

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

In the Matter of the Employment Status of
Ten Certificated Employees of the Riverside
County Office of Education,

Respondents.

OAH No. 2010030631

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Riverside, California on April 20, 2010.

Todd M. Robbins, Attorney at Law, represented the Riverside County Office of Education.

Ronald G. Skipper, Attorney at Law, represented all respondents appearing in this reduction in force proceeding except for Kelli DuCloux during that portion of the proceeding in which she asserted her right to occupy the positions held by more junior employees.

Dr. Kelli DuCloux represented herself in connection with her bumping status.

The matter was submitted on April 20, 2010.

FACTUAL FINDINGS

The Riverside County Office of Education

1. The Riverside County Office of Education (RCOE) is comprised of three components: The County Superintendent of Schools, who is elected to serve a four-year term of office; seven elected members of the County Board of Education, each of whom serve four year terms of office; and approximately 1,900 employees, 400 of whom are certificated and employed directly by the County Superintendent of Schools.¹ RCOE

¹ A county superintendent of schools directly employs certificated employees under Education Code section 1293. This is not the case with local school districts, where certificated employees are employed by the district.

provides educational services and supports to meet the needs of certain students do not or cannot receive services directly from the 23 local school districts that are within Riverside County (e.g., services provided to pregnant teens, juveniles residing in correctional facilities, or students with profound disabilities).

Kenneth M. Young (Superintendent Young) is RCOE’s Superintendent of Schools. Patrick Kelleher (Director Kelleher) is RCOE’s Executive Director, Division of Personnel Services. Kevin Rubow (Coordinator Rubow) is RCOE’s Coordinator for Certificated Personnel.

RCOE’s Budget Concerns and Need for Reorganization

2. Following meetings at the cabinet level and based upon budgetary concerns and a conviction that reorganization of its special education delivery system would benefit students, Director Kelleher recommended to Superintendent Young that he approve a resolution authorizing the reduction and elimination of particular kinds of services. Director Kelleher recommended that certain employees determined by seniority be given notice that their services would not be required for the 2010-2011 school year.

3. On March 5, 2010, Superintendent Young signed the following resolution:

“REDUCTION OF PARTICULAR KINDS OF CERTIFICATED SERVICES

RESOLUTION NO.: 17-10

WHEREAS, the Superintendent of Schools of Riverside County has determined that it is in the best interests of the County Office and the welfare of the schools and the pupils thereof that the particular kinds of services set forth herein must be reduced or discontinued due to financial conditions; and

WHEREAS, it is the opinion of the Superintendent that because of the aforementioned reason, the number of certificated employees of the County Office must be reduced; and

WHEREAS, the Superintendent does not desire to reduce the services of regular certificated employees based upon reduction of average daily attendance during the past two years.

NOW, THEREFORE, BE IT RESOLVED by the Superintendent of Schools for Riverside County as follows:

A. That the particular kinds of services set forth below be reduced or eliminated commencing in the 2010-2011 school year:

Alternative Education/Special Education Itinerant Specialists	9	F.T.E.
Correctional Education Teaching Services	10	F.T.E.

Special Education Emotionally Disturbed Teaching Services	2	F.T.E.
Special Education Trainable Mentally Handicapped Teaching Services	2	F.T.E.
Special Education Autistic Teaching Services	1	F.T.E.
Special Education Mentally Handicapped/Developmentally Disabled Teaching	1	F.T.E.
TOTAL CERTIFICATED POSITIONS	25	F.T.E.

B. That due to the reduction or elimination of particular kinds of services, the corresponding number of certificated employees of the Riverside County Office of Education shall be terminated pursuant to Education Code section 44955.

C. That the reduction of certificated staff be achieved by the termination of regular employees and not by terminating temporary and substitute employees.

D. That "competency" as described in Education Code section 44955(b) for the purposes of bumping shall necessarily include possession of a valid credential in the relevant subject matter area, "highly qualified" status under the No Child Left Behind Act, an appropriate EL authorization (if required by the position), and a completed security clearance (if required by the position).

E. That, as between certificated employees with the same seniority date, the order of termination shall be determined solely by criteria adopted by the Superintendent.

F. That the Superintendent's designee is directed to initiate layoff procedures and give appropriate notice pursuant to Education Code sections 44955 and 44949.

PASSED AND ADOPTED by the Superintendent of Schools of Riverside County on Friday, March 5, 2010.

Kenneth M. Young
Kenneth M. Young
Riverside County Office of Education

Exhibit A to Resolution No. 17-10 provided:

The following certificated personnel will receive a layoff notice:

1. Jose Bustos
2. Kelli DuCloux
3. Robin Elder
4. Kyndal Hays
5. Robert Hernandez
6. Yadira Kashak
7. Tabitha Muteti
8. Vikki Roberts
9. Jess Walker

The following certificated personnel will receive a precautionary layoff notice:

1. Joy Sanders”

4. Superintendent Young’s decision to reduce and eliminate particular kinds of services was the direct result of California’s fiscal crisis, the probable reduction in RCOE funding for the 2010-2011 school year, and a firm belief that special education services could be provided to students in a better fashion by reorganizing RCOE’s delivery system for those services. The particular kinds of services identified in Resolution No. 17-10 were services Superintendent Young was authorized to reduce and discontinue. The resolution to reduce and eliminate certain services was neither arbitrary nor capricious, and making the decision to do so was a matter squarely within Superintendent Young’s sound discretion.

5. On March 5, 2010, Superintendent Young signed a non-exclusive delegation of authority appointing Director Kelleher to act on his behalf with regard to the reduction in force proceeding required under Resolution No. 17-10.

The Reduction in Force and the Issuing of Preliminary Layoff Notices

6. In accordance with Resolution No. 17-10, Director Kelleher and Coordinator Rubow issued preliminary layoff notices to the most junior employees holding those positions that were subject to reduction and elimination. Before issuing the preliminary layoff notices, Director Kelleher and Coordinator Rubow considered all known positive attrition including resignations, retirements and probationary non-reelects.

Jurisdictional Matters

7. On and before March 15, 2010, RCOE served upon respondents Jose Bustos, Kelli DuCloux, Robin Elder, Kyndal Hays, Robert Hernandez, Yadira Kashak, Tabitha Muteti, Vikki Roberts and Jess Walker written notice of that recommendation made to Superintendent Young that their services would not be required for the 2010-2011 school year. RCOE filed and served accusations and other required documents upon respondents,

each of whom timely filed a notice of defense. Each respondent was served thereafter with a notice of hearing. All jurisdictional requirements were met to conduct this reduction in force proceeding.

8. On April 20, 2010, the record in the administrative hearing was opened. Attorney Todd M. Robbins appeared on behalf of the district. Attorney Ronald G. Skipper appeared on behalf of all respondents present at the hearing. Counsel for RCOE gave a brief opening statement. Counsel for respondents reserved opening statement. Jurisdictional documents and a written stipulation were presented, counsel stipulated that the preliminary layoff notice and accusation served upon respondent Tabitha Muteti (Muteti) be withdrawn due to a recent retirement and Muteti's seniority and qualification to assume the recently vacated position, documentary evidence was received, and sworn testimony was provided. Kelli DuCloux's request to be heard on the issue of her right to hold the positions being held by more junior employees was granted, and her testimony and the testimony of others was taken on the bumping issue. Thereafter, counsel for RCOE and respondents provided closing argument, Dr. DuCloux waived closing argument, the record was closed and the matter was submitted.

The Seniority List and Bump Analysis

9. RCOE maintains a seniority list for certificated employees, a continuously evolving schedule that sets forth each employee's seniority number, name, seniority date, position title, unit, annual length of service, status (tenured, probationary second year, probationary first year, or P0 (a status given to certificated employees who are neither tenured, temporary, or substitutes) status, the employee's credentials as of March 15, 2010, whether the employee holds English language authorization, whether the teacher holds No Child Left Behind (NCLB) status, and "bump notes."

10. By letters dated January 12, 2010, sent to all certificate employees, Coordinator Rubow advised of RCOE's effort to maintain an accurate seniority list. Each letter contained the employee's current position, first paid date of probationary service with RCOE, certificated status, credentials and authorizations, and NCLB and EL Authorization status. Coordinator Rubow requested each employee review the information and provide RCOE with any corrections or additional information. The information provided to Coordinator Rubow was verified and included in RCOE's seniority list.

11. Kelli DuCloux (Dr. DuCloux) testified she was on leave when Coordinator Rubow's letter was sent out and that she did not receive that letter. However, it was not established that any of the information set forth in RCOE's seniority list that pertained to Dr. DuCloux as it existed on March 15, 2010, was incorrect.

12. Under Coordinator Rubow's supervision, RCOE's updated master seniority list was utilized to produce the "bump analysis" that was employed in this layoff proceeding. The bump analysis that was created utilized Resolution No. 17-10 to identify the services being reduced or discontinued, the persons who were providing those services, and whether the persons being displaced under Resolution No. 17-10 had the seniority and qualifications

to displace (bump) a more junior employee. The process Coordinator Rubow used in creating the bump analysis was in accordance with the economic layoff statutes found in the Education Code which generally require the retention of senior certificated employees over more junior employees and the retention of permanent employees over probationary employees and others with less seniority. There was no “skipping” of any junior employees.

The CalSAFE Program Teachers

13. Joy Sanders (Sanders), Yadira Kashak (Kashak) and Robin Elder (Elder) are RCOE certificated employees who provide teaching services through the California School Age Families Education (CalSAFE) program, a categorically funded program that is designed to encourage and improve academic achievement and parenting skills of expectant and parenting students in addition to providing the children of these students with child care and developmental services. Sanders began employment with RCOE in 1986 as an instructional assistant and she began her service as a certificated employee in CalSAFE’s predecessor program in September 1987. Kashak has been employed by RCOE since 1992, the first two years as a long-term substitute teacher and then as an instructor in the Pregnant Minors Program (the predecessor to CalSAFE) beginning in April 1997. Elder has been a certificated employee with RCOE since August 2002, following a career in law enforcement.

14. Notice is taken that CalSAFE was established by Chapter 1078, Statutes of 1998, and became operational in July 2000. CalSAFE was a comprehensive, continuous, and community-linked school-based program that replaced the Pregnant Minors Program (PMP), School Age Parenting and Infant Development (SAPID) Program, and Pregnant and Lactating Students (PALS) Program.

15. Sometime in 2001, (then) RCOE Assistant Superintendent Sandy Schnack (Assistant Superintendent Schnack), who was in charge of RCOE programs but not RCOE personnel, met with RCOE employees who were assigned to the CalSAFE program and with Michael Bochicchio (Bochicchio), President of the RCOE teachers’ association. Assistant Superintendent Schnack discussed changes in the program (e.g., fathers caring for infants were now eligible to attend the program) and she assured those employees assigned to the CalSAFE program that their employment status would not be affected by the change in programs. Sanders, Kashak and Elder attended this meeting. Bochicchio, Sanders and Kashak specifically recalled Assistant Superintendent Schnack telling them that their right to tenured and permanent status would not change as a result of the transition in programs.

16. Notwithstanding Assistant Superintendent Schnack’s comments, Superintendent Young continuously employed CalSAFE employees under offers of employment that specifically stated that the CalSAFE positions that were being offered were for categorically funded projects.

The offers of employment, which Sanders, Kashak and Elder signed for each school year from 2001 to the present, stated in part:

“Employment in this position is offered as a part of a categorically funded project of indeterminate duration and is subject to the provisions of Section 1294.5 of the Education Code. Service in this position shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless you serve in this position for at least 75 percent of the number of days in the regular schools of the Riverside County of Superintendent of Schools (hereinafter referred to as the Superintendent) are maintained and you are subsequently employed as a probationary employee. Employment is subject to termination at the discretion of the Superintendent or at the expiration of the categorically funded project. The provisions of Sections 44949 and 44955 of the Education Code pertaining to dismissal and reduction in work force do not apply to this employment. . . .

Each employee signed an acceptance of offer/notification which stated in part: I accept the offer of employment/notification of employment status set for above. . . .”

17. Sanders, Kashak and Elder read the contracts before signing them. The contract language should have raised questions about their status. Despite this contract language, Sanders, Kashak and Elder never asked RCOE for clarification of their status, nor did they specifically ask their employee association about their status before 2009.

18. Sanders and Kashak received performance reviews from their immediate supervisors before the 2009-2010 school year which stated they held “permanent” status. RCOE afforded Elder a stipend to serve as a Peer Assistant and Review (P.A.R.) Consulting Teacher for the 2009-2010 school year, which theoretically required her to meet certain minimum qualifications including “Current RCOE classroom teacher with permanent status.” Sanders, Kashak and Elder were listed as having “tenured” employment status on RCOE Professional Assignment Information Forms that were provided to the California Basic Educational Data System.

19. In 2009 RCOE was required to lay off various certificated employees, some of whom were assigned to the CalSAFE program. The CalSAFE employees were not given permanent or probationary status for that reduction in force proceeding. At that time it became evident to Sanders, Kashak, Elder and Bochicchio that the district did not consider CalSAFE employees to hold permanent or probationary status. After discussion, the RCOE teachers’ association recommended that Sanders, Kashak and Elder seek documentation to establish that RCOE had, in fact, conferred them with permanent or probationary status.

20. Sanders, Kashak and Elder argued that RCOE was estopped to assert that they were not permanent employees and that it would be unjust to terminate their employment on the basis that they did not obtain tenure when working in the CalSAFE program. Each asserted that Assistant Superintendent Schnack’s comments concerning their right to tenure and permanent status were clear and unambiguous. Each asserted that she relied on these and other representations to their detriment. And, each implied that their reliance on these representations was reasonable. Sanders testified that she would have transferred into a non-categorically funded position from CalSAFE had she known her employment with CalSAFE

would not lead to her permanent status. Kashak implied that she would have looked for other employment had she known she was not a permanent employee. Elder testified that she was offered the opportunity to work in a custodial facility and that she specifically chose to work with CalSAFE because she believed her employment there would result in her tenured status based upon Assistant Superintendent Schnack's representations, her status as a P.A.R. consultant, and notations set forth in RCOE documents affirming her permanent and tenured status.

21. No evidence established that Sanders, Kashak or Elder were employed by the superintendent in regular educational programs as probationary employees before their employment in the CalSAFE program.

22. RCOE argued that Sanders, Kashak and Elder could not be permanent or probationary employees because of their service in a categorically funded program; that despite their lengthy and valuable service with the district, these three categorically funded employees were unable to "bump" permanent or probationary employees; and that these employees could not be retained over permanent and probationary employees. RCOE introduced offers of employment signed by each employee dating back to the beginning of the CalSAFE program, documentation that established that Sanders had never been employed by RCOE under any contract of employment that provided her with probationary or permanent status, and documentation that established that Kashak was employed under a temporary emergency permit from July 1998 through June 2001 and was not employed in a probationary or permanent position during that period of employment. The notations in RCOE's seniority list indicated that Sanders, Kashak and Elder held "P0" status (which is neither a formal probationary status nor indicative of a tenured status). RCOE argued that the "permanent" status notations set forth on the performance reviews entries were made by individuals who did not have the authority to confer permanent status, that Elder's service as a P.A.R. Consulting Teacher did not require her to have permanent status, and that the information that RCOE provided to California Basic Educational Data System was irrelevant for purposes of this proceeding.

23. Assistant Superintendent Schnack certainly assured each of these teachers that they did not have to worry about their tenured status under the CalSAFE program. Absent anything further, it would have been reasonable for Sanders, Kashak and Elder to rely on Assistant Superintendent Schnack's representation in this regard. However, after the 2001 meeting in which those assurances were given, each of these employees was presented with a series of contracts specifically stating: (1) that the employment being offered was part of a categorically funded project of indeterminate duration; (2) that service in the position would not be included in computing the service required to become classified as a permanent employee *unless* the employee provided service in the position for at least 75 percent of the number of regular school days in the contract period *and* was subsequently employed as a probationary employee; (3) that employment was subject to termination on expiration of the categorically funded project; and (4) that the provisions of Education Code sections 44949 and 44955 of the Education Code pertaining to reduction in work force did not apply to the employment.

The admonitions in the series of contracts that Sanders, Kashak and Elder signed should have warned each of them that they were not permanent employees and should have caused each of them to inquire of someone in RCOE's personnel division about their status or to ask the teachers' association to do so on their behalf. The assertion that there was some ambiguity in the contract that caused these employees to be convinced that they had permanent status was unreasonable. Given the cautionary language in the employment agreements, any continuing reliance upon the assurances that had been given by Assistant Superintendent Schnack in 2001 was unreasonable. The statements in performance reviews, the data RCOE provided to the State of California in forms, and Elder's holding a P.A.R. consultant position were not provided in response to any question about permanent status nor did these statements unambiguously guarantee tenured status. Finally, a preponderance of the evidence did not establish that Sanders, Kashak or Elder specifically relied to their detriment upon any RCOE representation about their permanent status in deciding to accept or reject specific employment opportunities.

Kelli DuCloux

24. Dr. Kelli DuCloux began employment with RCOE on September 14, 2004. She holds a clear multiple subject teaching credential, a child development program director permit, and applied for a special education credential after March 15, 2010. She holds two master's degrees and a doctorate in Education. She holds an emergency CLAD authorization and is NCLB compliant. Dr. DuCloux is assigned as a correctional education teacher. While this is a form of alternative education, and while she has provided services to Special Education students outside of the Special Education program, she does not have a Special Education credential or authorization. Her seniority number is 168.

Dr. DuCloux observed that she was senior to those persons holding seniority numbers 369, 368, 360, 359, 352, 317, and 305, each of whom was described in the seniority list as a "Specialized Academic Instruction Teacher." She testified that she had more degrees than those individuals, some of whom she believed to be non-NCLB compliant. She claimed that she taught Special Education students in her classroom and that she had applied for and was awaiting her Special Education credential. Dr. DuCloux asserted that she was competent and qualified to teach as a Specialized Academic Instruction Teacher and that she should be permitted to bump these junior employees.

25. The "Specialized Academic Instruction Teacher" position at RCOE requires a Special Education credential or authorization, Dr. DuCloux never advised RCOE that she held such a credential or authorization², and the California Commission on Teacher Credentialing website does not indicate that Dr. DuCloux held a Special Education credential or authorization on April 14, 2010. Dr. DuCloux did not teach Special Education classes at RCOE and she was not authorized to do so. She taught at a correctional facility.

² Dr. DuCloux testified she did not receive the January 2010 letter asking for information about her credentials because she was on leave. Even though that might be the case, it made no difference because Dr. DuCloux does not hold a Special Education credential or authorization.

26. Dr. DuCloux cannot to bump any junior employee assigned by RCOE to Specialized Academic Instruction because she does not hold a Special Education credential or authorization.

Ultimate Conclusions Regarding RCOE's Reduction in Force

27. The termination of respondents as a result of Superintendent Young's decision to reduce and discontinue particular kinds of services was totally unrelated to the quality of the professional services provided by these fine teachers. The length of service provided by these employees bespeaks of their value to RCOE, as does their academic achievements and professional accomplishments. An examination of the performance reviews received in evidence in this proceeding underscores this conclusion. Each review established that the individual whose employment was being terminated met or exceeded RCOE standards in connecting with students, used a variety of instructional strategies, facilitated the learning experience, engaged students in problem solving, promoted learning and excelled in every other area that was subject to being rated.

28. Superintendent Young resolved to reduce and discontinue particular kinds of services provided by RCOE certificated employees for legitimate reasons. This decision was unrelated to the competency or dedication of the employees whose services were proposed to be reduced and discontinued. Superintendent Young's determination was lawful, reasonable, and ultimately in the best interest of RCOE and its students.

RCOE's administrative staff initiated and followed a systematic procedure to identify employees who were directly affected by the resolution. A careful evaluation was made to determine each employee's seniority date, tenured status, credentials and authorizations, and qualifications in making determinations about what bumping rights, if any, an employee had. RCOE staff correctly determined that Joy Sanders, Yadira Kashak and Robin Elder worked in a categorically funded program and were not entitled to permanent or probationary status in this reduction in force proceeding. RCOE did not retain any junior credentialed employee to provide services which a more senior employee was certificated, competent and qualified to render. RCOE properly and in good faith applied relevant provisions of the Education Code in this reduction in force proceeding.

LEGAL CONCLUSIONS

Statutory Authority

1. Education Code section 44944 provides in part:

“No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year . . . the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor . . .

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year . . . If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing . . .

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with . . . the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

. . .

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. . . .”

2. Education Code section 44955 provides in part:

“(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . and when in the opinion of the governing board of the district it shall have become necessary . . . to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no

permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

. . .

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof . . .

. . .

(c) Notice of such termination of services shall be given before the 15th of May . . . and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) Notwithstanding subdivision (b), 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 teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.”

3. Education Code section 1294.5 provides:

“Any county superintendent of schools may employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted under contract with public or private agencies, or other categorically funded projects of indeterminate duration. The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the county superintendent and such agreement shall be reduced to writing. Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of county superintendent by which he is employed are maintained, and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications. Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees.

This section shall not be construed to apply to any regularly credentialed employee who has been employed in the regular educational programs of the county superintendent of schools as a probationary employee before being subsequently assigned to any one of these programs.”

Jurisdiction

4. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and other jurisdictional requirements contained in those sections were satisfied as to all respondent employees identified herein.

The Reduction of Particular Kinds of Services

5. The decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. It is within the governing authority’s discretion to determine the amount by which a particular kind of service will be reduced or discontinued as long as the district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.) A school district has wide discretion in setting its budget and a layoff decision will be upheld unless it was fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. (*California Sch. Employees Assn. v. Pasadena Unified Sch. Dist.* (1977) 71 Cal.App.3d 318, 322.)

Competence

6. The Education Code leaves to the governing authority the discretion to determine whether in addition to possessing seniority an employee is also “certificated and

competent” to be employed in a vacant position. The term “competent” in this regard relates to an individual’s specific skills or qualifications including academic background, training, credentials, and experience, but does not include evidence related to on-the-job performance. (*Forker v. Board of Trustees* (1984) 160 Cal.App.3d 13, 18-19.) In addition to seniority the only limitation in placing a teacher in a vacant position is that the teacher that is selected be “certificated and competent” to render the service required by the vacant position. Among employees who meet this threshold limitation, there is no room in the statutory scheme for comparative evaluation. (*Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 299.) An employee holding a special credential or needed skill, if such credentials or competence are not shared by a more senior employee, may be retained though it results in termination of a senior employee. (*Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648, 655.)

Seniority and Bumping

Seniority

7. Under Education Code section 44845, seniority is determined by the date a certificated employee “first rendered paid service in a probationary position.”

8. Education Code section 44846 provides in part: “The governing board shall have power and it shall be its duty to correct any errors discovered from time to time in its records showing the order of employment.”

The Statutory Scheme

9. Education Code section 44955, the economic layoff statute, provides in subdivision (b), in part, as follows: “Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while . . . any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.”

Essentially this language provides “bumping” rights for senior certificated and competent employees, and “skipping” authority to retain junior employees who are certificated and competent to render services which more senior employees are not. Subdivision (d)(1) of section 44955 provides an exception to subdivision (b) where a district demonstrates specific need for personnel to teach a specific course of study and that a junior certificated employee has special training and experience necessary to teach that course that the senior certificated employee does not possess. (*Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 134-135.) School districts have broad discretion in defining positions within the district and establishing requirements for employment. This discretion encompasses determining the training and experience necessary for particular positions. 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. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.)

Bumping

10. The district has an obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. (*Bledsoe v. Biggs Unified School Dist.*, *supra.* at 136-137.)

Categorically Funded Positions

11. As a review of the many and diverse programs categorically funded readily reveals, a categorically funded project need not involve the creation of special classes divorced from the normal curriculum, but may augment the curriculum in whatever manner is specified in the particular program. The defining characteristics are that the program be financed outside the base revenue limit with funds designated for a use specified by the particular program. (*Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 848.)

12. Education Code section 1294.5, set forth in its entirety at Legal Conclusion 3, authorized Superintendent Young to employ Sanders, Kashak and Elder in CalSAFE, a categorically funded project of indeterminate duration. The statute prohibited RCOE from computing a CalSAFE employee's service toward attainment of eligibility for classification as a permanent employee unless that employee was subsequently employed as a probationary employee in a position requiring certification qualifications. Sanders, Kashak and Elder did not meet that condition. Nor did they establish that they had been employed in the regular educational programs of the county superintendent as probationary employees before being assigned to the CalSAFE program.

Estoppel

13. Promissory estoppel is a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced. A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. To be binding, the promise must be clear and unambiguous. (*Cotta v. City and County of San Francisco* (2007) 157 Cal.App.4th 1550, 1566.) The elements of a promissory estoppel claim are: (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901.)

14. Promissory estoppel is based on a promise; equitable estoppel is based on misrepresentation of an existing fact. The doctrine of equitable estoppel is based on the theory that a party who by his declarations or conduct misleads another to his prejudice should be estopped from obtaining the benefits of his misconduct. The required elements for an equitable estoppel are: (1) the party to be estopped must be apprised of the facts; (2) the

party to be estopped must intend his or her conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must rely upon the conduct to his or her injury. It is well settled that the estoppel doctrine is applicable to government entities where justice and right require it. (*Cotta v. City and County of San Francisco, supra*, at 1566-1567.)

15. The series of contracts described in Finding 16 put Sanders, Kashak and Elder on notice that they were not permanent employees. Any continuing reliance upon assurances given by Assistant Superintendent Schnack in 2001 and any purported reliance upon the information contained in any performance review or form that was issued by any division other than RCOE's personnel division concerning their employment status was unreasonable. Sanders, Kashak and Elder did not reasonably rely to their detriment upon any RCOE representation about their permanent status in deciding to accept or reject specific employment opportunities. The estoppel doctrines do not apply.

Cause Exists to Give Notice to Certain Employees

16. As a result of Superintendent Young's lawful decision to reduce or discontinue particular kinds of service being provided by certificated employees, cause exists under the Education Code to give notice to Jose Bustos, Kelli DuCloux, Robin Elder, Kyndal Hays, Robert Hernandez, Yadira Kashak, Vikki Roberts and Jess Walker that their employment will be terminated at the close of the current school year and that their services will not be needed by the district for the 2010-2011 school year.

Determination

17. The charges set forth in the accusation were sustained by a preponderance of the evidence and related to the welfare of RCOE and the students thereof. RCOE's staff made assignments and reassignments under Resolution No. 17-10 in such a manner that the most senior RCOE employees were retained to render services which their seniority and qualifications entitled them to render. No RCOE employee with less seniority than any respondent will be retained to render a service which any respondent is certificated, competent and qualified to render.

The termination of the individuals as a result of Superintendent Young's decision to reduce and discontinue particular kinds of services is totally unrelated to the competence of these fine teachers. The length of service provided by these employees bespeaks of their value to RCOE, as does their academic achievements and professional accomplishments. The performance reviews in evidence underscores this conclusion.

This determination is based on all factual findings and on all legal conclusions.

RECOMMENDATION

It is recommended that Superintendent Young give notice to Jose Bustos, Kelli DuCloux, Robin Elder, Kyndal Hays, Robert Hernandez, Yadira Kashak, Vikki Roberts and Jess Walker that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2010-2011 school year:

DATED: _____

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings