

BEFORE THE
GOVERNING BOARD
SIERRA SANDS UNIFIED SCHOOL DISTRICT
COUNTY OF KERN
STATE OF CALIFORNIA

In the Matter of the Layoff of:

Alison Bachety and other certificated
employees of the Sierra Sands Unified
School District,

Respondents.

OAH Case No. L2010030610

PROPOSED DECISION

Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 8, 2010, in Ridgecrest, California.

Dean T. Adams, Attorney at Law, represented Joanna Rummer (Rummer), Superintendent of the Sierra Sands Unified School District (District).

Paul A. Welchans, Attorney at Law, represented Alison Bachety (Bachety), Keith Barnes (Barnes), Natalia Casco (Casco), Erin Courtemanche (Courtemanche), Stacey Crow (Crow), Doug Dalton (Dalton), Lori Durell (Durell), Margaret Holm (Holm), Tristan Kratz (Kratz), Arwen Kyte (Kyte), Shelley MacKenzie (MacKenzie), Heidi Miller-Costanzo (Miller-Costanzo), Laura Olinger (Olinger), and Eileen Poole (Poole), collectively referred to as Respondents.

The District has decided to reduce or discontinue certain educational services and has given Respondents notice of its intent not to reemploy them for the 2010-2011 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2010-2011 school year.

Oral and documentary evidence, and evidence by oral stipulation on the record, was presented at the hearing, and the matter was submitted for decision.

FACTUAL FINDINGS

1. Superintendent Rummer filed the Accusation in her official capacity.

2. Respondents are certificated employees of the District.

3. On March 11, 2010, the Governing Board of the District (Governing Board) adopted Resolution Number 25 0910, reducing or discontinuing the following services for the 2010-2011 school year:

<u>Service</u>	<u>FTE¹ Reduction</u>
Elementary Education (K-5)	
Elementary Teaching	8.0
Middle School Education (6-8)	
Home Economics	1.0
Industrial Arts	1.0
School Counselor	1.0
High School Education (9-12)	
Business	1.0
English	1.0
Foreign Language	1.0
Home Economics	1.0
Music	.60
Physical Education	1.0
ROP Auto Shop	.33
Science	1.0
Social Science	1.0
Alternative Education Programs	
ROP Foods	.64
Elementary Special Day Class	1.0
Middle School Special Day Class	1.0
Management Positions	
Elementary Principal	1.0
Alternative Education Principal	1.0
Middle School Assistant Principal	<u>1.0</u>
 Total	 24.57

4. Superintendent Rummer thereafter provided written notice to the Governing Board and to Respondents that she recommended the termination of Respondents' services for the 2010-2011 school year due to the reduction of particular kinds of services.

¹ Full-time equivalent position.

5. On or before March 15, 2009, 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. Respondents filed timely requests for hearing.

6. The District timely filed and served the Accusation and other required documents on Respondents. Respondents thereafter timely filed notices of defense, seeking a determination of whether cause exists for not reemploying them for the 2010-2011 school year.

7. All prehearing jurisdictional requirements have been met.

8. The services set forth in factual finding number 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.²

9. The Governing Board took action to reduce the services set forth in factual finding number 3 because of anticipated declines in State funding. The decision to reduce or discontinue the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

10. The reduction of services set forth in factual finding number 3, in the context of reductions necessitated by the anticipated cuts in State funding, 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.

11. The District took into account assured attrition in order to reduce the actual number of certificated employees it would have to lay off.

12. In addition, before the start of the hearing, the District withdrew the accusations filed against Respondents Bachety and Dalton, retaining them for the 2010-2011 school year.

13. a. On March 11, 2010, the Governing Board adopted Resolution 26 0910, setting forth its tie-breaking criteria for employees with the same seniority date. Points were awarded for meeting one or more of the following criteria: credentialing; No Child left Behind Authorization; English Learner Authorizations; and Education/Training. The criteria are reasonable as they relate to the skills and qualifications of certificated employees.

b. The District applied the criteria to withdraw the accusation filed against Respondent Bachety. Respondents Bachety and Poole were tied on points awarded, and the District resorted to chance to break the tie. Respondents have not challenged application of the criteria in this instance.

² All further references are to the Education Code.

14. a. Respondents Casco, Courtemanche, and Holm disputed the seniority date assigned to them by the District, August 14, 2006, and asserted that their first date of paid service should be adjusted because of their attendance at an orientation prior to that date. They did not recall the exact date of the orientation, but it occurred one or two days prior to August 14, 2006.

b. The orientation, held exclusively for first year teachers at District headquarters, included presentations about District programs and supports, motivational speeches, and meetings with other teachers and administrators. Representatives of the certificated employees' collective bargaining representative, the Desert Area Teachers Association (DATA), provided information about its benefits, and sought to enroll new members. A luncheon followed the meetings and presentations.

c. Article III, subdivision A.5, of the collective bargaining agreement between the District and DATA provides: "Returning teachers' work year shall be 182 days; teachers new to the District will work 183 days with the extra day being paid at the teacher's regular rate of pay." (Exhibit D, at p. 3.) Maureen Glennon, DATA President, was involved in the negotiation of the article, and testified that the parties expected the extra day to be used for the orientation or other work before the start of the school year, absent contrary directive by site administrators. Respondents attending the 2006 orientation received pay in accordance with this provision, and the pay was in addition to that set forth in their employment contract.

d. Attendance at the orientation was strongly encouraged, but was not mandatory. Although Article III of the collective bargaining agreement requires new employees to work, and receive pay for one extra day, it does not actually require that day to be the orientation day before the start of the school year. Employees who fail to attend are not disciplined. The orientation was scheduled before the date on which teachers were contractually required to be at their work sites.

15. a. The District retained certificated employees to provide instruction pursuant to Governing Board resolutions issued under the authority of sections 44256 and 44263. These Code provisions allow school districts to assign teachers, with their consent, to provide instruction in areas in which they have a certain number of units in a subject matter area outside their major or minor but which are insufficient to obtain a State-issued credential or authorization.

b. During the 2009-2010 school year, 13 certificated employees were authorized pursuant to section 44256 to teach in departmentalized classes below grade Nine in English, Mathematics, Physical Education, Science, Social Science, and Spanish. Testimony was received at the hearing with respect to four of these individuals, whom the District plans to retain. Their names, assignment areas, and seniority dates are as follows: Maureen Flatebo (Flatebo) (Science; August 17, 2007); Rebekah Howard (Howard) (English; August 14, 2006);

Matthew Smith (Smith) (Social Science; August 17, 2007); and Tonya Wicker (English and Spanish; August 17, 2007). All hold multiple subject credentials and are teaching in junior high schools. The District plans the same assignments for these four individuals and expects to issue the necessary certifications through Governing Board resolutions.

c. During the 2009-2010 school year, ten certificated employees were authorized pursuant to section 44263 to teach outside their major, minor, or credential authorization. One of these employees was April Griffin (Griffin), who taught English in high school. Her seniority date is August 14, 2006. She holds a preliminary multiple subject credential. Her major was Liberal Studies. The District plans the same assignment for Griffin for the 2010-2011 school year, and expects to issue the necessary certifications through Governing Board resolutions.

d. Individuals selected for the positions at issue were chosen pursuant to a process set forth in the collective bargaining agreement between the District and DATA. The process involves the posting of the available positions and an interview if multiple qualified applicants vie for any given position.

e. Several Respondents have college units in the areas of English, Science, and Social Sciences, and expressed a willingness to accept, or in Respondents Holm's case, to consider, assignments pursuant to sections 44256 or 44263. None of the following respondents applied for the positions when posted.

Respondent Holm holds a clear multiple subject credential, and teaches fifth grade. Her given seniority date is August 14, 2006. Her Bachelor's Degree is in Human Development. She has completed approximately 30 units in Social Science, and has started the process to obtain a supplemental authorization in this area.

Respondent MacKenzie holds a preliminary multiple subject credential and has a seniority date of August 15, 2005. She teaches Kindergarten. She has approximately 25 semester units in Science and 28 semester units in Social Studies.

Respondent Miller-Costanzo holds a clear multiple subject credential. Her seniority date is September 1, 2005. She teaches fifth grade. She received a Bachelor's Degree in English, and has approximately 36 units in this subject matter and between 50 and 60 in Social Science. However, she needs to complete a California History class in order to teach social sciences.

16. a. The District operates a continuation school, Mesquite School. As pertinent to this proceeding, three certificated employees who did not receive layoff notices work at the school. Nancy Cox, who holds a preliminary vocational education credential and whose assignment was described as "infant care," has a seniority date of February 23, 2004. Erik Duncan (Duncan) holds a clear single subject (social science) credential, teaches Social Science

and Physical Education, and has a seniority date of August 15, 2005. Holly Bergevin (Bergevin) holds a clear multiple subject credential, teaches Math, and has a seniority date of August 14, 2006.

b. Respondents Casco, Courtemanche, Holm, MacKenzie, and Miller-Costanzo expressed interest in teaching at the continuation school, but were not asked for their consent, as required before such assignments were made. Respondents MacKenzie and Miller-Costanzo testified that they would accept a position at Mesquite if offered. Respondents Casco, Courtemanche, and Holm testified that they would consider such an assignment if asked. They all meet the requirements set forth in section 44865 for teaching at a continuation school: they hold Bachelor degrees; they completed student teaching; and they hold teaching credentials.

17. Except for Respondents MacKenzie and Miller-Costanzo, and with the possible exception of Respondents Casco, Courtemanche, and Holm, the District did not retain any certificated employee junior to any Respondent to render a service which the remaining respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 7.

2. The services listed in factual finding number 3 are particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 3 and 8.

3. Cause exists under sections 44949 and 44955 for the reduction of the particular kinds of services set forth in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 17.

4. The seniority date of a certificated employee is defined as the date the employee "first rendered paid service in a probationary capacity." (§ 44845.) These words must be given their plain and commonsense meaning in order to effectuate the legislative intent. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 775; *California Teachers Assn. v. Governing Bd. of Rialto Unified School District* (1997) 14 Cal.4th 627, 632-633; *Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46, 51-52.) The statute requires crediting a certificated employee with the seniority date on which he or she was first paid to render service in a probationary capacity. The statute does not expressly require a particular salary rate or schedule, a particular type of service in a probationary capacity, or that the service be "mandatory."

The collective bargaining agreement between the District and DATA provides for an additional day of paid service for new employees, at their regular rate. This additional day of pay

is anticipated to be used for orientation, and employees are encouraged to attend. The facts that employees are not mandated to attend, suffer no disciplinary repercussions for failing to attend, and that they may actually work on another day of the year to fulfill the requirement of 183 days of work, does not change the fact that Respondents Casco, Courtemanche, and Holm, and other similarly-situated certificated employees, performed service in a probationary capacity for the District by attending the orientation and were paid for such service.

The District points out that another administrative law judge with the Office of Administrative Hearings, Mark E. Harman, arrived at a different result in layoff proceedings in 2009 (OAH Case Number 2009030156). Respondents, on the other hand, point out that Administrative Law Judge Jonathan Lew, in a 2008 proposed decision involving another district, Western Placer Unified School District (OAH Case Number 2008030489), concluded that attendance at a similar orientation constituted the respondents' first day of paid service in a probationary capacity. While neither case is binding on the Administrative Law Judge, it is noted that the respondents in the case before Judge Harman did not introduce in evidence the collective bargaining agreement setting forth the additional duty day and those before Judge Lew did, which fact is significant.

If the date on which the employee first rendered paid service in a probationary capacity is incorrect, the employee's seniority date must be adjusted to reflect the earlier first date of probationary service. (*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1273.)

Accordingly, the seniority dates of Respondents Casco, Courtemanche, and Holm, and those of all other certificated employees who attended the 2006 orientation, shall be adjusted to reflect their earlier first date of paid service in a probationary capacity.

5. Section 44955, subdivision (c), provides, in pertinent: "[T]he governing board shall make assignments and reassignments in such manner that employees shall be retained to render *any* service which their seniority and qualifications entitle them to render. . . ." (emphasis added.) Respondents Holm, MacKenzie, and Miller-Costanzo argue that they are senior and qualified to teach the assignments filled pursuant to sections 44256 or 44263 and that the District should have made the necessary assignments and reassignments to retain them to teach in those positions, even if those positions represent only a portion of their assignment. The District, on the other hand, maintains that issuance of such certifications is discretionary, and Respondents may not compel the District to assign them to the positions in question.

The District is correct that Respondents may not compel it to seek a certification pursuant to section 44256 or 44263, nor have Respondents presented any authority for such proposition. However, the District is not being compelled to offer the courses in question, but, rather, has decided to offer the courses for the 2010-2011 school year and plans to issue the requisite certifications pursuant to Governing Board resolution under sections 44256 or 44263 to

authorize the incumbents to teach the assignments. Inasmuch as the courses in question constitute teaching services offered by the District, they are subject to the requirements of section 44955, which, as highlighted above, requires assignments and reassignments into “any” service for which the certificated senior employee is qualified.

The only action the District would be required to take is to issue the certifications to Respondents instead of the incumbents. In this regard, the District has not offered a valid reason to favor retention of the junior employees. The District argues that the incumbents were selected pursuant to procedures set forth in the collective bargaining agreement, which included an interview. Even if the contract requires such result, courts have made clear that provisions of a collective bargaining agreement must yield to contrary provisions of the Education Code. (*San Mateo City School District v. Public Employment Relations Board* (1983) 33 Cal.3d 850, 864-66; *Raven v. Oakland Unified School District* (1989) 213 Cal.App.3d 1347; *United Steelworkers of America, Local 8599, AFL-CIO v. Board of Education of the Fontana Unified School District* (1984) 162 Cal.App.3d 823.) In any event, all certificated employees, including Respondents, were selected for their assignments for the 2009-2010 school year in some manner, whether it was through a collective bargaining process or not, and retention for the 2010-2011 school year is subject to the procedures and requirements of 44949 and 44955.

In this case, section 44955 requires retention of Respondents MacKenzie, Miller-Costanzo, and possibly Respondent Holm, to teach the assignments the more junior employees were retained to teach pursuant to anticipated Governing Board resolution(s). Respondent MacKenzie has sufficient units in Science and Social Studies and greater seniority than Flatebo, who was retained to teach Science, and Smith, who was retained to teach Social Science. Respondent Miller-Costanzo has greater seniority than Howard and Griffin, and sufficient units in English to obtain the required certification. Respondent Holm has sufficient units to qualify, pursuant to Governing Board resolution, to teach Social Science, but has less seniority than Respondent MacKenzie, and unless Respondent MacKenzie is assigned to teach Science, Respondent Holm will not be able to teach the classes Smith has been retained to teach.

6. Another service the District plans to offer next school year is that of a continuation school teaching. In this regard, the District retained Duncan and Bergevin, who share the same seniority date with, or are more junior to, Respondents Casco, Courtemanche, Holm, MacKenzie, and Miller-Costanzo. The continuation school positions are also services subject to section 44955 and, unlike the situation in *Bledsoe v. Biggs Unified School District* (2009) 170 Cal.App.4th 170, the District did not argue or present evidence to support retaining these employees pursuant to section 44955, subdivision (d).

7. Cause exists to terminate the services of Respondents Barnes, Crow, Durell, Kratz, Kyte, Olinger, and Poole for the 2010-2011 school year due to the reduction of particular kinds of services, by reason of factual finding numbers 1 through 14, and 17, and legal conclusion numbers 1 through 3.

8. Cause exists to terminate the services of one or two certificated employees from among Respondents Casco, Courtemanche, and Holm for the 2010-2011 school year due to the reduction of particular kinds of services, depending on adjustment of seniority dates and application of tie-breaking criteria, by reason of factual finding numbers 15 and 16, and legal conclusion numbers 4, 5, and 6. These Respondents presently share their seniority date with Bergevin, who was retained to teach at the continuation school, and this position should go to the person with the greatest seniority. Respondent Holm may also be retained to teach the position Smith was retained to teach, depending on whether Respondent MacKenzie is retained to teach Science or Social Science.

9. Cause does not exist to terminate the services of Respondents MacKenzie or Miller-Costanzo.

ORDER

1. The Accusations are sustained and the District may notify Respondents Barnes, Crow, Durell, Kratz, Kyte, Olinger, and Poole that their services will not be needed during the 2010-2011 school year due to the reduction of particular kinds of services.

2. The accusations are dismissed against Respondents MacKenzie and Miller-Costanzo, and they shall be retained for the 2010-2011 school year, provided that if they are offered a position that requires their consent, such consent is given.

3. The District shall adjust the seniority dates of Respondents Casco, Courtemanche, and Holm, and the seniority dates of all similarly-situated certificated employees who attended the 2006 orientation, apply the tie-breaking criteria as necessary, and determine, consistent with this Proposed Decision, whether the new seniority dates entitle any of these Respondents to provide services pursuant to sections 44256 or 44263 or at the continuation school. If any of these Respondents is retained to provide services in a position that requires her consent, retention is contingent on such consent.

DATED: _____

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings