

BEFORE THE
GOVERNING BOARD OF THE
LINDEN UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

ALI BRUNS, RITA BUCHER, DAVID
DROUIN, RENEE GATES, SHANNON
GUTIERREZ, BRIAN HECK, NOAH
KEPNER, JOSEPH MATTEOLI, JOSE
MEZA, CAROLE MITCHELL, JESSICA
PODESTA, SANDY PORTER, TARSHA
TAYLOR-GODFREY, CHRISTIANN
VERNON, AND MARILYN ZOLEZZI,

Respondents,

OAH No. 2012-04-0001

PROPOSED DECISION

This matter was heard on April 18, 2012, in Linden before Floyd Shimomura, Administrative Law Judge, Office of Administrative Hearings, State of California.

Roman J. Munoz, Attorney at Law, represented complainant Dr. Michael V. Gonzales, Superintendent of the Linden Unified School District (superintendent and district, respectively).

Ernie H. Tuttle, IV, Attorney at Law, represented the respondents, except for Marilyn Zolezzi, who did not attend the hearing, and Noah Kepner, who represented himself.

Oral and documentary evidence was received on April 18, 2012, and the matter submitted.

FACTUAL FINDINGS

Jurisdictional Facts

1. Dr. Michael V. Gonzales is the superintendent of the district. The district consists of seven schools including one high school, several elementary schools (K-4 and K-8), and a community day school. In the current school year (2011-12), the district employs approximately 125 certificated employees (permanent and probationary).

2. In early 2012, the superintendent determined that it was necessary to reduce the budget for the next school year (2012-13) by approximately \$1,500,000 due to declining enrollment, elimination of a federal education job funding program, and declining support from the state budget. To achieve this budget reduction, the superintendent determined that it would be necessary to reduce the number of certificated employees in the district for the next school year. Among the permanent or probationary certificated employees identified for reduction are respondents Ali Bruns, Rita Bucher, David Drouin, Renee Gates, Shannon Gutierrez, Brian Heck, Noah Kepner, Joseph Matteoli, Jose Meza, Carole Mitchell, Jessica Podesta, Sandy Porter, Tarsha Taylor-Godfrey, Christiann Vernon, and Marilyn Zolezzi.

3. The superintendent gave timely notice to the district's governing board and affected employees, including respondents, of his recommendation that notice be given to affected employees that their services would be terminated before commencement of the 2012-2013 school year for fiscal reasons.

4. On March 8, 2012, the district's governing board, pursuant to the superintendent's recommendation and reasons therefor, adopted a resolution to reduce four programs resulting in the elimination of a total of 18.5 FTE¹ certified teacher services. The reduced programs were the K-8 Elementary Education Program (14 FTE), the Reading Recovery Program (1.5 FTE), the Resource Specialist Program (1.0 FTE), and the 8-12 Alternative Education Program (2.0 FTE). The resolution also instructed the superintendent to take all appropriate action needed, including sending appropriate notice to affected employees.

5. Prior to March 15, 2012, the superintendent gave affected employees, including respondents, notice of his recommendation that their services would not be required for the 2012-2013 school year, and the reasons therefor.

6. Respondents are the affected employees who filed timely written requests for a hearing to determine if there is cause for not reemploying them in the ensuing school year.

¹ FTE stands for full-time equivalent.

7. On April 3, 2012, the superintendent, in his official capacity, filed an accusation against respondents with the district's governing board alleging that cause exists within the meaning of Education Code sections 44949 and 44955 for not reemploying them for the 2012-2013 school year.

8. All respondents, including Marilyn Zolezzi, were properly and timely served with a copy of the accusation, copies of the applicable Education and Government Code sections, notice of the April 18, 2012, hearing, notice of defense form, and request for discovery.

9. All respondents appeared at the April 18, 2012, hearing either in person or through their counsel with the exception of respondent Marilyn Zolezzi. The district rescinded its preliminary layoff notice and withdrew its accusation against respondent Rita Bucher.

Implementation of Layoff Resolutions – 2012 (By Seniority)

10. The superintendent and his designee, Assistant Superintendent Jane Steinkamp, implemented the district board's layoff resolutions by first compiling a comprehensive 2011-2012 seniority list for all of the district's certificated employees.² Based on the seniority list and other information available to the district, the superintendent and his designee created a "bump chart"³ which contained the names of 15 certificated district employees, ranked by seniority, who would not be retained for the ensuing 2012-2013 school year.⁴ All respondents are among the 15 certificated employees⁵ on the "bump chart," except the following four respondents who were sent precautionary notices: Jessica Podesta, Renee Gates, Noah Kepner, and Ali Bruns.

² The comprehensive seniority list not only contained seniority information, but also a certificated employee's credentials, current assignments, probationary status, and school site. The seniority list (Exh. 5) was accepted into evidence only to the extent the information related to a respondent or was otherwise relevant to this case.

³ The term "bump chart" was used by the district in its label for Exhibit 9.

⁴ The "bump chart" contained certificated employees in the programs being reduced and junior employees who could be displaced by such employees. The list omitted (skipped) some employees who had special training and experience to teach special courses. The "bump chart" (Exh. 9), which was initially objected to at hearing but not ruled upon, is hereby accepted into evidence as an authentic and relevant district document.

⁵ Four certificated employees who are on the "bump chart" did not request a hearing and therefore are not respondents.

Tie-Breaking Criteria for Seniority

11. On March 8, 2012, the district's governing board also adopted a resolution specifying tie-breaking criteria for the order of layoff of certificated employees with equal seniority. The resolution provides, in pertinent part, the following:

The Superintendent/designee shall determine the order of termination ... solely on the basis of the needs of the District and the students considering one or more of the following criteria:

BCLAD

Highly Qualified status in the subject area to which the person will be assigned.

Specialist credentials, such as a professional full credential in special education.

National Board Certification

Possession of a professional clear, preliminary, lifetime, or other full credential in a hard to staff subject area such as math, science and special education.

Post-graduate degree in the area of service or potential areas of service.

Participation in site level Leadership Team within the past two years.

Fully credentialed to teach in the assigned area without need for an assignment option such as a board resolution or waiver.

Employment within the last five years in the subject area being retained to which they will be assigned for the 2012-13 school year.

Assuming that the preceding criteria do not resolve all ties between employees having the same seniority date, then seniority will be determined by lot.

The Superintendent/designee has the discretion to determine which criteria are most relevant to serve the needs of the District and students in each tie-breaker situation.

Respondent Taylor-Godfrey's Seniority

12. Six of the respondents first rendered paid service to the district on the same date – August 8, 2006. Therefore, they have the same seniority date.

13. Of the six respondents, three met one of the resolution's criteria and three did not meet any of the criteria. The superintendent ranked the three that met one of the criteria above the three that met no criteria. The relative seniority of the three that did not meet any of the criteria was determined by lot (drawing straws).

14. Three respondents met at least one of the criteria. One of the three is Jose Meza, a first grade teacher at the district's English Language Development Academy. Respondent Meza has a Bilingual, Cross-cultural, Language and Academic Development (BCLAD) certificate, which authorizes him to provide certain types of direct instruction to English learners. Respondent Taylor-Godfrey and one other respondent met the "site leadership" criteria. The district has a large Hispanic population for which English is not a native language. The superintendent determined that the needs of the district and students were best served by giving priority to a teacher, such as respondent Meza, who could provide direct language instruction to the many English language learners in his district. As between the three who met one of the criteria, the superintendent ranked respondent Meza, who met the BCLAD criteria, ahead of respondent Taylor-Godfrey and another respondent who met the "site leadership" criteria. As between the latter two, respondent Taylor-Godfrey received the higher seniority date based on lot.

15. At hearing, respondent Taylor-Godfrey established that she had received a Masters of Education that met the post-graduate degree criteria in the board's tie-breaking resolution. This information was not available when the superintendent originally applied the tie-breaking criteria due to a lag within the reporting system used by the district. Assistant Superintendent Jane Steinkamp, who helped develop the seniority rankings, stated that this new information would not change the relative ranking of respondent Taylor-Godfrey to respondent Meza because the superintendent had selected BCLAD as the dominant tie-breaking criteria.

Definition of Competence for Assignments (Displacement)

16. On March 8, 2012, the district's board also adopted a resolution defining the criteria to determine the competence of a respondent to displace (i.e., bump) a more junior employee who is teaching a particular kind of service as follows:

- (1) Holding a preliminary, professional clear, lifetime or other full credential in the subject matter which the employee intends to displace another employee.
- (2) Has successfully taught one complete school year in the subject matter within the past 5 years, utilizing the full credential referenced above in number one.
- (3) Has highly qualified status under No Child Left Behind Act (NCLB) for the subject matter to which he/she will be assigned at the beginning of the 2012-2013 school year.

Respondent Taylor-Godfrey's Ability to Displace a Junior Teacher

17. Respondent Taylor-Godfrey is a first grade teacher at Glenwood Elementary School. She is a permanent employee with a clear multiple subject credential and clear single subject English credential. Her seniority date is August 8, 2006.

18. During the last five years, respondent Taylor-Godfrey has taught kindergarten, first, fifth, and sixth grade. To do such teaching, she used her multiple subject credential and not her single subject English credential. Her English credential permits her to teach English at the high school level, but she last taught at that level six years ago. She has not completed training to teach Advancement Via Individual Determination (AVID)⁶ in the last five years.

19. Respondent Jessica Podesta teaches English I and AVID at Linden High School. She is a permanent employee with a preliminary multiple subject teaching credential with a supplementary authorization in English. Her seniority date is August 7, 2007. For the past five years, respondent Podesta has received AVID training at the Sacramento Summer Institute.

Respondent Mitchell's Ability to Displace Two Junior Teachers

20. Respondent Carole Mitchell teaches language arts and social science to sixth and seventh graders at Glenwood Elementary School. She is a permanent employee with a clear single-subject social science credential and possesses board authorization to teach language arts. Her seniority date is August 7, 2007.

21. During the last five years, respondent Mitchell has taught sixth and seventh grade in a core assignment (self-contained classroom) and sixth to eighth grade English language development (ELD). To do such teaching, she relied partly on her single-subject social science credential and partly on a board authorization to teach language arts. She has no experience teaching at the high school level in the last five years except for a six-week summer course in Manteca. She is not authorized to teach an advanced placement (AP) world history course.

22. Respondent Renee Gates teaches English, language arts, and social science at Waverly Elementary School in grades six to eight. She teaches in a departmentalized (not core) program. She is a permanent employee with a clear single-subject social science credential, with a supplementary authorization in introductory English. Her seniority date is August 11, 2008.

⁶ AVID is a college readiness program designed to increase the number of students who enroll in college from certain underrepresented groups. AVID classes seek to motivate students and, among other things, improve their note-taking, study, test-taking, and research skills.

23. Respondent Noah Kepner teaches modern world history and AP world history at Linden High School. He is a permanent employee with a clear single-subject social science credential. His seniority date is August 11, 2008. In July 2011, respondent Kepner underwent 30 hours of special teacher training in AP world history at the University of San Diego. He developed an AP course syllabus and had the course approved by the College Board so that students would get special credit when applying to college. If he is displaced, the displacing teacher would also be required to undergo training and submit a syllabus to the College Board for authorization so that the course could continue to be designated as AP on student transcripts.

LEGAL CONCLUSIONS

Procedural Requirements

1. The district complied with the procedural requirements of Education Code sections 44949 and 44955, including giving proper notices to respondents, during its present layoff process. It also complied with the procedural requirements of Government Code section 11500 *et seq.* for the April 18, 2012, hearing. No party objected to the procedural process followed by the district or the jurisdiction of the administrative law judge to hear the case. The objections focused on a calculation of seniority and the ability of two senior teachers to displace junior ones.

The District's Tie-Breaking Criteria and Respondent Taylor-Godfrey's Seniority

2. Respondents contend that the district's tie-breaking criteria for seniority are invalid because the superintendent is given criteria without sufficient instruction on how to apply them. Specifically, respondent Taylor-Godfrey contends that the superintendent improperly applied the tie-breaking criterion to her because he failed to take into consideration her recently acquired Masters of Education degree due to a lag within the information system used by the district.

3. As between employees who first rendered paid service to the district on the same date, the district is required to "determine the order of termination solely on the basis of needs of the district and the students thereof." (Ed. Code, § 44955, subd. (b).) Upon request, the district is required to provide "a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group." (*Ibid.*)

4. Pursuant to this requirement, the district board adopted its tie-breaking resolution. The resolution lists nine distinct criteria that the superintendent or his designee can consider to break a tie. For example, the list includes "BCLAD," or "Post-graduate degree," or participation in "a site level Leadership Team." The resolution instructs the superintendent or his designee to consider, in each tie breaker situation, "one or more" of the

nine criteria to break ties “solely on the basis of the needs of the District and the students.” If the criteria do not resolve all ties, “then seniority is determined by lot.”

5. It is concluded that the district’s tie-breaking resolution does not satisfy the requirements of Education Code section 44955, subdivision (b) because it states criteria, but fails to state “the application of the criteria in ranking each employee relative to the other employees in the group.” The resolution provides no guidance to the superintendent, affected employees, or a reviewing judge as to how the nine criteria are to be applied. For example, the resolution does not rank the nine criteria in any particular order of importance or give an employee meeting more of the criteria preference over one meeting less. It allows the superintendent to consider “one or more” of the criteria based “solely on the basis of the needs of the district and the students.” Moreover, the superintendent is not even required to be consistent and may exercise his discretion differently “in each tie-breaker situation.”

6. Despite the fact that the tie-breaking resolution failed to state how the criteria were to be applied, the superintendent appears to have adopted a rational and fair method for applying the criteria in his initial determination. He ranked those who met more of the criteria over those who met less, and among those who met the same number of criteria, he exercised his judgment to choose which criteria best served the needs of the district and the students. Thus, the three respondents (of the six who were tied) who met the BCLAD or “site leadership” criteria were ranked above the three who met none of the criteria. And based on his assessment of the needs of the district and students, he gave priority to the one respondent with a BCLAD over the two with “site leadership.”

7. The problem arose when it was discovered at the hearing that respondent Taylor-Godfrey, who met the “site leadership” criteria and was ranked immediately below respondent Meza, had recently received a Masters of Education degree, which was not taken into consideration when the tie-breaking criteria was initially applied due to a lag in the information system used by the district. The superintendent placed her lower than respondent Meza, who met only the BCLAD criterion, even though respondent Taylor-Godfrey met the district’s criteria for both “site leadership” and for possessing a “[p]ost-graduate degree in the area of service or potential areas of service.” Respondent Taylor-Godfrey argued that her Masters of Education degree trained her, among other things, to understand different teaching techniques to assist English language learners and therefore her particular post-graduate degree should be afforded the same priority as BCLAD. Nevertheless, when her Masters of Education came to light at the hearing, it was summarily disregarded by the superintendent’s designee even though it met one of the district’s nine tie-breaking criteria. It is found that disregarding the Masters of Education degree was arbitrary and capricious because the superintendent failed to consistently follow the same application standards that he had previously used. That is, he failed to give preference to those who met more of the criteria over those who met less and only ranked criteria against each other when there was a tie. Here respondent Taylor-Godfrey should have been ranked higher than respondent Meza because she met two of the district’s tie-breaking criteria (“site leadership” and “post-graduate degree”) while respondent Meza only met one (BCLAD).

8. Based on the above, it is concluded that the district's tie-breaking resolution fails to satisfy Education Code section 44955, subdivision (b) because it states criteria, but fails to state "the application of the criteria in ranking each employee relative to the other employees in the group." Moreover, the superintendent's decision to disregard respondent Taylor-Godfrey's post-graduate degree was arbitrary and capricious because it was inconsistent with the application standards he applied before discovery of the Masters of Education degree. For that reason, respondent Taylor-Godfrey should be ranked above respondent Meza for purposes of seniority.

Respondent Taylor-Godfrey's Ability to Displace a Junior Teacher

9. Respondent Taylor-Godfrey is a first grade teacher at Glenwood Elementary School. She is a permanent employee with a clear multiple subject credential and clear single subject English credential. Her English credential permits her to teach English at the high school level. Her seniority date is August 8, 2006. She asserts that she may displace respondent Jessica Podesta who teaches English I and AVID at Linden High School because respondent Podesta has less seniority (August 7, 2007) and she is certificated and competent to provide the services of the junior teacher.

10. If a permanent certificated teacher is certificated and competent to render a service provided by a more junior teacher, the senior teacher is entitled to displace the junior teacher in such position. (Ed. Code, § 44955, subd. (b).)

11. The district has defined competency to require the senior teacher to have "successfully taught one complete school year in the subject matter [taught by the junior teacher] within the past 5 years, utilizing the full credential ... [she holds to teach such subject matter]." Respondent Taylor-Godfrey has not taught English at the high school level within the past five years. She has not utilized her single subject English credential to teach English within the last five years. She used her multiple subject credential while teaching at the elementary school level. Finally, she has neither taught AVID in the last five years nor completed training to teach AVID. Therefore, respondent Taylor-Godfrey may not displace respondent Podesta because she has not met the district's competency standard.

12. Respondent Taylor-Godfrey argues that the district's competency standard that requires that she have taught the subject matter of the junior teacher within the past five years is unreasonable and arbitrary. She contends that she last taught English at the high school level six years ago and there is no rational difference between five and six years. In *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 564, the court stated that a school district has broad discretion to establish competency standards for purposes of exercising displacement rights. In *Duax*, the court noted on page 567 that since the community college district criteria "require only one year of teaching in the last ten, not one in the last two or three, we are not persuaded that it too narrowly defines competency." According to Assistant Superintendent Jane Steinkamp, one reason for the five-year rule is to ensure competency in knowledge of California state standards that are constantly evolving.

While two or three years might be too short, the *Duax* court suggests that longer periods may be permissible and periods may be measured in years. It is concluded that the five-year period specified in the district's competency definition is not unreasonably narrow or the use of a five-year standard arbitrary under the *Duax* case.

13. Based on the above, respondent Taylor-Godfrey may not displace respondent Podesta because she has not met the district's competency standard.

Respondent Mitchell's Ability to Displace Two Junior Teachers

14. Respondent Carole Mitchell teaches language arts and social science to sixth and seventh graders at Glenwood Elementary School. She is a permanent employee with a clear single-subject social science credential and possesses board authorization to teach language arts. Her seniority date is August 7, 2007. She asserts that she may displace respondent Renee Gates and respondent Noah Kepner who have less seniority than her. Both have a seniority date of August 11, 2008. She argues that she has greater seniority and is certificated and competent to provide the services of the junior teachers.

15. As previously indicated, if a permanent certificated teacher is certificated and competent to render a service provided by a more junior teacher, the senior teacher is entitled to displace the junior teacher. (Ed. Code, § 44955, subd. (b).)

16. Respondent Carole Mitchell asserts that she may displace respondent Gates who teaches English, language arts, and social science at Waverly Elementary School in grades six to eight. Respondent Mitchell claims that these are very similar to the classes she currently teaches at Glenwood Elementary School. The district has defined competency to require the senior teacher to “[h]old ... a preliminary, professional clear, lifetime or other full credential in the subject matter which the employee intends to displace another ... [more junior teacher].” Even though respondent Mitchell is teaching, among other subjects, language arts at Glenwood Elementary School, she is not credentialed in language arts. She is teaching this subject matter under a board authorization. The fact that respondent Mitchell has a board authorization in the current year does not mean she is entitled to it in subsequent years. Education Code section 44258.3 provides that such board authorization cannot “be construed to alter the effect of Section 44955 [relating to layoffs] with regard to the reduction by a school district governing board of the number of certified employees.” Thus, respondent Mitchell cannot displace respondent Gates because she is not credentialed in language arts.

17. Respondent Carole Mitchell also asserts that she may bump respondent Noah Kepner who teaches modern world history and AP world history at Linden High School. Respondent Mitchell established that she, like respondent Kepner, possesses a clear single-subject social science credential. She also argues that she has used her credential to teach social science during the past five years with the district. The district argues that she did not use the “full credential” as required by the second element of the district's competency definition because she also taught language arts under a board authorization. Moreover, the

district argues that respondent Mitchell taught in a core assignment in a self-contained classroom and not in a departmentalized program like respondent Kepner. It is not necessary to decide this question because even if respondent Mitchell meets the district's competency standard, she cannot displace respondent Kepner because she cannot teach AP world history.

18. There was insufficient evidence to establish that Respondent Mitchell is able to teach the AP world history class, which was developed and taught by respondent Kepner at Linden High School. Respondent Kepner underwent special training, developed the AP course syllabus, and got the course approved by the College Board so that students could receive special credit when applying to college. Respondent Kepner, who represented himself, established that if he were displaced, the displacing teacher would be required to also undergo special training and submit a syllabus to the College Board for authorization so that the course could be designated as AP on student transcripts. Education Code section 44955, subdivision (d) provides that a school district may deviate from seniority if the "district demonstrates a specific need for personnel to teach a specific course ... and that the certificated employee has special training and experience necessary to teach that course ... which others with more seniority do not possess." In the present case, the weight of the evidence supports the finding that respondent Kepner has the specialized training and experience to teach the AP world history course at Linden High School and that respondent Mitchell does not.

19. For the above reasons, it is concluded that respondent Mitchell cannot displace respondent Gates because she is not credentialed in language arts and she cannot displace respondent Kepner because she does not have the specialized training and experience to teach AP world history at Linden High School.

"Bump Chart"

20. The district has properly identified those certificated employees for layoff as reflected in its "bump chart" (Exhibit 9) pursuant to Education Code sections 44949 and 44955 and the district's resolutions except that respondent Taylor-Godfrey should be ranked above respondent Meza.

Marilyn Zolezzi – Failure to Appear

21. Respondent Marilyn Zolezzi failed to appear at the April 17, 2012, hearing either in person or by representation even though she was properly served with the pleadings and given notice of the hearing. At the end of the hearing, the ALJ granted the motion of the district to default her.

Good Cause

22. Because it is necessary to reduce the budget for the next school year (2012-13) by approximately \$1,500,000 due to declining enrollment, elimination of a federal education job funding program, and declining support from the state budget, good cause exists to reduce the number of certificated employees in the district for the next school year for the welfare of the district's schools and its students. The district board's decision was not arbitrary, capricious, or fraudulent and the services to be reduced are particular kinds of services that may be reduced or discontinued within the meaning of Education Code section 44955.

23. Any other assertions put forth by respondents and not addressed above are found to be without merit and are rejected.

RECOMMENDATION

1. The district rescinded its preliminary layoff notice and withdrew its accusation against respondent Rita Bucher.

2. The district's tie-breaking resolution does not satisfy Education Code section 44955, subdivision (b) because it states criteria, but fails to state "the application of the criteria in ranking each employee relative to the other employees in the group." Nevertheless, the superintendent applied a rational and fair method for applying the criteria except that he must rank respondent Taylor-Godfrey above respondent Meza to maintain consistency in his application.

3. Respondent Taylor-Godfrey does not satisfy the district's competency criteria for the displacement of respondent Jessica Podesta or any other junior employee.

4. Respondent Mitchell does not satisfy the district's competency criteria for the displacement of respondent Renee Gates or for any other junior employee.

5. Respondent Mitchell cannot displace respondent Kepner because she does not have the specialized training and experience to teach AP world history at Linden High School.

6. The district has properly identified those certificated employees for layoff as reflected in its "bump chart" (Exhibit 9) except that respondent Taylor-Godfrey must be ranked above respondent Meza in seniority. Notice may be given to respondents identified in Exhibit 9 that their services will not be required for the 2012-13 school year.

7. Respondent Marilyn Zolezzi is defaulted for failure to appear at the April 17, 2012, hearing.

8. Cause exists to reduce or eliminate certificated positions no later than the beginning of the 2012-2013 school year in accordance with the board's resolution.

9. Notice may be given to respondents that their services will be reduced or will not be required for the 2012-2013 school year. Notice shall be given in inverse order of seniority.

Dated: May 3, 2012

FLOYD D. SHIMOMURA
Administrative Law Judge
Office of Administrative Hearings