

BEFORE THE
GOVERNING BOARD OF THE
BUENA PARK SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

CERTIFICATED EMPLOYEES OF THE
BUENA PARK SCHOOL DISTRICT,

Respondents.

OAH Case No. 2012030924

PROPOSED DECISION

Administrative Law Judge Erlinda G. Shrenger of the Office of Administrative Hearings heard this matter on April 25, 2012, in Buena Park, California.

Aaron V. O'Donnell of Atkinson, Andelson, Loya, Ruud & Romo represented the Buena Park School District (District).

Kent Morizawa of Reich, Adell & Cvitan represented respondents Wanda Blodgett, Jeanne Krucli, Scott Magnin, Christina Reider, Kristin Sherman, Mark Thomas, and Laura Uruburu, but not respondents Heather Guay or Joanne Vu. All respondents were present except for Guay and Vu.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision on April 25, 2012.

FACTUAL FINDINGS

1. Greg Magnuson, the District's Superintendent, and Barbara Montelongo, Director of Human Resources for the District and the Superintendent's designee, acted in their official capacities at all relevant times and caused all pleadings, notices and other papers to be filed and served upon Respondents pursuant to the provisions of Education Code sections 44949 and 44955.

2. Wanda Blodgett, Jeanne Krucli, Scott Magnin, Christina Reider, Kristin Sherman, Mark Thomas, Laura Uruburu, Heather Guay and Joanne Vu (collectively, Respondents) are certificated employees of the District.

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3. On February 27, 2012, the Governing Board of the District (Governing Board) adopted Resolution Number 11-20, reducing 21.5 full-time equivalent (FTE) positions for the 2012-2013 school year, in the following services:

<u>Service</u>	<u>FTE</u>
K through Grade 6 Elementary Classroom Instruction	12.0
Jr. High (Grades 7-8) History Instruction	1.0
Jr. High (Grades 7-8) English	0.5
Jr. High (Grades 7-8) Math Instruction	1.0
Jr. High (Grades 7-8) Home Economics Instruction	0.66
Jr. High (Grades 7-8) Culinary Arts	0.17
Jr. High (Grades 7-8) Study Skills	0.17
Jr. High (Grades 7-8) Industrial Arts	0.66
Jr. High (Grades 7-8) Computer Applications	0.17
Jr. High (Grades 7-8) CAD/Drafting	0.17
Registered Nurse Services	1.0
School Counselor Services	1.0
Teacher on Special Assignment (Response to Intervention)	1.0
Prevention Intervention Instruction	1.0
Coordinator, Community Based Programs	<u>1.0</u>
Total	21.5

4. Pursuant to Resolution Number 11-20, the term “competency” as described in Education Code sections 44955, subdivision (b), 44956, and 44957, for the purposes of “bumping” and rehire rights, “shall necessarily include possession of a valid credential in the relevant subject matter area, an appropriate EL authorization (if required by the position), experience in the position or assignment within the last five (5) years, and certification or eligibility for certification of subject matter knowledge in the area of service under federal NCLB/ESEA regulations.” The criterion of "experience in the position or assignment within the last five (5) years" was included because the District has, over the last five years, implemented programs and changes in the elementary curriculum in order to increase academic achievement. The District has used this specific criterion in defining "competency" for the past three years. The District's "competency" criteria are reasonable as they relate to the skills and qualifications of certificated employees.

5. On February 27, 2012, in Resolution 11-21, the Governing Board took action to not reelect and to release certain temporary certificated employees from their temporary or long-term substitute assignments at the conclusion of the 2011-2012 school year.

6. On or about February 27, 2012, Superintendent Magnuson notified the Governing Board that he recommended that notice be provided to Respondents and others that

their services will not be required for the 2012-2013 school year due to the reduction of particular kinds of services.

7. On or before March 15, 2012, the District provided notice to Respondents and others, and certain temporary employees identified as providing services slated for reduction, that their services will not be required for the 2012-2013 school year due to the reduction of particular kinds of services. A total of 12 certificated permanent or probationary employees were served with preliminary notices of layoff. A total of 11 temporary employees were served with a "precautionary layoff notice" in the event any of them challenged their status as temporary employees; the District also provided the temporary employees with a notice of release from employment.

8. All Respondents filed timely requests for hearing. The employees who did not file a request for hearing thereby waived their right to a hearing and cannot contest the recommendation of their non-reemployment by the District. (Ed. Code, § 44949, subd. (b).) Those employees are: Mary Beckelheimer, Anna Brewer, Jessica Case, Sarah Conlin (temporary), Vanessa Gomez, Miyuki Hernandez (temporary), Angela Hidalgo (temporary), Seri Hwang (temporary), Jodie Reddingius Tintorer (temporary), Jodie Wackerman (temporary), Jessica Williams (temporary), Julie Woo, Monica Young (temporary), and Amy Zambon (temporary).

9. On or about April 9, 2012, the District filed and served the Accusation. All but two of the Respondents submitted a notice of defense. When Respondent Joanne Vu requested a hearing in response to her March 15 layoff notice, she used a form entitled "Notice of Defense; after service of the Accusation, Vu did not submit a notice of defense. Respondent Heather Guay filed a request for hearing, but did not submit a notice of defense after service of the Accusation. No issue or objection was raised by the District regarding the failure of Vu and Guay to file a notice of defense. Respondents Vu and Guay shall not be deemed to have waived their right to a hearing on the merits of the Accusation. (Gov. Code, § 11506, subd. (c).) Neither Vu or Guay were present at the hearing.

10. All prehearing jurisdictional requirements have been met.

11. The services set forth in Finding 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.¹

12. The decision to reduce the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion. The decision to include competency requirements, as set forth in Finding 4, for "bumping" rights likewise is not arbitrary or capricious and is a proper exercise of the District's discretion.

¹ All further references are to the Education Code.

13. The reduction of services set forth in Finding 3 is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

14. The District identified vacancies for the 2012-2013 school year due to any positively assured attrition (confirmed resignations or retirements) and release of temporary certificated employees. Such attrition and release of temporary employees was taken into consideration in determining the order of layoff.

15. The District maintains a seniority list (Exhibit 13) which contains employees' names, seniority dates (first date of paid service), indications as to whether employees are probationary, tenured, or temporary, and current assignments, credentials, authorizations, and FTE. Certificated employees were provided the opportunity to review the list and confirm its accuracy, and the District modified the seniority list to take account of information provided by employees that was verified by the District.

16. On February 27, 2012, the Governing Board adopted Resolution 11-19, which sets forth criteria to break ties in seniority among certificated employees with the same first paid date of probationary service. Resolution 11-19 includes 17 different criteria (in paragraphs numbered 4 through 20 of the resolution), prioritizing types of credentials, certifications, qualifications, authorizations, and training, types and years of experience, education and degrees, and date of issuance of first credential. If a tie continued to exist, a lottery would be held to break the tie.

17. In creating the seniority list, the District applied each one of the tie-breaking criteria in order, one step at a time, as needed, with respect to teachers with the same first date of paid service on or after August 27, 2001. Going down the list of criteria, if no employee under tie-breaking consideration could satisfy a particular criterion, the consideration of the criteria stopped. The lottery number would then come into play only if all the prior tie-breaking criteria did not break a tie in seniority. The District did not apply the tie-breaking criteria to employees with seniority dates prior to August 27, 2001, because no employees with seniority dates prior to August 27, 2001, were subject to layoff.

18. The tie-breaking criteria were properly applied, and the seniority list is accurate. Montelongo testified there is a typographical error on the District's tie-breaking analysis chart (Exh. 14, p. 2). The seniority date of "08/25/03" should be changed to "08/25/05." This correction does not affect the layoff.

19. The District used the seniority list to designate who was proposed to be laid off and who could "bump" less senior employees currently assigned in the various services being reduced. The District then determined whether the least senior employees held credentials in another area and were entitled to "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 created from the release of temporary employees and positive assured attrition, and determined the impact on current staff in inverse order of seniority, with probationary employees being proposed for layoff prior to any permanent (tenured) employees. The seniority list designates those employees the District proposes to lay off with an indication in the "Notes" column of the employee's order of termination for a particular kind of service being eliminated.

20. (A) Respondent Mark Thomas (#129) has a seniority date of September 1, 1998, which he does not dispute. He is currently assigned to Buena Park Junior High School, where he teaches industrial arts and other elective classes. Thomas has taught junior high school since 2003. The District identified Thomas as an employee subject to layoff for the 0.66 FTE reduction in industrial arts, the 0.17 FTE reduction in computer applications, and the 0.17 FTE reduction in CAD/Drafting.

(B) Employees #130, #131, and #132 on the seniority list are elementary teachers with a seniority date of September 1, 1998. None of the three employees were noticed for layoff. Thomas contends he is credentialed and competent to "bump" into one of the elementary teaching positions held by these employees. Thomas holds a clear multiple subject credential with CLAD, and authorization in industrial arts technology. He is rated "highly qualified" under No Child Left Behind (NCLB) for grades K-6. He taught elementary school in his first five years in the District, from 1998 to 2003. He taught fifth grade for four years, and taught a combination fourth grade/fifth grade class for one year. Although Thomas is credentialed to teach elementary school, he does not have the "competency" (as defined in Resolution 11-20) because he has not taught in elementary school within the last five years. The District correctly identified Thomas as an employee subject to layoff.

21. Respondent Christina Reider is a temporary employee who received a precautionary layoff notice. (Exh. 13, p. 18.) She holds a clear multiple subject credential with CLAD authorization. Reider was previously a permanent employee of the District until she was laid off in the 2008-2009 school year. For the 2011-2012 school year, Reider is employed as a temporary elementary K-6 teacher, under a contract of employment indicating her temporary status, which she signed before commencing this employment. Montelongo's testimony established that the District determined the number of temporary employees it needed for the 2011-2012 school year based on the number of vacancies and enrollment. The District hired previously permanent employees, such as Reider, as temporary employees for the 2011-2012 school year. When enrollment stabilized, the District determined it could reclassify some of these temporary employees as permanent, based on seniority. It was not established that Respondent Reider is entitled to be reclassified as permanent. The District correctly classified Reider as a temporary employee who will be released at the end of the current school year. (Ed. Code, § 44916.)

22. No certificated employee junior to any Respondent was retained to render a service which any Respondent is certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of Findings 1 through 10.

2. The services listed in Finding 3 are determined to be particular kinds of services within the meaning of section 44955, by reason of Findings 3 and 11.

3. Cause exists under sections 44949 and 44955 for the District to reduce or discontinue the particular kinds of services set forth in Finding 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of Findings 1 through 22. 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. The District properly considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to employees by March 15, 2012. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 636.) The District was not required, as Respondents contend, to consider attrition occurring after March 15. "A school district need not consider positively assured attrition occurring between the date of the [March 15] preliminary notice and the final notice in determining the number of certificated employees to be terminated by reason of a reduction or discontinuation of a particular kind of service." (*Id.*, at p. 630 and 635-636.)

5. (A) 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. (§ 44955, subs. (b) and (c); *Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469, 473-474; *Krausen v. Solano County Junior College District* (1974) 42 Cal.App.3d 394, 402.) For purposes of analyzing "bumping" rights, a district may, in its discretion, define the term "competent," as used in section 44955, so long as the competency standard is reasonable. To be reasonable, a competency standard must relate to the skills and qualifications to teach. (See *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 564-567 [definition of competency under parallel statute applicable to community college districts held reasonable because it required one year's full-time teaching in the subject area in the prior ten years].) In *Duax*, the governing board had established a standard of competency that required one year of full-time teaching in the subject area within the last ten years. The Court

found such standard “clearly related to skills and qualifications to teach” and therefore a reasonable one. (*Duax, supra*, 196 Cal. App.3d 555, at p. 567.) The Court also concluded that the standard did not define competency too narrowly.

(B) In this case, the District’s competency criteria relate to the skills and qualifications of its certificated employees, and may be used by the District in implementing the layoffs. In fact, its requirement that teachers have one year in the past five of teaching experience in the subject matter in question is a rule similar to the one upheld in *Duax*. Application of the competency criteria impacts Respondent Mark Thomas, who does not meet the experience requirement and may not displace more junior certificated employees, as set forth in Finding 20.

6. In determining the order of seniority among employees who first rendered paid service to the District on the same date, the order of termination shall be “solely on the basis of needs of the district and the students thereof.” (§ 44955, subd. (b).) The District’s tie-breaking criteria met this standard.

7. The District correctly classified Reider as a temporary employee. Education Code section 44916 provides, in pertinent part: "The classification [of an employee] shall be made at the time of employment and thereafter in the month of July of each school year. At the time of initial employment during each academic year, each new certificated employee of the school district shall receive a written statement indicating his employment status and the salary that he is to be paid. If a school district hires a certificated person as a temporary employee, the written statement shall clearly indicate the temporary nature of the employment and the length of time for which the person is being employed."

8. Cause exists to terminate the services of all Respondents indentified in Finding 2, by reason of Findings 1 through 22, and Legal Conclusions 1 through 7.

ORDER

The Accusation is sustained and the District may notify all Respondents identified in Factual Finding 2 in inverse order of seniority, that their services will not be needed during the 2012-2013 school year due to the reduction of particular kinds of services.

Dated: April ___, 2012

ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings