

BEFORE THE  
GOVERNING BOARD OF THE  
APPLE VALLEY UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusation against:

Certificated Employees of the Apple Valley  
Unified School District,

Respondents.

OAH Case No. 2009020852

**PROPOSED DECISION**

Administrative Law Judge Susan L. Formaker of the Office of Administrative Hearings heard this matter on April 10, 2009, in Apple Valley, California.

Alexandria M. Davidson of the Law Offices of Margaret A. Chidester & Associates represented Assistant Superintendent for Human Resources, Dan Leary (Leary), Apple Valley Unified School District (District).

Carlos R. Perez of Reich, Adell & Cvitan represented Debra Boyd (Boyd), Nichole Cataneso (Cataneso), Linda Cordova (Cordova), Sean Duarte (Duarte), Toni Peterson (Peterson), Alicia Weber (Weber), Kittie Yonamine (Yonamine), Carrie Talataina (Talataina), and Aurora Mendoza (Mendoza). Georgina Barreda (Barreda), Esther Haskins (Haskins), Martell Olson (Olson), and Timothy Rogers (Rogers) were not represented by counsel at the hearing and did not appear.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision on April 10, 2009.

**FACTUAL FINDINGS**

1. Leary, acting in his official capacity with the District, 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. Boyd, Cataneso, Cordova, Duarte, Peterson, Weber, Yonamine, Talataina, Mendoza, Barreda, Haskins, Olson, and Rogers (Respondents) are certificated employees of the District.

3. On March 5, 2009, the Governing Board of the District (Governing Board) adopted Resolution number 29-27, reducing 46 full-time equivalent (FTE) positions for the

2009-2010 school year, in the following services: K-6 Elementary Classroom Teachers (30 FTE), Middle School 7/8 Core Classroom Teachers (2 FTE), Elementary Instructional/Choral Music Teachers (2 FTE), Middle School English Teacher (1 FTE), Middle School Physical Education Teacher (1 FTE), High School Science Teacher (1 FTE), High School English Teacher (1 FTE), High School Math Teacher (1 FTE), High School Technology Teacher (1 FTE), Counselors (5 FTE), and Language, Speech and Hearing Specialist (1 FTE). Through Resolution 29-27, the Governing Board also reduced 1 FTE position for the 2009-1010 school year, in the following services: Preschool Teacher (1 FTE) and Preschool Associate Teacher (1 FTE). The Preschool positions were not included in the instant proceeding.

4. As set forth in Exhibit “A” to Resolution 29-27, the Governing Board exempted from the order of layoff certificated personnel who possess an administrative credential, a credential authorizing service in special education, a credential authorizing service in language, speech and hearing, a waiver authorizing service in the area of language, speech and hearing, or a single subject, supplementary authorization or subject matter authorization credential authorizing service in Math, Science, English, or Social Science. For all of these categories of certificated personnel, the exemption only applied if the personnel were presently assigned within the scope of the credentials and will be assigned within the scope of such credentials for the 2009-2010 school year. Resolution 29-27 also exempted certificated personnel who possess a single subject credential in Music, who are presently assigned as a High School Band or Choral Teacher, with at least two years of teaching experience in this position, and who will be assigned within the scope of that credential for the 2009-2010 school year. These exemptions were sought by the Governing Board because of the special training, experience, or credentials that others with more seniority do not possess and the needs of the District.

5. Subsequent to adoption of the Board’s Resolution, the District identified vacancies for the 2009-10 school year due to positive assured attrition (confirmed retirements or resignations) and release of temporary teachers. After consideration of such attrition, the District concluded that 22 FTE are required to be terminated pursuant to this proceeding.

6. Leary thereafter notified the Governing Board that he recommended that notice be provided to Respondents that their services will not be required for the 2009-20010 school year due to the reduction of particular kinds of services.

7. On or about March 6, 2009, the District provided notice to Respondents that their services will not be required for the 2009-2010 school year due to the reduction of particular kinds of services. A total of 24 certificated employees were served with preliminary notices of layoff. Respondents filed timely requests for hearing.<sup>1</sup>

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<sup>1</sup> Rhobley Montelongo, one of the District’s certificated employees currently on a leave of absence, was sent a preliminary notice not to reemploy, by certified mail. Although

8. On or about March 17, 2009, the District filed and served the Accusation on Respondents. All Respondents other than Barreda thereafter filed timely notices of defense, seeking a determination of whether cause exists for not reemploying them for the 2009-20010 school year.

9. All prehearing jurisdictional requirements have been met.

10. 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.<sup>2</sup>

11. The Governing Board took action to reduce the services set forth in Finding 3 primarily because of a reduction in state funding, resulting budgetary concerns, and the need to ensure the solvency of the District. 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 exempt certain certificated employees from the order of layoff likewise was not arbitrary or capricious and was a proper exercise of the District's discretion.

12. 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.

13. On March 5, 2009, the Governing Board adopted Resolution 29-27 setting forth criteria and a point system to break ties in seniority among certificated employees with the same first paid date of probationary service. The District and the Apple Valley Unified Teachers' Association had previously agreed upon these criteria in a contract for the period July 1, 2006, through June 30, 2009. The criteria and point system that was adopted reads as follows:

“A. Seniority shall be determined according to the first day of work performed in probationary status.

“B. Unit members with the same first day of work performed in probationary status shall have their seniority order determined by lot.

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Ms. Montelongo never picked up the notice, the service of the notice by certified mail was sufficient under Education Code section 44949, subdivision (d), to trigger Ms. Montelongo's obligation to request a hearing. Ms. Montelongo and certain other certificated employees in the District did not request a hearing and are not considered Respondents in this matter.

<sup>2</sup> All further references are to the Education Code.

“1. The lottery shall be conducted in the presence of at least two (2) Association representatives.

“2. Seniority determined by lot shall remain effective while the unit member is employed in the District.

“C. Criteria for Resolving Ties in Seniority Related to Certificated Layoffs

“1. Whereas Education Code section 44955, subsection (b), related to certificated layoffs, provides, in relevant part, that ‘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 . . . ’

“2. Based upon the needs of the District and the students thereof, the following criteria shall be applied in order, one step at a time, to resolve ties in seniority between certificated employees as outlined in the contract agreement between Apple Valley Unified School District and Apple Valley Unified Teachers’ Association.

“a. First day of full time teaching service in the district as a bargaining unit member.

“b. Authorization to teach English Language Learners (CLAD, BCLAD, SDAIE, SB395, etc.).

“c. Number of years credentialed teaching experience in the District (prior to seniority date).

“d. Number of years credentialed teaching experience outside the District.

“e. Teaching experience in different grades or subjects.

“f. Number of additional credentials or supplemental authorizations.

“g. Possession of a Masters Degree - earliest date prevails.

“h. Possession of a Doctorate Degree - earliest date prevails.”<sup>3</sup>

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<sup>3</sup> The contract between the District and the Apple Valley Unified Teachers’ Association contained typographical errors so that criteria “f,” “g,” and “h” were erroneously designated as repeat letters “d,” “e,” and “f,” respectively. These errors were corrected in Resolution 29-27.

14. When the District hires certificated employees with the same first date of paid probationary service, it conducts a lottery on the date of hiring or shortly thereafter to determine each such certificated employee's lottery number order. The lottery is carried out independently of any reduction in force. That lottery seniority number stays the same throughout a certificated employee's employment with the District. This process has been followed for every certificated employee affected by the layoff considered here.

15. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), indications as to whether employees are probationary or tenured, and current assignments, credentials, and authorizations. Certificated employees were provided the opportunity to review the list and confirm its accuracy. No employees provided any information that was not included in the list that was updated as of April 7, 2009 (Exhibit 1.b).

16. In creating the seniority list, each one of the tiebreaker criteria was applied in order, one step at a time, as needed, with respect to teachers with the same first date of paid service. 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 the tiebreaker criteria did not break a tie in seniority. The tiebreaker criteria were properly applied, and the seniority list is accurate.

17. 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 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 District also exempted from the services being reduced those persons holding credentials exempted from the layoff under Resolution 29-27. The seniority list, as corrected during the hearing, designates those employees the District proposes to lay off with the handwritten letters "LO" in the far left column.

18. 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 3 and 5 through 9.

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 10.

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 18. 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. 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, 473-474; *Krausen v. Solano County Junior College District* (1974) 42 Cal.App.3d 394, 402.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess special credentials or needed 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.)

5. Cause exists to terminate the services of Respondents Boyd, Cataneso, Cordova, Duarte, Peterson, Weber, Yonamine, Talataina, Mendoza, Barreda, Haskins, Olson, and Rogers by reason of Findings 1 through 18, and Legal Conclusions 1 through 4.

### **ORDER**

The Accusation is sustained and the District may notify Respondents Boyd, Cataneso, Cordova, Duarte, Peterson, Weber, Yonamine, Talataina, Mendoza, Barreda, Haskins, Olson, and Rogers that their services will not be needed during the 2009-2010 school year due to the reduction of particular kinds of services.

Dated: May 1, 2009

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SUSAN L. FORMAKER  
Administrative Law Judge  
Office of Administrative Hearings