

**BEFORE THE
GOVERNING BOARD OF THE
SOUTH FORK UNION SCHOOL DISTRICT
COUNTY OF KERN
STATE OF CALIFORNIA**

In The Matter of the Accusation Against:

**SHANNON DAMRON
MICHAEL LANE**

Respondents.

OAH No. 2010031553

PROPOSED DECISION

H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 7, 2010, at Bakersfield, California.

Peter C. Carton, Attorney at Law, represented the South Fork Union School District (District).

Paul A. Welchans, Attorney at Law, represented the respondents.

The matter was submitted on April 7, 2010.

SUMMARY OF PROPOSED DECISION

The Governing Board of the South Fork Union School District (Board) determined to reduce or discontinue particular kinds of services provided by teachers and other certificated employees for budgetary reasons. The decision was not related to the competency and dedication of the individuals whose services are proposed to be reduced or eliminated.

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

FACTUAL FINDINGS

1. Sherry Nichols made and filed the Accusation in her official capacity as Superintendent of the District.
2. Respondents are permanent certificated District employees.
3. On or before March 15, 2010, the District personally served on each respondent a written notice that it had been recommended that notice be given to each respondent, pursuant to Education Code sections 44949 and 44955, that his/her services would not be required for the next school year (Notice of Recommendation Not to Reemploy). Each written notice set forth a reason for the recommendation and noted that the Board had passed a Resolution (Board Resolution Number 10-09) reducing the certificated staff.
4. Respondents timely submitted written requests for a hearing to determine if there is cause for not reemploying them for the ensuing school year.
5. The Superintendent made and filed Accusations against each of the certificated employees who requested a hearing. The Accusations, with required accompanying documents and blank Notices of Defense, were timely served on those certificated employees.
6. Timely Notices of Defense were filed by and on behalf of the respondents.
7. Board Resolution Number 10-07, adopted on January 12, 2010, established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. It provided that the order of termination shall be based on the needs of the District and its students.
8. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments and locations, advanced degrees, credentials, and authorizations. Credential and authorization data are obtained from the records of the County Office of Education, at which certificated employees must register such documents.
9. All prehearing jurisdictional requirements were met.

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10 On March 9, 2010, the Board took action to reduce or discontinue the following particular kinds of services for the 2010-2011 school year:

<u>SERVICES</u>	<u>NUMBER OF FULL TIME EQUIVALENT POSITIONS</u>
Self-Contained Classroom Instruction, Grades K-6	3.0
Self-contained Classroom Non-EL Qualified Instruction, Grades K-6	1.0
Departmentalized Instruction, Junior High	
Administrator, Principal Tucpan-CDS	0.28
Total Full Time Equivalent Reduction:	4.28

11. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

12. The eliminated services were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The Superintendent’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

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

14. Respondent Shannon Damron (Respondent Damron) shares the same first date of paid service to the District with Dawne Gibson. Respondent Damron conceded that the District properly applied the Board’s tie-breaker criteria and did not abuse its discretion in retaining Dawne Gibson and issuing a layoff notice to Respondent Damron.

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15. Respondent Michael Lane (Respondent Lane) presently teaches the District's Community Day School, a non-CLAD-compliant program. That program is being eliminated at the end of the current school year because of state-imposed cuts in community day school funding¹.

16. Respondent Lane holds a clear multi-subject credential. He formerly held a Special Education credential, but allowed it to lapse. Respondent Lane does not hold a CLAD certification.

17. The District has failed to meet the state's Academic Performance Index (API) standards and is now in Program Improvement status. By virtue of that status, the District must improve its students' test scores. Failure to do so may result in losses of state funding and, eventually, the removal of the District's superintendent. To avoid those sanctions, the District must assist students in making academic progress, especially students from low income families and English language learners. Out of the District's approximately 280 students, five are English language learners. The evidence did not disclose how many English language learners will be enrolled with the District in the 2010-2011 school year.

18. Public school teachers who teach English language learners are required to be specially certified. (Ed. Code,² §§ 44253.3, 44253.4, 44253.10.)

19. On at least four occasions, beginning in January 2007, the District notified Respondent Lane that he must obtain his CLAD certification. He failed to do so. In or around September 2007, Respondent Lane was informed that, if he failed to obtain a CLAD emergency permit, his next pay warrant would be withheld. Respondent Lane failed to do so, but the District did not withhold his pay warrant.

20. The District allowed a number of teachers with multi-subject credentials and first dates of paid service later than that of Respondent Lane to skip Respondent Lane. Each of those teachers holds a CLAD certification. Respondent Lane argued that he should be retained over those teachers, despite his lack of CLAD certification, because he is senior to those teachers, because the Board has not adopted a policy mandating CLAD certification for its teachers, because the District did not impose any sanctions against him such as withholding his pay warrant, despite its threat to do so, and because his layoff, based on a lack of CLAD certification, constitutes an abuse of discretion in light of the fact that only five of the District's 280 students are English language learners. Respondent Lane is incorrect.

¹ The 1.0 full time equivalent listed under "Self-Contained Classroom Non-EL Qualified Instruction, Grades K-6" on the Board's List of Certificated Services Being Reduced or Eliminated, refers to the elimination of the Community Day School.

² All statutory references are to the Education Code.

21. Because of its Program Improvement status on the API, the District is under great pressure to improve its students' test scores or face additional funding cuts which will directly impact the District and its students. Although only a small percentage of the District's students are English language learners, they are entitled to the same academic opportunities as their peers whose primary language is English, and the District may not deny them those opportunities because of their race, color, sex, or national origin by failing "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." (20 U.S.C. § 1703.) Further, as is referenced in Paragraph 25, below, the number of English language learners in California is rapidly increasing. Therefore, the District must anticipate a rise in the number of English language learners it must serve in the upcoming school year.

22. Although a senior teacher may "bump" a junior teacher from his/her position if the senior teacher is certificated and competent to render the service being provided by the junior teacher (§ 44955, subd. (b).), he/she is not permitted to do so if "[t]he district demonstrates a specific need for personnel to teach a specific course or course of study . . . and that the certificated employee [the junior teacher] has special training and experience necessary to teach that course or course of study . . . which others with more seniority do not possess." (§ 44955, subd. (d)(1).)

23. "Subdivision (d)(1) of section 44955 expressly allows a district to demonstrate its specific 'needs' and there is nothing in the statute that requires such needs to be evidenced by formal, written policies, course or job descriptions, or program requirements." (*Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 138.) Accordingly, the District was not required to have a policy in place requiring its teachers to obtain and maintain a CLAD certification.

24. In this case, the non-CLAD-compliant program in which Respondent teaches is being eliminated. If Respondent "bumps" a more junior teacher, he will be placed into a self-contained classroom but will not be permitted by law to teach English language learners, a group the District has identified as having one of the most critical needs for improvement, and a group the District is required and committed to assist.

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25. In *Governing Board of Ripon Unified School District v. Commission on Professional Conduct* (2009) 177 Cal.App.4th 1379, 1386-1388, the Court held that the school district was permitted to terminate a teacher (Messick) who was required by the District to obtain a CLAD certification but who refused to do so. The Court reasoned:

The District is required to provide its EL students with equal opportunity to all of the District's programs. And the Legislature has required all teachers who teach EL students to be certified to do so. (Ed. Code, §§ 44253.1, 44253.10.) A district is subject to monitoring and penalties if it assigns an EL student to a teacher who has not been certified to teach them. (Ed. Code, §§ 44258.9, 45037.) As a result of Messick's refusal to become EL certified, if an EL student registers for a music class, the District can either deny the student the opportunity to take the class, or it can risk sanctions for assigning the student to Messick. Neither of these options is viable.

Messick also complains that as of yet no EL student has been denied access to music education and the District was terminating her based on an anticipated harm. That may be so, but the Legislature has recognized that the number of EL students in the state is increasing, and it has clearly instructed the state to prepare for this need: "The Legislature finds and declares that almost one million, or one of every five, pupils in California's public schools are of limited English proficiency, and that the number of those pupils is increasing rapidly. In addition, the number of primary languages spoken by California's limited-English-proficient pupils is increasing. The Legislature recognizes that limited-English-proficient pupils have the same right to a quality education as all California pupils. For these pupils to have access to quality education, their special needs must be met by teachers who have essential skills and knowledge related to English language development, specially designed content instruction delivered in English, and content instruction delivered in the pupils' primary languages. It is the intent of the Legislature that the Commission on Teacher Credentialing implement an assessment system to certify those teachers who have the essential skills and knowledge necessary to meet the needs of California's limited-English-proficient pupils." (Ed. Code, § 44253.1.) [Footnote omitted.]

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Messick claims her failure to obtain the credential is not a legitimate ground for terminating her, a tenured teacher, because the credential requirement was unlawful. This argument merely begs the question of whether the District's action was preempted by state law. The District can terminate a tenured employee for, among other reasons, unprofessional conduct, evident unfitness for service, and persistent violation of, or refusal to obey, reasonable regulations prescribed by the District. (Ed. Code, § 44932, subds. (a)(1), (5), and (7).) If the District's requirement that all certificated teachers, including tenured teachers, become EL certified is lawful, Messick's persistent refusal to comply with the District's requirement is a lawful ground on which to initiate termination proceedings against her.

26. The rationale in *Ripon, supra*, is equally applicable here. If termination of a tenured teacher for failure to obtain an EL certification is deemed by the Court to be a lawful exercise of the District's discretion, it follows that the District's requirement of a CLAD certification in relation to the less onerous issue of a reduction in force³ also falls within that discretion.

27. The Legislature has determined that an EL certification is necessary to comply with federal law and to provide English language learners with the quality education enjoyed by their peers whose primary language is English. The District will face sanctions for its failure to comply with the laws relating to English language learners and, unless English language learners are taught by CLAD-compliant teachers, they will not reap the benefit of those laws. Respondent has received several notices/warnings to obtain a CLAD certification, and he has had ample opportunity to do so over more than three-years. His arguments in favor of retention do not reflect California law, and his retention would inure to the detriment of the District and its students.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met.

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³ The reduction in force is deemed less onerous than a dismissal because, although in both cases, the teacher finds himself/herself out of work, the dismissal involves discipline against the credentialed individual, but the reduction in force does not.

2. The services identified in Board Resolution Number 10-09 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 was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

3. 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* (1976) 64 Cal.App.3d 167, 178-179.)

4. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. The District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued.

5. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

6. 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 if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.)

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ORDER

1. The Accusation against the respondents is sustained. Notice may be given to the respondents that their services will not be required for the 2010-2011 school year because of reduction or discontinuance of particular kinds of services.

2. Notice shall be given in inverse order of seniority.

DATED: April 12, 2010

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings