

BEFORE THE
GOVERNING BOARD OF THE
HACIENDA LA PUENTE UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2010031158

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE HACIENDA
LA PUENTE UNIFIED SCHOOL DISTRICT,

Respondents.

PROPOSED DECISION

David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on April 29 and May 3, 2010, at the district office of the Hacienda La Puente Unified School District, Hacienda Heights, California.

Fagen Friedman & Fulfroost, by James B. Fernow and Maggy M. Athanasious, Attorneys at Law, represented the Hacienda La Puente Unified School District (District).

Rothner, Segall, Greenstone & Leheny and Law Offices of Richard A. Love, by Kathleen M. Erskine, Attorney at Law, represented Respondent teachers except for Edward Monteilh. Respondent Edward Monteilh was present and represented himself.

Evidence was received by way of stipulation, testimony and documents. When the hearing was not completed as of the end of April 29, 2010, the first and only day originally scheduled for hearing, all parties made a motion to continue the hearing with the understanding that, under Education Code section 44955, subdivision (e), various statutory dates and deadlines would be extended. The motion was granted and the hearing was continued to May 3, 2010. As a result, the statutory dates and deadlines are extended by four days.

At the conclusion of the hearing, the record was left open for briefs, which were received May 10, 2010, and marked for identification as follows: District's letter brief, Exhibit 15; Respondents' letter brief, Exhibit O, and Respondent Monteilhs' email, Exhibit P. The record was closed and the matter was submitted on May 10, 2010.

SUMMARY OF PROPOSED DECISION

The Governing Board of the District determined to reduce or discontinue particular kinds of services provided by certificated teachers for budgetary reasons. The decision was not related to the capabilities 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. The selection process was in accordance with the requirements of the Education Code, except as set forth below. Therefore, some Accusations will be dismissed and the Board may proceed as indicated herein.

FACTUAL FINDINGS

Jurisdiction and Parties

1. The District provides educational services for minors in schools including grades K-12 and for adults in two distinct areas: corrections and adult education. This proceeding relates to the District's approximately 155 certificated employees in permanent or probationary positions in corrections and adult education.

2. William F. Roberts, IV (Roberts), is the Assistant Superintendent of Human Resources of the District. Cynthia Parulan-Colfer (Parulan-Colfer) is the Associate Superintendent of Adult and Continuing Education. Their actions were taken in those official capacities. Parulan-Colfer was primarily responsible for implementation of the technical aspects of the layoff.

3. Before March 15, 2010, the District served on 118 teachers, including Respondents, by personal service and/or certified mail, a written notice (notice) that it had been recommended that notice be given to them pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year. Each notice set forth the reasons for the recommendation and noted that the Board had passed a Resolution reducing the certificated staff by 98.38 full-time equivalent (FTE) positions.

4. Approximately 83 certificated employees in the corrections and adult education programs, referred to as Respondents, submitted timely written requests for a hearing to determine if there is cause for not reemploying them for the ensuing school year.

5. Roberts made and filed Accusations against each of the Respondents. On March 24, 2010, the District served the Respondents by certified mail with an Accusation along with required accompanying documents and blank Notices of Defense.

6. Notices of Defense were served on the District by 73 Respondents. Exhibit 10 is a list of teachers who: were served with the notice; requested a hearing; were served with an

Accusation; and submitted a Notice of Defense. Also listed is the amount of FTE affected for each teacher listed.

7. Attachment A is incorporated by reference. The 83 names originally listed and numbered are teachers whom the District served with notices. Those who did not return a Notice of Defense have the designation “NNOD.” The District waived objection to inclusion in the proceedings of teachers who had filed a Request for Hearing but had not filed a Notice of Defense. Finally, all Respondents and teachers whose names have the designation “*” appeared at the hearing, although not necessarily for the entire hearing.

8. Respondents in this proceeding are probationary and permanent certificated employees of the District.

9. The District objected to the inclusion on the proceeding of teachers who were present but had not submitted a Request for Hearing: Mel Kleven and Robert West. The objection was sustained pursuant to the language of Education Code section 44949, subdivision (b), that a teacher who fails to submit a Request for Hearing has waived the right to a hearing. Also listed on Attachment A are two teachers who were working in temporary positions: Jeffrey Johansen and Tarrie McBride. The evidence established that they were employed in temporary positions and were sent notices that they were being released from those positions. Although the District served them with notices “in an abundance of caution” if they claimed rights as a probationary or permanent employee; no such claims were raised. Temporary employees who are properly classified as such do not hold the right to participate in proceedings of this type under the Education Code.

The Governing Board and the Lay Off Resolution

10. On February 10, 2010, the Governing Board of the District (Board) was given notice of the Superintendent’s recommendation that 98.38 FTE employees be given notice that their services would not be required for the next school year and stating the reasons therefore. Board Resolution number 2009/10-21 was adopted that day (Resolution) and proposed a layoff of 98.38 FTE certificated employees and provided for the reduction or elimination of the particular kinds of services set forth in Attachment B, incorporated herein by reference.

11. The Resolution also established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date.

12. The Resolution also indicated that certain employees would be retained regardless of seniority and it set forth three definitions of competency to be used if a more senior employee was to displace, or bump, a less senior employee from their position. As stated in the Resolution, Exhibit 1:

“BE IT FURTHER RESOLVED that it will be necessary to retain the services of certificated employees in the 2010-2011 school year regardless of seniority, who possess qualifications needed for the following programs:

“As to any employee who seeks to move into a position requiring certification qualifications held by a less-senior certificated employee, the following criteria must be met to determine competency for the position:

“To teach as a K-12 classroom teacher, home teacher, or teacher in an alternative or community day school, an employee must have teaching experience in the subject area and grade level for at least one (1) year within the last ten (10) years.

“To teach as an adult school teacher, an employee must have teaching experience in the subject area and with the targeted student population (i.e., adults with disabilities, parents together with infants/toddlers) for at least one (1) year within the last ten (10) years.

“To teach as an adult school teacher, an employee must have all appropriate certifications, as determined by the District and state law, to hold the position (e.g., ASE Certification (automotive), EL Certification, CLAD, registered nursing license).”

13. The first phrase quoted above presents an issue, as it appears to supply justification for the District to skip over certain employees with less seniority to teach certain programs. Although the phrase is written as if those programs will be listed in the Resolution itself (to follow the colon at the end of the phrase), no programs are listed. However, the District is not required to set forth its skipping scenarios in writing. In testimony, the District indicated it wanted to skip Mark Gunzelman due to his knowledge and use of, and certification in American Sign Language which he uses to teach ABE (Adult Basic Education) and ASE (High School Diploma) to students who are hearing impaired. (See position number 34 in Exhibits 11 and 14.) The District skipped Sharon Anderson due to her license as a Registered Nurse (RN) and its need, discussed more fully in Finding 34.

14. The second phrase and the three sentences following it, quoted above, establish competency criteria to be met by a more senior employee whose position is being eliminated and who seeks to displace, or bump into the position of, a less senior employee. In Exhibits 11, 12 and 14 the District sets out its understanding of the bumping that would take place, including identifying some of the instances wherein the competency criteria of the Resolution are implicated. More specifically, the District claims the following Respondents, who may have the certifications necessary to bump a more-junior employee, do not meet the competency criteria¹: Karla Ruano-Ramirez, Danny Masonovich and Joanna Belle Empeno.

¹ Three other teachers were so listed: William Zeko, is not a Respondent in this matter; Dennis Mulkey, whose listing was modified after he put in for retirement; and Diane Hitchcock, whose listing was modified based on the evidence to remove the competency issue.

As noted in more detail below (Findings 27, 28, 29, 31, 32, 33, 34, 35, 37, 38, 41 and 43), several additional Respondents claim that they are certificated and competent to bump others, or that others are not competent to bump them.

15. Parulan-Colfer testified that the Resolution was required by the District's fiscal crisis and need to reduce services to balance its budget for the welfare of the District and its students. The District provides educational services through its corrections division in seven facilities supervised by the Los Angeles County Sheriff's Office under an annual contract with Los Angeles County with a value of between \$8.5 and \$10 million per year. It has done so for many years. Based on a pending lawsuit, the District has determined that any future contract must include a provision that it be indemnified. No such provision has been offered in the ongoing negotiations for a contract for next year. The District cannot assure that it will have a contract to provide correctional education next year, and it decided that it must lay off all of its certificated employees in the corrections division (67 FTE). The adult education program provides over 300 courses to over 22,000 students in 35 locations. Due to anticipated budget cuts of \$5 million in the adult education program for school year 2010-2011, the District would experience a further budget shortfall and has laid off certificated employees in that program (31.38 FTE).

16. The decision to reduce or eliminate services was not related to the capabilities and dedication of the individuals whose services are proposed to be reduced or eliminated.

The Seniority List and the Lay Offs

17. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments and credentials. There is one seniority list combining teachers in the adult education and corrections division.

18. 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. The District claims that it was not necessary to apply the tie-breaker criteria of the Resolution because employees with the same seniority dates were being laid off.

19. Parulan-Colfer testified to some of the details of implementing the lay off. For example, she explained that in the adult education and corrections division, the District considers one FTE to be the equivalent of a teacher providing 30 hours of instruction per week. A teacher gains permanency by working at least 60 percent of one FTE (or 18 hours per week) for at least 75 percent of a school year, for two years in a probationary status. Education Code section 44929.25 is the legal basis supporting this practice. To determine the number of FTEs to be reduced or eliminated by the lay off, the number of hours of instruction for each particular kind of service affected was totaled and then divided by 30. She then examined the seniority list to determine which teachers held the positions being reduced or eliminated. Further complicating the task is that many teachers in the adult education and corrections division have more than one assignment and there are fractional

FTEs for each position. Also, teachers may gain permanency at different times for their different positions.

20. The District then determined whether the least senior affected employees held credentials in another area and were entitled to displace, or “bump,” other employees. 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, and also referred to the competency criteria in the Resolution. In Exhibit 11, later modified in Exhibit 14, the District identified the teachers whose positions were affected by the layoff. Exhibits 11 and 14, as well as Exhibit 12, note when bumping would occur, including portions of an FTE affected.

21. In performing her analysis, Parulan-Colfer was also aware that the District had been notified by the Los Angeles County Office of Education that numerous teachers were considered to be “missassigned” due to their failure to have the proper authorization(s) to teach particular courses (see Exhibit 13).

22. Her work was complicated and arduous. Parulan-Colfer estimated she spent between 200 and 400 hours on this entire process.

23. The services identified in the Resolution are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Board’s decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and were a proper exercise of its discretion. The decisions were based on the welfare of the District and its students.

24. The District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

Lay Off implementation, Individual Respondents, Respondents’ Contentions and Related Evidence

25. One example of the complexity of the process is the reduction of 3.13 FTE in the corrections program for the position/course described as “Family/Family Members Interaction/Personal Relationships.”² Originally, the District laid off three more junior employees who totaled 2.13 FTE; identified Diane Hitchcock as the last 1.0 FTE affected;

² During the hearing, the ALJ added to Exhibit 11 by placing numbers next to the 64 positions listed. This particular position is number 32. Also during the hearing, the District modified its lay off implementation as to some of these positions (see Exhibit 14), including position number 32.

determined she could not bump a more junior teacher (Edward Monteilh, who teaches Parenting Techniques in the adult education program) due to the competency criteria in the Resolution requiring one year of teaching the same student population within the last ten years (the potential for bumping was for 0.34 FTE); and issued a “precautionary notice” to Edward Monteilh to the extent of 0.34 FTE. (Monteilh’s present assignment is 0.47 FTE for Parenting Techniques and 0.53 FTE for Job Readiness/Job Skills Training, both in the adult education program.) Parulan-Colfer testified that Hitchcock, who also has a credential to teach the handicapped, could not bump into Howard Chudler’s position as a teacher on special assignment serving a program for adults with disabilities because of the student population-one year/ten years competency criterion in the Resolution. During the hearing, Hitchcock’s testimony and documents (Exhibit N) established that she met another competency criterion of the Resolution based on experience teaching parenting techniques in the District as well as at another school district. The District revised its bumping chart to indicate that she would bump 0.34 FTE of Monteilh’s Parenting Techniques position (see Exhibit 14, position number 32).

26. There were other examples of partial bumping, several bumps related to one position and precautionary notices because the District was unsure if it would be permitted to skip employees or if its competency criteria in the Resolution would be upheld. Further, individual Respondents raised issues.

27. Theresa MacAller: Based on evidence supplied by MacAller that she was not able to be bumped by Nicholas Giglio, the District modified the bumping chart accordingly (Exhibits 11 and 14, position number 2).

28. Diane Hitchcock: The evidence supported Hitchcock’s contention that she was competent to bump Monteihl, and the District modified the bumping chart accordingly (Exhibits 11 and 14, positions number 32 and 56). The evidence did not support Hitchcock’s contention that she was credentialed and competent to teach the course taught by Peggy Hawthorne.

29. Peter Sill: Sill presently teaches ABE (Adult Basic Education) to adults with disabilities. In Exhibits 11 and 14, he is bumped 0.7 FTE by Nicholas Giglio for position number 2 and bumped 0.3 FTE by Jerilynn Delmonico for position number 64. However, Parulan-Colfer testified that she was “not aware” of any experience Giglio had teaching students with disabilities. On this record, there was insufficient evidence to support the District’s position that Giglio meets the competency criterion in the Resolution that he taught this student population for one year within the last ten years and can bump Sill. As the District is the proponent of both the bump and the competency criteria, it should bear the burden of producing sufficient supporting evidence. As it has not, the Accusation as to 0.7 FTE of Sill must be dismissed.

30. Dixie Gleason: Gleason is presently assigned to teach ESL (English as a Second Language) for her 1.0 FTE, yet contends she improperly appears on the lay off implementation lists under the designation ABE/ASE (Adult Secondary Education, also

referred to as High School Diploma) (Exhibits 11 and 14, position number 4). This placement is proper, as her layoff is due to her being bumped by Rodger Smith, who holds a present assignment in ABE/ASE in a position that is being eliminated, and because Smith is more senior than Gleason and is certificated and competent to teach her ESL assignment.

31. Karla Ruano-Ramirez: The present assignments of Ruano-Ramirez fall into three positions on Exhibits 11 and 14. There is no issue raised as to her lay off for the first two: position number 20 is her 0.4 FTE in Directory Assistance Operator, and position number 25 is her 0.4 FTE in Job Skills Training. However, in position number 24, her 0.2 FTE in Computer Operator-Introduction, the District considered that she may bump Sandip Sengupta, who teaches computer network and repair for 1.0 FTE, or Richard Manriquez, who teaches web design and computer graphics for 0.6 FTE. However, the District raised the issue of whether Ruano-Ramirez meets the subject area and certification competency criteria in the Resolution. The evidence established that Ruano-Ramirez is not competent to bump Sengupta. Although a portion of the course she teaches includes computer networking, she does not have extensive subject area experience similar to Sengupta and does not possess an A+ Certification in computer network and repair. Sengupta has the experience and the certification and is therefore able to offer the certification to successful students. The A+ Certification is part of the course description and is an important factor to employment in the field of computer network and repair. The evidence established that Ruano-Ramirez is not competent to bump Manriquez. Although a portion of the course she teaches includes web design and computer graphics, she does not have extensive subject area experience similar to Manriquez. Based on his years of commercial experience and teaching the subject, Manriquez is able to provide a level of expertise and instruction that is part of the course description and is an important factor to employment in the field of web design and computer graphics. As a result, the District may retain Sengupta and Manriquez for this position. (Note that the remainder of Manriquez assignment, 0.4 FTE in Introduction to Computers and Computer Applications, is eliminated also under position number 24 when he is bumped by Colleen Barela.)

32. Olga Lee: Lee is listed under position number 24, Computer Operator-Introduction (Exhibits 11 and 14) as being bumped for 0.6 FTE by Colleen Barela. Lee teaches a student population of senior citizens, often in a senior center or other similar facility. She contends that Barela has not taught to the same student population and is therefore not competent to bump her. Barela may bump Lee, as there was sufficient evidence that Barela may teach to seniors, just not in a senior center environment.

33. Brenda Gomez: Gomez is listed as receiving a precautionary notice for 0.4 FTE under position number 7 and as bumping Urszula Oleksyn for 0.34 FTE under position number 34. Position number 7 is designated as ABE/ASE/ESL. The precautionary notice given to Gomez under position number 7 must be modified from 0.4 FTE to 0.06 FTE, based on the testimony of Parulan-Colfer. However, the precautionary notice is not necessary because the teacher who may bump Gomez, Roxana Carmicheal, does not possess the required EL certification and is therefore not certificated and competent for the ESL position under the Resolution's competency criterion concerning proper certification. Carmichael,

however, does have the proper credential and certifications to teach ABE and ASE. As to ABE and ASE, the bumping set forth in Exhibit 14 is correct and, as a result, Gomez is bumped to the extent of 0.43 FTE of her ABE/ASE position. However, she in turn bumps 0.33 FTE of Urszula Oleksyn. Also, under position number 34, Gomez bumps Oleksyn for 0.34 FTE.

34. Harry Nelson: Nelson is identified as holding one of the 2.0 FTE reductions for Psychiatric Technician 1 and 2. The District proposes to skip Sharon Anderson, who is more junior to Nelson, due to her RN license. Nelson does not have an RN license. The District wants to maintain maximum flexibility by assuring that its remaining teachers in this position have an RN license, so that it may continue using those clinical facilities that require the teacher who is supervising students to be an RN. More specifically, in District courses for students to become licensed vocational nurses and psychiatric technicians, certain health facilities, such as Kaiser Downey, in which students perform clinical duties, require students to be supervised by an RN. Nelson testified that the clinical facilities with which he has had contact, such as Patton State Hospital and Lanterman Developmental Center, do not have such requirements. Under these circumstances, the District may skip Anderson and lay off Nelson. Nelson's contention that he was also being bumped by Joanna Belle Empeno, Steven Vincent and Laurie Haight is not supported by the evidence. To the contrary, the evidence suggested that, if the competency criteria were not upheld, he would bump Empeno. Therefore, Nelson's reasons why he should not be bumped by them are irrelevant.

35. Donna Owens: Owens teaches 1.0 FTE of Animal Pet Groomer-Animal Caretaker in the adult education program (position number 37). Of this, 0.53 FTE is to be reduced. Debbie Icenogle teaches 1.0 FTE of Animal Attendant-Pet Groomer in the corrections program (position number 8), all of which is being laid off. The District contends that Icenogle would bump the remaining 0.47 FTE of Owens. Owens contends that the course as taught in the corrections program covers significantly fewer subjects and that the teacher, Icenogle, would not be competent in the more expanded and comprehensive subject areas included in the adult education course. A comparison of the course outlines (Exhibit H) reveals that: while it is true that the adult education course includes more coverage of subjects such as health, hygiene, first aid and pet sitting, the remaining subjects are covered to some degree in both courses; and the most substantial course module in both courses is devoted to grooming. The evidence did not support Owens' contention that Icenogle was not competent to teach the adult education course.

36. Ruth Gates: Gates is number 68 on the seniority list, with a seniority date of September 9, 1996. The same seniority date is assigned to Dixie Gleason, who is number 69 on the seniority list. No one else has that seniority date. Gates contends that she worked prior to that date and should have higher seniority. The District replied that, as both Gates and Dixon are being laid off, there is no reason to apply tie-breaking criteria and the issue is essentially one for order of rehire. As noted in Conclusion 14, below, the statute requires the District to break ties and does not allow the District to avoid it because all tied employees are being laid off anyway. The District shall be ordered to apply the tie break criteria to Gates,

Gleason and any other employees who share the same seniority date with any other employees.

37. Edward Monteilh: Monteilh teaches in the adult education program as follows: 0.47 FTE in Effective Parenting Techniques and 0.53 FTE in Career Prep/Job Skills. He testified to the significant skills and experience he brings to the District and its students and their families. He was originally identified for layoff of his 0.53 FTE in Career Prep/Job Skills under position number 47 (Exhibit 11) and other positions, some involving bumping. After modification of the layoff implementation and bumping analysis in Exhibit 14, he is being laid off from his 0.47 FTE in Effective Parenting Techniques as follows: under position number 32, Personal Relationships, he is bumped for 0.34 FTE; and under position number 56, Effective Parenting Techniques, he is bumped for 0.13 FTE.

38. K-12 Credentials: Several Respondents possess the types of credentials that would permit them to teach or serve in a K-12 program. Among them are: Theresa MacAller; Brenda Gomez; Ruth Gates; Delinda Otto; Suzanne Moore; Lynn Grolsch; Dennis Lazar; and Darryl Ross. In addition, Moore has a credential for K-12 administration. They contend that they should be able to move into the District's K-12 division.

39. The District's K-12 division is separate from the adult education and corrections division. There are different seniority lists; the salary scales are different; education for students in the K-12 division is compulsory while education services in the adult education and corrections division is funded by categorical funding and contracts and is based on the needs of the District and the community. Students in the K-12 division are required to take state testing. Some adult education and corrections division courses offer testing for certain certifications.³ Each division has a separate hiring process. The procedures whereby FTEs are determined are different based upon the nature of the teaching services provided in each division. According to the collective bargaining agreement, teachers who want to transfer from the adult education and corrections division into the K-12 division are entitled to be placed on a transfer list which is distributed to the principals of the schools in the K-12 division, and when those principals have vacancies they are required to offer interviews to those on the transfer list. (The transfer list also contains names of other K-12 teachers who want to transfer to another school.) Although teachers on the transfer list must be interviewed if they express a desire to be considered for a vacancy, there is no guarantee that they will be hired for the vacancy, as such hiring is a competitive process. In fact, one Respondent testified that she is on the transfer list and has been interviewed for six openings, but has not been made an offer for any. Further, if a permanent teacher from one division is hired in another division, completes their probationary service and is about to become permanent in the second division, they are required to chose only one division in which to

³ Examples are an A+ Certification for computer networking and repair; an ASE certification for automobile mechanics; and a smog technician certification from the Bureau of Automotive Repair.

remain a permanent teacher. Teachers cannot be permanent in both divisions at the same time. Education Code section 44929.26 is the legal basis supporting this practice.

40. There was sufficient evidence to establish that the K-12 division is separate from the adult education and corrections division, and that teachers facing lay off from the adult education and corrections division could not transfer to, or bump, teachers from the K-12 division. The contention that they can and should bump into positions in the District's K-12 program is not supported by the facts or the law.

41. Precautionary Notices Related to Competency Criteria and Skipping: Several Respondents were provided with notices that the District characterizes as "precautionary," due to its concern that, if the competency criteria in the Resolution are not upheld by the ALJ, several proposed bumps would be affected and those employees may therefore need to be laid off. Among them are: Danny Masanovich; Karla Ruano-Ramirez; Suzanne Moore; Brenda Gomez; Paul Flor; Peter Sill; Richard Manriquez; Allen Rojas; Douglas Fore; Sandip Sengupta; and Joanna Belle Empeno (see Exhibits 11 and 12). Some of these precautionary notices were not for full FTEs. Precautionary notices were also issued to Mark Gunzelman and Sharon Anderson because, if the District's justifications for skipping them were not upheld by the ALJ, these junior employees may need to be laid off.

42. For the reasons set forth in the Conclusions, the District's competency criteria are upheld, as well as the skipping of Gunzelman and Anderson.

43. Claims of Special Skills, or Lack of Another Teacher's Competence : Several Respondents testified to their experience and special skills and contend that they should be retained, including: Brenda Gomez (regarding distance learning, parenting techniques and other experience and special skills); Paul Flor (regarding distance learning, ESL, High School Diploma and other experience and special skills); Olga Lee (regarding teaching computer courses to senior citizens); and Donna Owens (animal caretaker). However, the applicable law does not provide that a teacher can force the District to skip them based on their special training and experience. Other Respondents, such as Robert Marsh, Donna Owens, Jose Reyes and Olga Lee, argued that some of their colleagues lacked the competence to teach certain subject areas or student populations. These contentions are not supported by the law and/or the facts and are rejected.

44. Evidence That Resulted in Modification of the Layoff and Bumping Implementation: As noted more specifically on the record and above, based on evidence presented during the hearing the District reconsidered aspects of its layoff implementation and bumping analysis. The testimony of Parulan-Colfer and Exhibit 14 address those modifications. Based thereon, the Accusations against certain Respondents should be dismissed and, as to other Respondents should be modified as to the amount of FTE affected, including: Paul Flor, in an amount of FTE to be determined (based upon positions number 2, 4 and 7 and because the competency criteria were upheld); Suzanne Moore, 1.0 FTE (based upon position number 7 and because the competency criteria were upheld); Theresa MacAller, now 0.4 FTE (based upon positions number 2 and 7); Brenda Gomez, in an

amount of FTE to be determined (based upon positions number 2, 5, 7 and 34 and because the competency criteria were upheld); Peter Sill, now 0.7 FTE (based upon positions number 2 and 4); Sandip Sengupta (based upon position number 24 and because the competency criteria were upheld); Richard Manriquez, to the extent of 0.6 FTE (based upon position number 24 and because the competency criteria were upheld); Diane Hitchcock, in an amount of FTE to be determined (based upon positions number 32 and 56 and because the competency criteria were upheld); Douglas Fore, 1.0 FTE (based upon position number 21 and because the competency criteria were upheld); Allen Rojas, 1.0 FTE (based upon position number 31 and because the competency criteria were upheld); Mark Gunzelman and Sharon Anderson due to skipping; and any others as supported by the evidence.

45. Respondents raised several additional contentions in their brief (Exhibit O), including improper issuance of precautionary notices and failure to consider the K-12 credentials of some Respondents and whether those Respondents met the competency criterion of the Resolution as entitling them to transfer into the K-12 program. Except as specifically set forth herein, these contentions were not supported by sufficient evidence or the law and, therefore, are rejected.

LEGAL CONCLUSIONS AND DISCUSSION

1. Education Code⁴ section 44949, subdivision (a), states in pertinent 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 for the reasons specified in Section 44955, 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.”

2. Section 44955 provides, in pertinent 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 by reason of any of these conditions 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

⁴ All citations are to the Education Code unless otherwise indicated.

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) . . . [S]ervices of such employees shall be shall be terminated in the reverse order in which they were employed, as determined by the board in accordance with 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. . . .

“(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 . . . and that the certificated employee has special training and experience necessary to teach that course or course of study . . . which others with more seniority do not possess.”

3. Sections 44949 and 44955 establish jurisdiction for this proceeding. The notice and jurisdictional requirements set forth in sections 44949 and 44945 were met. (Factual Findings 1 through 8.)

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

5. Boards of education hold significant discretion in determining the need to reduce or discontinue particular kinds of services, which is not open to second-guessing in this proceeding. (*Rutherford, supra.*) Such policy-making decisions are not subject to arguments as to the wisdom of their enactment, their necessity, or the motivations for the decisions. (*California Teachers; Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1529.) Such decisions and action must be reasonable under the circumstances, with the understanding that “such a standard may permit a difference of opinion.” (*Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831 (*Santa Clara*).

6. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and students within the meaning of section 44949.

7. 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. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) Junior teachers may be given retention priority over senior teachers, or "skipped," if the junior teachers possess superior skills or capabilities which their more senior counterparts lack, which are necessary to teach a specific course or course of study. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.)

8. The language of the Resolution and the evidence of the District's process in determining which teacher might bump another and which teachers it would skip sufficiently follows the statutory language concerning skipping and bumping rights. The District skipped Gunzelman due to his special credential, training and experience in the use and teaching of American Sign Language. The District skipped Anderson due to her licensure as a Registered Nurse (RN), which it stated was necessary for use in its courses for licensed vocational nurses and psychiatric technicians because certain health facilities, such as Kaiser Downey, in which students performed clinical duties, required students to be supervised by an RN. (See position number 43 in Exhibit 11.)

9. The incomplete language of the Resolution concerning skipping, although troublesome, is not fatal. Numerous cases stand for the proposition that the process of implementing layoffs is a very flexible one and that school districts retain great flexibility in carrying out the process. (*Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796) In fact, school districts have been permitted to present at hearing, for the first time, evidence of the type of tie-breaking that might apply. (*Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838; *Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127.) "Nonsubstantive procedural errors" under section 44949, subdivision (c), are not cause for dismissing the charges. Further, Evidence Code section 664 establishes the presumption that the action or official duties of a public entity, such as a school district or its governing board, have been regularly performed.

10. The contention of various Respondents that their special training, experience and skills should cause the Department to skip them in this proceeding is not supported by law. This "skipping" is a process, under section 44955, subdivision (d)(1), wherein a school district may choose to demonstrate a specific need and that an employee has the special training and experience to meet that need. However, the statute does not require a school district to do so. Rather, it is within the school district's discretion to determine if it wishes

the lay off process to skip over an employee. The District adequately described the special skills and training upon which it relied.

11. The District's use of bumping competency criteria for bumping is similar to *Duax v. Kern Community College Dist. (Duax)* (1987) 196 Cal.App.3d 555, 559-560, wherein the board of trustees had adopted by resolution a standard of competency. "That resolution provided that an employee must have rendered a service or taught in a specific subject area the equivalent of one year . . . (i.e., one year in the ten years preceding the adoption of the resolution) to be considered competent to render a service for purposes of 'bumping' a junior employee." The appellate court considered the question whether the criteria were reasonable and valid. The court cited *Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, at p. 299, and *King v. Berkeley Unified School Dist.* (1979) 89 Cal.App.3d 1016, at p. 1023, in support of the conclusion that such determinations necessarily involve "discretionary decisions" by a school district's responsible officials because they have a "special competence" to make them, with no indication in the applicable statutes that there is any intent to negate or limit this "special competence" and its "discretionary" exercise.

"Hence, from these authorities we conclude that a board's definition of competency is reasonable when it considers the skills and qualifications of the teacher threatened with layoff." (*Duax, supra* at p. 565.)

At the administrative hearing, Roberts and Parulan-Colfer provided ample testimony to support the reasons underlying the District's implementation of the competency criteria. *Duax* found: the "one year of actual teaching within the last ten years" standard to "clearly" relate to skills and qualifications to teach; was not too narrow a standard, as might have been established if it were one year within the last two or three years; and rejected the contention that there were other factors of importance that should have been included within the competency standard. "While we might agree it would have been better to have done so, [the challenger] has cited no statute or case that imposes any such requirement on the board." (*Duax, supra* at 567.)

12. Once a teacher is found to be competent, the statutory directive is met, and a school district may not change the focus of the inquiry to determine the *most* competent teacher, nor may teachers force a school district to do so. As stated in *Martin v. Kentfield School Dist. (Martin)* (1983) 35 Cal.3d. 294, 299: "Among the employees who met this threshold limitation [of being 'certificated and competent'], there is not room in the statutory scheme for comparative evaluation. Thus, . . . which of the two employees under consideration . . . was 'better' qualified for the job is not the question here, nor was it properly the question before the board." Although *Martin* analyzed reinstatement rights after lay off, the court in *Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343-345, determined that the phrase "certificated and competent," as used in the reinstatement context, had the same meaning as in the lay off context.

13. With respect to Peter Sill (Finding 29), the District could not produce sufficient evidence that Nicholas Giglio, the teacher bumping 0.7 of the FTE, met the competency criterion of the Resolution regarding experience in teaching the student population of adults with disabilities. Although bumping is considered a right of one teacher *vis a vis* another teacher, the District should bear the burden under the circumstances of this case, including: it has prepared the bumping analysis and offered it in evidence; it was suggesting that the bump could occur (see Evidence Code section 500); and it had within its power the ability to search its records to determine if there was evidence of such experience. Under Evidence Code section 412, if the party with the power to produce “stronger and more satisfactory evidence” does not do so, the weaker and less satisfactory evidence it has offered “should be viewed with distrust.”

14. The District contends that it does not have to break ties under the circumstances of this case and, with Ruth Gates presents a specific instance in which it has not done so. See Findings 11, 18 and 36. The statutory direction to school districts to break ties is mandatory: “As between employees who first rendered paid service to the district on the same date, the governing board *shall* determine the order of termination (Ed. Code § 44955, subd. (b); *emphasis* added.) The discretion and flexibility granted to the Board under the applicable statutes and case law does not include the ability to avoid this statutory directive.

ORDER

1. The District may give notices to Respondents, except as set forth below, that their services will not be required for the 2010-2011 school year because of the reduction of particular kinds of services. Such notices may be given to the Respondents on Attachment A, except as set forth below.

2. Notice shall be given in inverse order of seniority. Each respondent shall receive such a notice.

3. The Accusations against the following Respondents are dismissed, either in whole or in part as determined in accordance with this Proposed Decision: Paul Flor; Suzanne Moore; Theresa MacAller; Brenda Gomez; Peter Sill; Sandip Sengupta; Richard Manriquez; Diane Hitchcock; Douglas Fore; Allen Rojas; Mark Gunzelman; and Sharon Anderson.

DATED: May 13, 2010.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT A: Hacienda La Puente Unified School District, OAH No. 2010031158

Key: NNOD = no Notice of Defense

* = present at the hearing;

+ = represented by Katherine Erskine

1. Ruben Acuna * +
2. Sharon Anderson * +
3. Martha Ayala * +
4. Melvyn Balatbat * +
5. Francine Ballard * +
6. James Beard * + NNOD
7. Imelda Beltran * +
8. Michael Buckle
9. David Burton
10. Theresa Bush * +
11. Gilbert Callendar * +
12. Brent Canzano * +
13. Daniel Ceballos * +
14. Yesenia Ceballos * +
15. John Cervantes +
16. Darrel Charbaszcz * +
17. Richard Conrad * +
18. Elizabeth Curtis * + NNOD
19. James Domenico * +
20. Charles Drake * +
21. Destiny Dupleasis * +
22. Juan Duran * + NNOD
23. Joanna Belle Empeno * +
24. Ditas Esparza * +
25. Laura Esparza-Marquez
26. Christopher Figueroa * +
27. Paul Flor * +
28. Douglas Fore * +
29. Arnold Gamboa * +
30. Ruth Gates * +
31. Dixie Gleason * +
32. Brenda Gomez * +
33. Mariangela Grana + +
34. Lynn Kaiser-Grosch * +
35. Mark Gunzelman * +
36. Laurie Haight * +
37. Amber Hao * +
38. Diane Hitchcock * +
39. Su Hsu * +
40. Jasmine Ilano * +
41. Jeffrey Johansen +
42. Kevin Kaplan * +
43. Mark Kleven * +
44. Josh Kubarii + NNOD
45. Dennis Lazar * +
46. Olga Lee * +
47. Theresa MacAller * +
48. Richard Manriquez * +
49. Robert Marsh * +
50. Danny Masanovich * +
51. Bruce McCoy
52. Kevin McGuire *
53. Tarrie McBride * +
54. Marilyn Mendieta +
55. Edward Monteilh *
56. Suzanne Moore * +
57. Annie Mu
58. Harry Nelson * +
59. Karen Neville * +
60. Urszula Oleksyn * +
61. Delinda Otto * + NNOD
62. Donna Owens * +
63. Sylvia Peralta NNOD
64. Cecil Polonio * +
65. Jose Reyes * +
66. Valentin Rodriguez * +
67. Allen Rojas * +
68. Daryl Ross * +
69. Karla Ruano-Ramirez * +
70. Carlos Sanchez * +
71. Elaine Semo * +
72. Sandip Sengupta * +
73. Peter Sill * +
74. Thomas Stockfish * +
75. David Suderman * +
76. Josephine Taylor * + NNOD
77. Ronald Thomas NNOD
78. Tedmund Thompson * +
79. Roland Valencia
80. Julian Vasquez +
81. John Windsor NNOD
82. Terry Wright +
83. William Zeko NNOD

ATTACHMENT B: Hacienda La Puente Unified School District, OAH No. 2010031158
Reduction in 2010-2011 Programs/Services, Hacienda La Puente Unified School District

CORRECTIONS DIVISION

Particular Kinds of Services	Number of Full Time Equivalent Positions
Academics	
ABE ⁱ	1.0 FTE
ASE ⁱⁱ	4.0 FTE
ESL ⁱⁱⁱ	4.0 FTE
ABE/ASE	5.0 FTE
ABE/ESL	2.0 FTE
ASE/Drawing	2.0 FTE
ABE/ASE/ESL	8.0 FTE
Career Technical Education (CTE)/Apprenticeships	
Agriculture and Natural Resources/Animal Science/Animal Attendant–Pet Groomer	1.0 FTE
Agriculture and Natural Resources/Ornamental Horticulture/Gardener–Groundskeeper	1.0 FTE
Agriculture and Natural Resources/Ornamental Horticulture/Landscape Gardener - Nursery Manager	1.0 FTE
Arts, Media, and Entertainment Technology/Media and Design Arts/ Computer Aided Sign Making	1.0 FTE
Building Trades and Construction/Cabinet Making and Wood Products/Woodworking	1.0 FTE
Building Trades and Construction/Mechanical Construction/Combination Welder	1.0 FTE
Building Trades and Construction/Residential/Commercial Construction/ Cement Mason	1.0 FTE
Building Trades and Construction/Residential/Commercial/Construction/Construction Worker-Introduction to Building Trades	1.0 FTE
Building Trades and Construction/Residential/Commercial Construction/Floor Layer-Floor Covering	1.0 FTE
Building Trades and Construction/Residential/Commercial Construction/Laborer	1.0 FTE
Building Trades and Construction/Residential/Commercial Construction/Painter-Basic/Painter–Intermediate	2.0 FTE
Fashion and Interior Design/Fashion, Design, Manufacturing and Merchandising/Semi-automatic Sewing Machine Operator	2.0 FTE
Finance and Business/Business Financial Management/Directory Assistance Operator - Telecommunications	.4 FTE

Particular Kinds of Services	Number of Full Time Equivalent Positions
Hospitality, Tourism and Recreation/Food Service and Hospitality/Cook Apprentice	2.0 FTE
Hospitality, Tourism and Recreation/Hospitality, Tourism and Recreation/Custodial Building Maintenance	1.0 FTE
Hospitality, Tourism and Recreation/Hospitality, Tourism and Recreation/Laundry Operator	1.0 FTE
Information Technology/Information Support and Services/Computer Operator–Introduction	5.7 FTE
Job Readiness/Career Preparation/Job Skills Training	1.9 FTE
Manufacturing and Product Development/Manufacturing Systems and Processes/Graphic Communication Technology Systems and Processes/Offset Press Operator	3.0 FTE
Transportation/Automotive Services/Automobile Detailer/Body Repairer	1.0 FTE
Transportation/Automotive Services/Automobile Dismantler Technician	1.0 FTE
Transportation/Automotive Services/Bicycle Repairer	1.0 FTE
Parenting, Family and Consumer Awareness	
Consumer Awareness/Health, Fitness, Nutrition, and Safety/Substance Abuse Prevention	3.67 FTE
Family/Family Members Interaction/Parent Education	1.2 FTE
Family/Family Members Interaction/Personal Relationships	3.13 FTE
Family/Family Members Interaction/Teaching and Loving Kids (TALK) Parenting for Family Reunification	1.0 FTE
Total Corrections Full Time Equivalent	67 FTE

ADULT EDUCATION DIVISION

Particular Kinds of Services	Number of Full Time Equivalent Positions
Academic	
ABE/ASE/ESL/Citizenship	8.53
Adults with Disabilities	
Life Skills and Functional Academics/ Arts and Crafts-Leisure Time Skills	.6 FTE
Workplace Skills and Functional Academics/ Work Improvement Skills	.5 FTE
Career Technical Education (CTE)/Apprenticeships	

Particular Kinds of Services	Number of Full Time Equivalent Positions
Agricultural and Natural Resources/Animal Science/Animal Pet Groomer-Animal Caretaker	.53 FTE
Diversified Occupations/Cosmetology	1.0 FTE
Finance and Business/Business Financial Management/Typist/Computer Keyboarding (Basic/Advanced)	.67 FTE
Health, Science and Medical Technology/Health Informatics/Basic Medical Billing and Coding	.2 FTE
Health, Science and Medical Technology/Health Informatics/Computerized Billing	.2 FTE
Health, Science and Medical Technology/Medical Assistant/Medical Terminology	.2 FTE
Health, Science and Medical Technology/Therapeutic Services/Psychiatric Technician 1 and 2	2.0 FTE
Hospitality, Tourism and Recreation/Hospitality, Tourism and Recreation/Custodial Building Maintenance	.53 FTE
Information Technology/Information Support and Services/Computer Software Applications	2.93 FTE
Information Technology/Information Support and Services/Data Entry Clerk	.2 FTE
Job Readiness/Career Preparation/Job Skills Training	.95 FTE
Manufacturing and Product Development/Manufacturing Systems Processes/Basic Electronic Theory	1.0 FTE
Manufacturing and Product Development/Manufacturing Systems Processes/Electronics Assembler	1.0 FTE
Older Adult Programs	
Communication/English Speaking, Reading, and Writing	.5 FTE
Health Fitness Literacy/Exercise and Fitness	.13 FTE
The Arts/Chinese Brush Painting and Gift Making	.4 FTE
The Arts/Oil and Water Color Painting	.1 FTE
Parenting, Family and Consumer Awareness	
Consumer Awareness/Home Arts/Arts and Crafts	.33 FTE
Consumer Awareness/Home Arts/Ceramics	1.4 FTE
Parenting/Effective Parenting Techniques	.25 FTE
Teacher on Special Assignment (TOSA)	
TOSA – Assessment	.53 FTE
TOSA – Attendance Specialist	.53 FTE
TOSA – Counseling Department	1.0 FTE
TOSA – EL Civics	.2 FTE
TOSA – Fee Based	.67 FTE
TOSA – Health Careers	1.0 FTE

Particular Kinds of Services	Number of Full Time Equivalent Positions
TOSA – Job Developer	2.0 FTE
TOSA – Learning and Assessment Center	1.3 FTE
Total Adult Education Full Time Equivalent	31.38 FTE
TOTAL FULL TIME EQUIVALENT	98.38 FTE

ⁱ ABE = Adult Basic Education

ⁱⁱ ASE= High School Diploma

ⁱⁱⁱ ESL= English as a Second Language