

BEFORE THE
SUPERINTENDENT OF SCHOOLS
SAN DIEGO COUNTY OFFICE OF EDUCATION
STATE OF CALIFORNIA

In the Matter of the Employment Status of
26 Certificated Employees of the San Diego
County Office of Education,

Respondents.

OAH No. 2012030344

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on April 13, 2012.

Mark R. Bresee, and Jabari A. Willis, Atkinson, Andelson, Loya, Ruud & Romo, represented the San Diego County Office of Education.

Fern Steiner, Tosdal, Smith, Steiner, & Wax, represented respondents Wendy Aguilar; Wendy Aja; Tara Barrows; Jose Bello; Samantha Bielman; Jessica Billeci; Douglas Connor; Karen Daley; Valentin Escanuela; Mirsha Garcia; Kimberley Gudeth; Samantha Howerton; Tim Kobayashi; Jerry Lindsey; Sally Lopez; Kathleen Loyd; Bethesda Manrique; Dionne Marijana; Marco Moore; Mike Nguyen; Emilio Nunez; Erendira Ramirez; Scott Riddick; Dyane Sendaydiego; Sherrell Tyler; and Martin Walker.

The matter was submitted on April 13, 2012.

FACTUAL FINDINGS

The San Diego County Office of Education

1. There are 47 school districts that fall under the jurisdiction of the San Diego County Office of Education (SDCOE), which operates under the authority of the California Constitution, the State Legislature, California Education Code, and the California State Board of Education. SDCOE has many responsibilities including serving as the appeals board for student expulsions, acting as the appeals board for inter-district transfers, acting as the appeals board for Charter School petitions, and providing various educational programs.

SDCOE is directed by the San Diego County Board of Education, which consists of five publically elected board members. The Board members' terms are staggered to allow for continuity. From among its members, the Board elects a president and vice president.

Randolph E. Ward, Ed.D., serves as the Board's secretary and SDCOE's Chief Executive Officer. Superintendent Ward, with assistance of the Board, staff, and the public, develops programs and services authorized by statute and as determined by needs or requests. He provides educational leadership and administers mandated services. He has direct oversight responsibilities for approving and assuring school district budgets, calling school district elections, and assisting school district in meeting emergencies by providing necessary services.

2. SDCOE provides various educational programs within the county including the Juvenile Court and Community Schools (JCCS) program, a migrant education program, and an outdoor education program.

SDCOE's Budget Constraints

3. Lora Duzyk, SDCOE's Assistant Superintendent of Business Services, established that budget problems affecting the nation and state have impacted SDCOE's operations. Last year, SDCOE had a deficit budget. This year, as a result of possible cuts in transportation funding and a reduction in average daily attendance rates, additional budgetary problems are anticipated. SDCOE has made efforts to overcome some of the anticipated deficit by eliminating long-term substitute teachers and by not replacing teachers who have retired, but taking these steps will not balance SDCOE's budget and permit SDCOE to maintain a prudent reserve.

4. On March 12, 2012, Claudette Inge, Assistant Superintendent, Student Programs and Services District, sent the following notice to Superintendent Ward and SDCOE's Board.

The undersigned, Claudette Inge, Assistant Superintendent, Student Programs and Services Division of the San Diego County Office of Education, hereby gives notice to the County Superintendent pursuant to subdivision (a) of section 44949 of the Education Code and recommends that County Superintendent reduce and/or eliminate the programs set forth in Exhibit A attached hereto and incorporated herein by this reference.

It is necessary to decrease the number of employees of the San Diego County Office of Education for the 2102-2013 school year consistent with the recommended reduction and/or elimination of the described particular kinds of service. The county Superintendent should send a notice to the affected employees pursuant to the Education Code sections 44949 and 44955 that their services will be reduced and/or eliminated effective at the end of the 20121-12 school year.

Exhibit A provided:

EXHIBIT A

RECOMMENDATION TO REDUCE AND/OR ELIMINATE PARTICULAR KINDS OF SERVICES OR PROGRAMS

<u>Particular Kind of Service or Program</u>	<u>Number Of Full-Time Equivalent (FTE) Positions To Be Eliminated</u>
<u>Juvenile Court and Community School (JCCS)</u>	
• Resource Teacher	1.00
• Court Schools	7.00
• Community Schools	4.00
• Independent Study	4.00
• Youth Day Treatment Center	2.00
• JCCS Principal	1.00
<u>SELPA-North Coastal Special Education Region Discovery Hill/Valley Day Treatment Center</u>	
• Discovery School Teacher	1.00
Total FTE	20.00

Executive Order 001-11-12

5. Based on his review of available information, Superintendent Ward concurred with Assistant Superintendent Inge's recommendations. Superintendent Ward expressed his determinations in Executive Order No. 001-11-12 as follows:

A. The Assistant Superintendent, Student Services and Programs Division has recommended to this Superintendent of Schools that those programs and services performed by certificated employees and shown in Exhibit "A" attached hereto and incorporated herein by reference be reduced and eliminated, effective at the end of the 2011-12 school year.

B. The Superintendent finds it is in the best interest of the County Office of Education to reduce and eliminate the programs and services shown in Exhibit "A", effective at the end of the 2011-12 school year.

NOW, THEREFORE, THE SUPERINTENDENT DETERMINES THAT:

1. The above recitals are true and correct;
2. The programs and services described in Exhibit "A" attached to this Resolution are reduced and eliminated, starting with the 2012-13 school year in accordance with the recommendations of the Assistant Superintendent;
3. The Executive Director, Human Resources is authorized and directed to determine which employees' services will not be required for the 2012-2013 school year as a result of this reduction and elimination in programs and services and to take all steps necessary under the law not to employ those certificated employees of the County Superintendent, because of the reduction and elimination of these programs and services;
4. The Executive Director, Human Resources, or designee is authorized and directed to determine the order of layoff for those certificated employees having the same seniority date solely on the basis of needs of the San Diego County Office of Education and the students thereof;
5. In selecting those probationary and permanent certificated employees who shall receive notice of termination pursuant to this Resolution, Education Code section 44955 allows the Superintendent to deviate from terminating a certificated employee in order of seniority by virtue of their competence, credential(s), assignment, and the specific needs of the County Office of Education and its students.
6. The criteria that will be applied to deviate from terminating certificated employees who may otherwise be terminated by order of seniority, are based on the needs of the students of the County Office of Education, and will ensure that no employee will be terminated while a less senior employee is retained to render service which the more senior employee is both certificated and competent to render.

7. In observing the statutory rights of more senior certificated employees performing services in a subject matter or field identified by the County Office of Education for reduction or elimination to displace a less senior certificated employee, those more senior certificated employees may displace less senior certificated employee if it is established to the satisfaction of the County Office of Education that the more senior certificated employee is both competent and credentialed to render the services performed by a less senior certificated employee.

8. Additionally, the Executive Director, Human Resources or designee is authorized and directed to take such other action as may be necessary as a result of this action, pursuant to applicable provisions of law and San Diego County Office of Education policy and procedures, including but not limited to affording laid-off employees those re-employments rights to which they are entitled by law.

The Reduction in Force Determination

6. In accordance with Executive Order 001-11-12, Michele Fort-Merrill, SDCOE's Executive Director of Human Resources Services, determined which SDCOE employees were subject to the executive order's reduction in force. In addition to the 20 employees subject to the reduction in force, six additional employees were identified to receive precautionary notices.

The Service of Preliminary Layoff Notices

7. On March 12, 2012, pursuant to Executive Order 001-11-12, respondents, each of whom was employed as a certificated employee by SDCOE in a teaching position, was served with a Preliminary Notice of Layoff, which advised each employee of the right to request a hearing and contained Executive Order 001-11-12, Assistant Superintendent Inge's notice dated March 12, 2012, a copy of Exhibit A, relevant Education Code provisions, and a blank notice of defense.

The following employees/respondents were served with the preliminary layoff notices: Wendy Aguilar; Wendy Aja; Tara Barrows; Jose Bello; Samantha Bielman; Jessica Billeci; Douglas Connor; Karen Daley; Valentin Escanuela; Mirsha Garcia; Kimberley Gudeth; Samantha Howerton; Tim Kobayashi; Jerry Lindsey; Sally Lopez; Kathleen Loyd; Bethesda Manrique; Dionne Marijana; Marco Moore; Mike Nguyen; Emilio Nunez; Erendira Ramirez; Scott Riddick; Dyane Sendaydiego; Sherrell Tyler; and Martin Walker.

Jurisdictional Matters

8. On April 13, 2012, the record in the reduction in force proceeding was opened. Attorneys Mark R. Breese and Jabari A. Willis appeared on behalf of SDCOE. Attorney Fern Steiner appeared on behalf of all respondents. Counsel for SDCOE gave a brief opening statement. Counsel for respondents waived the presentation of an opening statement. Jurisdictional documents and a written stipulation were presented. SDCOE's counsel advised that SDCOE had rescinded the preliminary layoff notice related to the elimination of the JCCS Principal position. Sworn testimony was given; documentary evidence was received; closing argument was provided; the record was closed; and the matter was submitted.

The Seniority List, Bumping Charts, Bumping, Skipping

9. SDCOE maintains a seniority list for its certificated employees that sets forth each employee's name in order from the most recently hired employee to the most senior employee; the employee's first and last name; the kind of service provided (e.g., teacher; special education teacher; speech and language specialist, early intervention specialist, etc.); the worksite where services were provided; the employee's full-time equivalent status¹; the employee's seniority date (first paid date as a probationary employee); the employee's status (probationary or tenured); whether the employee was served with a preliminary layoff notice (N) and requested a hearing (H); the employee's teaching credential(s); a running column that indicates the extent of the reduction in force through that employee; and employee notes. The "notes" section of the list contains such comments as "retain, counselor" (meaning the counselor employee's service was not subject to layoff in the Executive Order); "Layoff, Bumped by [Name]"; and SKIP.

Executive Director Fort-Merrill established that the seniority list was delivered to employees for review before the hearing. No employee contested the validity of the information contained in the seniority list as it related to what the employee taught, the seniority dates, where services were provided, whether an employee was a probationary or a tenured, or the nature of the credential held.

10. Executive Director Fort-Merrill's list established bumping charts that identified the particular kinds of services being reduced or discontinued under the Executive Order, the employees who provided those services, and whether employees displaced by the Executive Order had the seniority and qualification to displace (bump) a more junior employee. The process used to prepare the bumping charts complied 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 except for five instances involving skipping.

¹ A full-time employment position is a 1.0 full-time equivalent (FTE).

Bumping and Skipping

11. For purposes of a school district reduction in force, “bumping” refers to a senior teacher moving into the position held by a junior teacher; “skipping” refers to a junior teacher being retained by a district for specified reasons that go beyond base qualifications.

12. The general rule in reduction in force proceedings is that an employer – whether a school district or a board of education – must make assignments and reassignments in such a manner that employees will be retained to render any service which their seniority and qualifications entitle them to render. (Ed. Code, § 44955, subd. (b).) But, an exception to this general rule exists when the employer demonstrates a specific need for personnel to teach a specific course or course of study and the certificated employee who is being skipped 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. (Ed. Code, § 44955, subd. (d).) Nothing in the statute requires special needs to be evidenced by formal, written policies, course or job descriptions, or program requirements.

13. With respect to Monarch School, a school that provides services to homeless children, Executive Director Fort-Merrill and Joel Garcia, the Principal of Monarch School, established that a Kindergarten-First Grade (K-1) teaching position requires early elementary school teaching experience and bilingual skills.² Principal Garcia testified that at least half the Monarch School students in K-1 were Latino and spoke Spanish, and that these early education students had special needs in literacy, social issues, and meeting academic expectations that could not be provided by a teacher who was not bilingual and who did not also possess experience in early education instruction. The K-1 position was posted with those qualifications being listed, but no one who applied for the K-1 position who was senior to Kathleen Lloyd met the special qualifications.

Kathleen Loyd, a probationary teacher with SDCOE, holds a seniority date of October 31, 2011. Ms. Loyd has bilingual skills which she uses and she possesses early elementary school teaching experience. SDCOE decided to skip Ms. Loyd over more senior teachers who were credentialed to teach elementary school, but either were not bilingual or lacked experience in early elementary instruction or both.

No respondent senior to Ms. Loyd was bilingual and possessed the special training and experience necessary to teach the K-1 position at Monarch School. Skipping Ms. Loyd was appropriate because of her special experience and training.

14. With respect to its outdoor program, SDCOE operates Camp Cuyamaca, a five-day residential educational program for sixth grade students. The camp’s curriculum

² For the purpose of skipping in this reduction in force proceeding, SDCOE has determined that the term bilingual necessarily includes an employee’s the ability to speak, write, and communicate in the Spanish language, both with students and the parents of students. An employee’s possession of a BCLAD certification was not required to establish required bilingual skills for skipping purposes.

includes life science, biology, botany, earth science, geology, meteorology, astronomy, outdoor skills, Native American lore, recreation activities, and crafts. Camp Cuyamaca is headed by a principal and is divided into three villages. Each village is supervised by a credentialed teacher, known as the head teacher. Each head teacher has eight specialists whom he supervises. The specialists provide direct instruction and supervision to students. The four head teachers who are employed during the day are each responsible for the 72 boys and 72 girls who live in a village for the school week. In addition, Camp Cuyamaca employs a head teacher who is responsible for supervising the camp at night.

Tina Chin, the Senior Director of SDCOE's outdoor education program, testified about the unique education, training, and responsibilities required to hold employment as a head teacher. All head teachers have previously served as specialists, and head teachers must know about the operation of Camp Cuyamaca, the operation of the villages, the curriculum, the trails and hiking areas that surround the camp, the flora and fauna, and the emergency procedures that must be followed. Student safety requires a head teacher have actual experience in working at Camp Cuyamaca, and the position of head teacher requires far more than simply holding an appropriate teaching credential.

Douglas Connor is a head teacher at Camp Cuyamaca with a seniority date of August 29, 2011. For the past year, Mr. Connor has been in charge of Camp Cuyamaca at night. Before he became a head teacher, Mr. Connor was employed a specialist at Camp Cuyamaca for several years.

Scott Riddick is a head teacher at Camp Cuyamaca with a seniority date of August 27, 2008. For the past year, Mr. Riddick has been in charge of a Camp Cuyamaca village. Before he became a head teacher, Mr. Connor was employed a specialist at Camp Cuyamaca for several years.

SDCOE skipped Mr. Connor and Mr. Riddick over more senior teachers who were credentialed to teach elementary school but lacked experience in teaching outdoor programs and lacked teaching experience at Camp Cuyamaca.

No other respondent possessed the special training and experience necessary hold the position of head teacher at Camp Cuyamaca.

15. SDCOE provides services to Spanish-speaking students who are awaiting deportation. Executive Director Fort-Merrill established SDCOE's need for teachers with bilingual skills to provide service in these positions.

Wendy Aguilar, a probationary teacher with SDCOE, held a seniority date of December 2, 2010. She has bilingual skills and possesses a multiple subject teaching credential, a BCLAD certification, and a mild-moderate special education credential. As a result of her bilingual skills, SDCOE decided to skip Ms. Aguilar over more senior teachers who were credentialed to teach elementary school, but did not possess needed bilingual skills. Ms. Aguilar uses her bilingual skills in the position she currently holds and she will be required to use those skills in the position into which she is being skipped. No respondent

senior to Ms. Aguilar was bilingual and possessed the special training and experience necessary to teach in this position.

Samantha Bielman, a probationary teacher with SDCOE, held a seniority date of October 4, 2010. She has bilingual skills and possesses a multiple subject teaching credential and an EL certification. She currently teaches in a residential, non-court school setting where she utilizes her Spanish-speaking skills. As a result of her bilingual skills, SDCOE decided to skip Ms. Bielman over more senior teachers who were credentialed to teach elementary school, but did not possess required bilingual skills. Ms. Bielman will be required to use her bilingual skills in the position into which she is being skipped. No respondent senior to Ms. Bielman was bilingual and possessed the special training and experience necessary to teach in this position.

Other Evidence

16. Martin Walker is a permanent certificated employee with SCCOE whose seniority date is October 29, 2007. Mr. Walker was on active duty with the United States Marine Corps from 1983 through 1985, where he served as a drill instructor. Much of his time was spent outdoors instructing Marine recruits. Mr. Walker was not required to hold a teaching credential in this capacity. Mr. Walker gained experience as a teacher at the Army-Navy Academy in Carlsbad, California, from 2000 through 2002, where he was not required to hold a teaching credential. Mr. Walker obtained 90 to 120 days of teaching experience as a long term substitute at the Oak Hills Boys Home, where he taught first through third grades in 2006. Mr. Walker's employment with SDCOE since then has been as a middle school and high school teacher.

Mr. Walker did not establish that he was not subject to the reduction in force proceeding by reason of his credential and seniority.

17. Twenty respondents entered information onto Exhibit 17 adjacent to their names that mentioned whether they held a BCLAD certification, experience teaching early elementary school, and/or experience teaching outdoor classes.

The information provided did not establish that SDCOE improperly determined bumping rights, that any employee whose employment is being terminated possesses the seniority and qualifications that would entitle him or her to be assigned to another position, or that the five junior teachers who were being retained do not possess special training and experience required for their retention in accordance's with SDCOE's exercise of discretion.

18. A copy of the Decision in OAH 2009030208 was submitted.

Ultimate Conclusions Regarding SDCOE's Reduction in Force

19. The termination of respondents as a result of Superintendent Ward's executive order 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 SDCOE, as does their academic achievements and professional accomplishments.

20. Superintendent Ward resolved to reduce and discontinue particular kinds of services provided by SDCOE 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 Ward's determination was lawful, reasonable, and ultimately in the best interest of SDCOE and its students.

SDCOE's administrative staff initiated and followed a systematic procedure to identify employees who were directly affected by the executive order. The staff conducted a careful evaluation to verify each employee's seniority date, tenured status, credentials and authorizations, and qualifications to determine what bumping rights, if any, an employee had. SDCOE properly retained the services of Kathleen Lloyd, Douglas Connor, Wendy Aguilar, Samantha Bielman, and Scott Riddick based upon each employee's special training and experience, SDCOE's need to retain employees possessing such special training and experience, and the fact that other employees with more seniority did not possess such required special training and experience. SDCOE did not retain any junior credentialed employee to provide services which a more senior employee was certificated, competent and qualified to render. SDCOE 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, Bumping, Skipping

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:

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.

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.* (2008) 170 Cal.App.4th 127, 136-137.)

Skipping

11. 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.*, *supra*, at pp. 134-135.) There is nothing in the statute that requires such special needs to be evidenced by formal, written policies, course or job descriptions, or program requirements. (*Id.*, at p. 138.)

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.)

Cause Exists to Give Notice to Certain Employees

12. As a result of Superintendent Ward'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 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 2012-2013 school year.

Determination

13. The charges set forth in the accusation were sustained by a preponderance of the evidence and related to the welfare of SDCOE and the students thereof. SDCOE's staff made assignments and reassignments under Executive Order 001-11-12 in such a manner that the most senior SDCOE employees were retained to render services which their seniority and qualifications entitled them to render. No SDCOE employee with less seniority than any respondent will be retained to render a service which any respondent is certificated, competent and qualified to render.

Superintendent Ward's decision to reduce and discontinue particular kinds of services is totally unrelated to the competence of these fine teachers whose employment is subject to this economic layoff proceeding.

RECOMMENDATION

It is recommended that Superintendent Ward give notice to Wendy Aja, Tara Barrows, Jose Bello, Jessica Billeci, Karen Daley, Valentin Escanuela, Mirsha Garcia, Kimberley Gudeth, Samantha Howerton; Jerry Lindsey; Sally Lopez, Bethesda Manrique, Dionne Marijana; Marco Moore; Mike Nguyen; Emilio Nunez; Erendira Ramirez; Dyane Sendaydiego, Sherrell Tyler, and Martin Walker, that their services will not be required for the 2012-2013 school year.

DATED: April 16, 2012

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings