. The

decision was not related to the competency and dedication of the individuals whose services are proposed to be reduced or eliminated.

District staff carried out the Board's decision by using a selection process involving review of credentials and seniority, "bumping," "skipping" and breaking ties between/among employees with the same first dates of paid service. The selection process was in accordance with the requirements of the Education Code.

FACTUAL FINDINGS

1. Respondents listed on Exhibit "A" (Respondents) are certificated employees of the Lemon Grove School District (District).

2. On March 9, 2010, Ernest Anastos, the District's Superintendent (Superintendent), notified the District's Governing Board (Board) of his recommendation to reduce or discontinue services for the ensuing school year "due to budgetary limitations."

3. On March 9, 2010, the Board adopted Resolution No. 09-10-16 reducing or eliminating particular kinds of services for the ensuing school year and establishing tie-breaker criteria and "competency" criteria for purposes of displacement.

4. On March 9, 2010, the Board adopted the Superintendent's recommendation and thereby took action to reduce or eliminate particular kinds of services, commencing the 2010-2011 school year. Further, the Board directed the Superintendent or his designated representative to send notices to all employees possibly affected by virtue of the reduction or elimination of particular kinds of services.

5. Each Respondent submitted a timely Request for Hearing to determine if there was cause for not re-employing him or her for the ensuing school year.

6. On March 22, 2010, the Superintendent made and filed an Accusation Against Certificated Employees. He served each individual who submitted a Request for Hearing with an Accusation, Notice of Defense, Notice of Hearing and related materials.

In response, Respondents submitted a timely Notice of Defense.

7. All prehearing jurisdictional requirements were satisfied.

8. On March 9, 2010, the Board adopted Resolution number 09-10-17, ordering the release of temporary certificated employees from their temporary assignment at the end of the 2009 – 2010 school year in order to effectuate the reduction of particular kinds of services; further, the Board directed the Superintendent or his designated representative to notify the temporary employees of the foregoing. The District complied and allowed the temporary employees to participate in the hearing. There is no issue regarding the temporary

status of any employee in this District. As a result, there is no evidence that the District's temporary employees had a right to participate in this proceeding. Pursuant to Board Resolution number 09-10-17, the employment of all temporary certificated employees will be terminated at the conclusion of the 2009-2010 school year.¹

9. On March 9, 2010, the Board adopted Resolution No. 09-10-16 and thereby took action to reduce or eliminate the following particular kinds of certificated services commencing the 2010-2011 school year:

Particular Kinds of Service	Full Time Equivalent
Elementary (K-6) Self Contained Classroom Teaching Services	14
Specialized Academic Instructor (Special Education Teacher)	1.0
Middle School English/Language Arts Teaching Services	1.0
Social Worker Services	1.8
Teacher on Special Assignment Services	1.0
Middle School Math Teaching Services	1.0
Middle School Physical Education Teaching Services	.6
Middle School Music Teaching Services	.6
Principal Services	2.0
Assistant Principal Services	1.0
Academic Counselor Services	1.0

The proposed reductions totaled 25.0 full-time equivalent (FTE) positions.

10. The District considered all positively assured attrition in determining the actual number of final layoff notices to be delivered to its certificated employees.

11. Glenn Heath, the District's Director of Human Resources and Professional Development (Director), was responsible for implementing the technical aspects of the layoff. The District developed a seniority list for probationary or permanent certificated staff that included, among other matters, the name of the certificated employee, first date of paid service, assignment, position, credentials, graduate degree(s) area of emphasis, CLAD², and application of tie-breaker criteria.

¹ The District requested an order affirming its Decision releasing temporary employees. Pursuant to Resolution No. 09-10-17, the Board released all temporary employees at the conclusion of the 2009 – 2010 school year. Given the facts in Finding 8, the issue is moot and outside the scope of the jurisdiction (Education Code sections 44949 and 44955) of this hearing.

² Crosscultural, Language and Academic Development.

12. The Director used the seniority list to develop a proposed order of layoff list to determine the least senior employees currently assigned in the various services being reduced. Then, the District determined whether the least senior employees held credentials in another area that would entitle them to “bump” other junior employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions and determined the impact on incumbent staff in inverse order of seniority. Then, the District checked the credentials of affected individuals and whether they could “bump” other employees, considering the District’s “competency” criteria established by the Board in its resolution, which states, in pertinent part:

“....

WHEREAS, this Board has determined that due to a significant population of English language learners with specialized educational needs, a specific and compelling need exists to retain certificated employees who have Bilingual Cross-cultural Language Arts Development ("BCLAD") authorization to teach English language learners and the special training and experience that comes therewith; and

WHEREAS, this Board has determined that due to a significant population of English language learners with specialized educational needs, a specific and compelling need exists to retain certificated employees who teach in the District's bilingual dual immersion program and therefore possess the special training and experience that comes therewith; and

WHEREAS, this Board has determined that there is a significant and compelling need to retain teachers who have attained National Board Certification, and therefore possess the training and experience that comes therewith; and

WHEREAS, Education Code section 44955(d) authorizes this Board to deviate from terminating a certificated employee in order of seniority for the above reasons, if necessary.

NOW, THEREFORE, BE IT RESOLVED by the Governing Board of the Lemon Grove School District:

....

3. That the seniority and qualifications of some of the employees in the services being reduced or eliminated are such that they have displacement rights, and that no employee will be terminated while a less senior employee is retained to render a service which the more senior employee is both certificated and competent to render.
4. That in observing the statutory rights of a more senior certificated employee performing services in a subject matter or field identified by the District for reduction or elimination to displace a less senior certificated employee, the more senior certificated employee may displace less senior certificated employee if it is established to the satisfaction of the District that the more

senior certificated employee is both competent and credentialed to render the services performed by a less senior certificated employee.

5. That "competency" as described in Education Code section 44955(b) and referenced in paragraph 8 above, for the purposes of displacement, shall necessarily include possession of: (1) a valid credential in the relevant subject matter area; (2) "highly qualified" status under the No Child Left Behind Act in the position to be assumed; (3) if displacing an employee who possesses a BCLAD certification, possession of a BCLAD certification; (4) special training and experience necessary to meet the job requirements of specialized positions (such as AVID teachers, EDP lead teachers, Dual Immersion teachers); (5) if displacing an employee who possesses a National Board Certification, possession of a National Board Certification; (6) for elementary (K-5) teaching positions, or a self contained 6th grade classroom teaching position, at least (1) year of experience in the past five (5) years teaching at the elementary level or in a sixth grade self contained classroom; and (7) for positions involving instruction to 6^m 7^h and/or 8^h grade students, other than a self contained 6^h grade classroom, at least one (1) year of experience in the position or assignment within the last five (5) years.

....”

13. Respondent Diane Gibson (Respondent Gibson) does not dispute her status as temporary teacher but challenged her seniority date, arguing that it should be August 24, 2005, her first date of paid service in a probationary position with the District.

She was tenured in 2007 but received a layoff notice, effective the conclusion of the 2007 – 2008 school year, and thereby acquired recall rights. During the 2008 – 2009 school year, the District offered Respondent a probationary teaching position, and she declined. She returned to the District in a temporary position to replace a teacher on leave during the current school year. Should she return to the District in a probationary position within the timeframe allowed by statute, Respondent Gibson will resume her prior seniority date of August 24, 2005.³

14. Respondents Pablo Chavarin (Respondent Chavarin) and Melvetta Owens (Respondent Owens) assert that they were improperly identified for layoff, that they are more senior to Respondents Kyle Griffith (Respondent Griffith) and Shari Erlendson (Erlendson) and certificated and competent to bump into positions held by Respondents Griffith and Erlendson.

Respondents Griffith’s seniority date is August 14, 2007, and Erlendson first date of paid service in a probationary position is August 26, 2006. Each holds a multiple subject credential with a supplemental authorization in English (which authorizes teaching English through eighth grade) and teaches English Language Arts to middle school students. Based on its competency criteria, the District seeks to retain the foregoing teachers but issued them a precautionary notice.

³ Education Code section 44956

Respondent Chavarin has a seniority date of August 25, 2004. He holds the same credentials as Respondents Griffith and Erlendson. He teaches fifth grade. He received a layoff notice as a result of the District's reduction of elementary teaching services. He has not taught English Language Arts to middle school students one of the last five years.

Respondent Owens has a seniority date of May 22, 2007. She holds a multiple subject credential and administrative services credential. During the current school year, she teaches fourth grade students. She received a layoff notice as a result of the District's reduction of elementary teaching services. She has not taught English Language Arts to middle school students one of the last five years.

The District established competency criteria for purposes of bumping or displacing more junior employees. There is no evidence that the District's competency criteria were arbitrary or capricious or otherwise invalid. Neither Respondent Chavarin nor Respondent Owen established that he/she satisfied the District's competency criteria to displace Respondent Chavarin or Respondent Erlendson.

15. The District retained teachers who have attained National Board Certification (NBC) and who possess the training and experience associated therewith (Finding 12) and identified Respondent Ellen Davis (Respondent Davis) as the teacher who satisfies this competency.

The Assistant Superintendent and Respondent Davis testified regarding NBC, the special skills and training acquired by the teacher and the benefits to the District and students thereof.

NBC is acquired from the National Board of Professional Teaching Standards, a national organization (composed of 25 board members, most of whom are teachers). The program's goal is to identify accomplished teachers who are able to perform in an exemplary manner with rigorous standards. The organization's mission is to improve teaching and learning through the training of teachers. The Assistant Superintendent testified that typically teachers who qualify for the certificate spend five years in preparation. Davis testified that, for her, it was a two-year process; among other things, it included performance-based videotapes, taped studies, thesis papers and computerized tests in different subject areas for early childhood.

Teachers who attain NBC are highly accomplished, have satisfied high, rigorous standards and are considered "the core of the profession." They learn effective methods/strategies "for raising achievement of at-risk students" different from those employed by teachers who do not hold the certificate. NBC teachers are able to accelerate learning among students in low performing schools.

Finally, the State of California Commission on Teacher Credentialing authorizes the issuance of additional credentials on the basis of NBC, including the CLAD, English to speakers of other languages, pupil personnel services and librarian services.

Davis has a seniority date of August 25, 2004, holds a clear multiple subject credential and is assigned to teach first grade in a low performing school. She obtained NBC in 2005. She has 16 years of teaching experience, 10 years in Florida and most recently six years in California.

The District established a need for teachers who have NBC and the experience associated therewith. Davis holds NBC and five years teaching experience thereafter. There is no evidence that any more senior teacher satisfies this competency.

Given the facts in Finding 15, the District properly retained Respondent Davis.

16. Between the employees who first rendered paid service to the District on the same date, the Board determined their order of termination solely on the basis of needs of the District and the students. The Board adopted specific criteria and provided clear instructions for implementation of the criteria. The order of termination was based on the needs of the District and its students.

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

18. The District’s reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuance of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

19. No certificated employee junior to any Respondent was retained to perform any services that any Respondent was certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in these sections are satisfied.

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, 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 vs. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. Cause exists under Education Code sections 44949 and 44955 for the Lemon Grove School District to reduce or discontinue particular kinds of services. The cause for the

reduction or discontinuance of particular kinds of services is related solely to the welfare of the schools and the pupils thereof.

4. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he/she is certificated and competent to fill. In doing so, the senior employee may displace or “bump” a junior employee who is filling that position. (*Lacy vs. Richmond Unified School District* (1975) 13 Cal. 3d 469.)

5. The District has the discretion to determine whether teachers are certificated and competent to hold the position for which said teachers have been skipped and retained. (*King v. Berkeley Unified School District* (1979) 89 Cal.App.3d 1016) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831)

6. No employee with less seniority than any Respondent is being retained to perform a service that any Respondent is certificated and competent to render.

7. All arguments not addressed herein are not supported by the evidence and/or the law and therefore rejected.

ORDER

The Accusation served on Respondents listed on Amended Exhibit “A” is sustained. The Accusation against any Respondents not listed on Amended Exhibit “A” is dismissed. Notice shall be given to Respondents before May 15, 2010 that their services will not be required for the 2010-2011 school year because of the reduction or discontinuance of particular kinds of services.

DATED: _____

VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

LEMON GROVE SCHOOL DISTRICT

RESPONDENTS

EXHIBIT "A"

LAST	FIRST	SENIORITY DATE
ALIANELLI	KRISTIN	8/22/2001
ANDREEN	KEVIN	N/A
BARGENQUAST	JESSICA	8/14/2007
BRAZZEL	PAUL	N/A (20%)
BRAZZEL	PAUL	10/3/2003
CARTER	KATHLEEN	8/21/2002
CHAVARIN	PABLO	8/25/2004
DAVIS	ELLEN	8/25/2004
ERLENDSON	SHARI	8/16/2006
FRI PP	MICHELLE	8/21/2003
GIBSON	DIANE	N/A
GRIFFITH	KYLE	8/14/2007
KAZAOKA	CRAIG	8/14/2008
KREMER	KAITLIN	N/A
LACSAMANA	FRANCISCO	8/14/2007
LEWIS	KELLIE	8/25/2004
MENIKOFF	'STACY	8/14/2007
MOSS	AMBLER	8/1/2007
MURILLO	EDNA	N/A (20%)
MURILLO	EDNA	8/25/2004
NOBLE	STEVEN	8/22/2001
OTFINOSKI	WILLIAM	11/12/2001
OWENS	MELVETTA	8/25/2004
PILIGIAN	CYNTHIA	N/A
REED	BRENDA	8/22/2001
RHOADES	KRISTINA.	8/16/2006
SANA	SILVIA	8/14/2007
SILVERIO	MICHELLE	8/25/2004
STACK	TRISHA	10/27/2004
WARREN	ADRIANNE	8/14/2007

LEMON GROVE SCHOOL DISTRICT

Respondents

AMENDED EXHIBIT "A"

LAST	FIRST
ALIANELLI	KRISTIN
BARGENQUAST	JESSICA
BRAZZEL	PAUL
CARTER	KATHLEEN
CHAVARIN	PABLO
FARNSWORTH	SUSAN
FEINER	LORI
FRIPP	MICHELLE
KAZAOKA	CRAIG
LEFKOWITZ	ROBYN
LEWIS	KELLIE
MENIKOFF	'STACY
MOUDRY	TERESA
MURILLO	EDNA
NOBLE	STEVEN
OTFINOSKI	WILLIAM
OWENS	MELVETTA
RHOADES	KRISTINA.
SCHEN	ANNA
SILVERIO	MICHELLE
STACK	TRISHA