

BEFORE THE
GOVERNING BOARD OF THE
SYLVAN UNION SCHOOL DISTRICT
COUNTY OF STANISLAUS
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE SYLVAN UNION
SCHOOL DISTRICT,

Respondents.

OAH No. 2009030197

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, in Modesto, California, on May 1, 2009.

John R. Yeh, Attorney at Law, represented the Sylvan Union School District (District).

Eric Rouen, Attorney at Law, represented all respondents who are listed on Attachment A hereto except Danny Rovig. Mr. Rovig did not appear at the hearing.

Evidence was received, the record was closed, and the matter was submitted for decision on May 1, 2009. Because the hearing in this matter was continued for good cause from April 20 and 21, 2009, to May 1, 2009, pursuant to Education Code section 44949, subdivision (e), the May 7 date set forth in Education Code section 44949, subdivision (c)(3), was extended to May 18, 2009, and the May 15 date set forth in Education Code section 44955, subdivision (c) was extended to May 26, 2009. The terms and conditions of Education Code sections 44949 and 44955 were not otherwise changed.

FACTUAL FINDINGS

1. On February 17, 2009, the Board of Trustees (Governing Board) of the District adopted Resolution No. 2008/2009 #19, entitled "Decrease in the Number of Certificated Employees Due to a Reduction in Particular Kinds of Services" (PKS Resolution). In the PKS Resolution, the Governing Board determined that it was necessary to reduce or eliminate the following particular kinds of certificated services not later than the beginning of the 2009-2010 school year:

| <u>PKS</u> ¹ | <u>FTE</u> |
|-------------------------------------|-------------|
| Multiple Subject | 33 |
| Music | 7 |
| Art | 4 |
| Librarian | 2 |
| Counselor | 1 |
| Dean | 2 |
| K-5 Assistant Principal | 1 |
| BTSA Teacher | 1 |
| AT & G Pullout | 0.85 |
| K-5 Instructional Facilitators | 5 |
| 6th Grade (Middle School) Electives | 3 |
| Adapted Physical Education | <u>0.25</u> |

Total: 60.1

As a result of the above reduction or elimination of particular kinds of services, the Governing Board determined that it will be necessary to terminate, at the end of the 2008-2009 school year, the employment of certain certificated employees. In the PKS Resolution, the Governing Board also resolved to retain the services of certificated employees who possess the qualifications for certain designated programs (skipping criteria). The reduction or elimination of particular kinds of services and the termination of certificated employees are based solely upon the severe budget cuts that the District anticipates in these difficult economic times, and are not related to the skills, abilities or work performance of the affected employees.

2. On February 24, 2009, the Governing Board adopted Resolution 2008/2009 #18 entitled, “Criteria for Determining Order of Seniority for Those Employees with the Same Date of First Paid Service” (Tie-breaking Resolution). In the Tie-breaking Resolution, the Governing Board set forth the criteria for the District to apply when determining the order of termination among employees who first rendered paid service to the District on the same date.

3. Prior to March 15, 2009, the Superintendent gave certain certificated employees written notice that, pursuant to Education Code sections 44949 and 44955, he had recommended that their services be eliminated for 2009-2010 school year (Notice of Recommended Layoff).

4. Respondents are currently certificated employees of the District. Each respondent was properly and timely served with a Notice of Recommended Layoff and timely requested a hearing. Each was also properly and timely served with an Accusation, Statement to Respondent, form Notice of Defense, Notice of Hearing and relevant statutes, and filed a timely Notice of Defense.

¹ “PKS” stands for particular kind of service. “FTE” stands for full-time equivalent.

5. Prior to the hearing, the District rescinded the Notices of Recommended Layoff served on Martine Knapp, Rebecca Martino, and Ashley Peters. Consequently, these certificated employees are no longer respondents in this matter.

6. At the hearing, the District corrected the seniority dates of Renee Ousley-Swank from August 3, 2006, to August 1, 2006; Jelynn Degnan from October 5, 2006, to August 3, 2005; and Serra Borland from November 27, 2006, to October 2006, an exact date to be established at a later time.

The District's NCLB Compliance Requirement

7. At the hearing, respondent Jennifer Roberts contended that the District should rescind the Notice of Recommended Layoff that it served upon her because it rescinded the Notice of Recommended Layoff that it served upon Martine Knapp, a more junior teacher who will be rendering services that respondent Roberts believes she is certificated and competent to perform. As set forth below, respondent Roberts's contention is persuasive.

8. According to David Ralph Holtz, the District's Assistant Superintendent of Human Resources, the District requires that every teacher who teaches a single subject in the seventh and eighth grade, in addition to holding an appropriate credential, must also meet the requirements set forth in the federal No Child Left Behind Act (NCLB). Under NCLB, parents may demand that their children be taught by teachers who are NCLB-compliant. According to Mr. Holtz, to meet the NCLB requirements, seventh and eighth grade teachers must be subject-matter proficient in the subject area in which they teach. Currently, all the seventh and eighth grade teachers in the District are NCLB-compliant. There are different ways in which a teacher may establish subject-matter proficiency. Mr. Holtz explained that one of those ways is the High, Objective, Uniform State Standard of Evaluation (HOUSSE). HOUSSE allows teachers who received their credentials prior to July 1, 2002, to demonstrate subject-matter proficiency by submitting evidence of past successful teaching experience in their subject area.

9. Martine Knapp is currently employed by the District as an Art Consultant. Her seniority date is September 4, 2008. She has a single subject teaching credential in Art, and a multiple subject teaching credential with a supplementary authorization in English. The District initially served a Notice of Recommended Layoff on Ms. Knapp. After she was served with that notice, Ms. Knapp submitted to the District sufficient evidence to establish that, under HOUSSE, she had attained subject-matter proficiency teaching English in another school district. The District determined that Ms. Knapp met both the District's credentialing and NCLB-compliance requirements to teach seventh and eighth grade English. The District, therefore, rescinded Ms. Knapp's Notice of Recommended Layoff prior to the hearing.

10. Respondent Roberts is currently employed by the District as a fourth grade teacher. Her seniority date is August 6, 2007. She holds a Preliminary Multiple Subject

Teaching Credential with a supplementary authorization in English. She has not, however, met the NCLB requirements for subject-matter proficiency in English. Even though she is not NCLB-compliant, respondent Roberts contends that her credential authorizes her to teach seventh and eighth grade English in the District, and that, because she is more senior to Ms. Knapp, her Notice of Recommended Layoff should also be rescinded.

11. Education Code section 44955, subdivision (d)(1), permits a school district to deviate from terminating certificated employees in order of seniority when the school 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.” In *Bledsoe v. Biggs Unified School District (Bledsoe)* (2008) 170 Cal.App.4th 127, 138, the court found that “[s]ubdivision (d)(1) of section 44955 expressly allows a district to demonstrate its specific ‘needs’ and there is nothing in the statute that requires such needs to be evidenced by formal, written policies, course or job descriptions, or program requirements.” The court explained, however, that in order for a school district “to retain a certificated employee under section 44955, subdivision (d)(1), ... a district must not only establish a specific need for personnel to teach a specific course of study, but establish the certificated employee it proposes to retain ‘has special training and experience necessary to teach that course or course of study or to provide those services[.]’” (*Ibid.*)

12. The PKS Resolution does not include any provisions that define the term “competent” or establish competency criteria. It also does not explicitly state that, in order to be retained to teach seventh and eighth grade subjects, certificated employee must not only have appropriate credentials, they must also be NCLB-compliant. Although Mr. Holtz testified that the District requires that all its seventh and eighth grade teachers be NCLB-compliant in the subject areas in which they teach, he explained that this was because the District must notify parents if teachers are not NCLB-compliant, so that parents may decide whether they want their children to be taught by that teacher. According to Mr. Holtz, if parents notify the District that they do not want their child taught by a non-compliant teacher, the District must transfer their child to a teacher who is NCLB-compliant. But it follows from Mr. Holtz’s testimony that, if the parents do not so notify the District, the non-compliant teacher may remain the child’s teacher. While Mr. Holtz’s explanation for the District’s NCLB compliance requirement shows that it may be inconvenient for the District to have a non-compliant teacher, it does not demonstrate that NCLB compliance is necessary for an otherwise certificated and competent teacher to teach seventh and eighth grade English in the District. Consequently, the District failed to establish that Ms. Knapp “has special training and experience necessary” to teach seventh and eighth grade English that respondent Roberts does not possess. (Ed. Code, § 44955, subd. (d)(1).) Because respondent Roberts is more senior than Ms. Knapp and is credentialed and competent to teach seventh and eighth grade English, her Notice of Recommended Layoff must be rescinded.

Classification of Teachers in Categorically Funded Programs

13. The District maintains a Certificated Seniority List, which contains the name, seniority date, employee status, FTE, position, work site, class, and credentials of the District's certificated employees. A certificated employee's seniority date is the date the employee first rendered paid probationary service.² On the Seniority List, respondent Nicole Prom's seniority date is listed as August 6, 2007, and respondent Denise Argain's seniority date is listed as August 24, 2007. At the hearing, these respondents argued that their seniority dates were not correct because they were not given any credit toward seniority for the time they served in categorically funded positions. They argued that respondent Prom's seniority date should be corrected to September 19, 2005, and respondent Argain's seniority date should be corrected to January 17, 2007. As set forth below, respondents Prom and Argain's arguments are not persuasive.

14. During the 2005-2006 school year, respondent Prom began working for the District in a categorically funded position on September 19, 2005. She worked 134 days that year - less than 75 percent of the District's regular schools days. Respondent Prom also served in categorically funded positions for the 2006-2007 and 2007-2008 school years. In the 2007-2008 school year, she began working on August 6, 2007, and worked at least 75 percent of the District's regular school days that year. She began working as a probationary employee in the 2008-2009 school year. Because respondent Prom worked at least 75 percent of the District's regular school days in the 2007-2008 school year, pursuant to Education Code section 44918, the District retroactively tacked that year onto respondent Prom's 2008-2009 probationary year, and awarded her probationary status as of August 6, 2007.³

15. In the 2007-2008 school year, respondent Argain began working for the District on August 24, 2007, as a probationary employee. During the 2006-2007 school year, she worked for the District in a categorically funded program, beginning on January 17, 2007. Because respondent Argain did not work at least 75 percent of the District's regular school days during the 2006-2007 school year, the District did not tack that year onto her 2007-2008 probationary year or award her any probationary status for the 2006-2007 school year.

² Education Code section 44845 provides: "Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position."

³ Education Code section 44918, subdivision (a), provides:

Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.

16. Both respondent Prom and respondent Argain were hired into categorically funded positions when they first began working for the District. They were not hired to backfill for regular teachers assigned to categorically funded positions. They were not hired to be long-term or short-term substitute teachers.

17. The District hired respondents Prom and Argain to fill categorically funded positions under Education Code section 44909, which provides:

The governing board of any school district 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 categorically funded projects which are not required by federal or state statutes. The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the governing board 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 the district 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 other than Section 44918.

Whenever any certificated employee in the regular educational program is assigned to a categorically funded project not required by federal or state statute and the district employs an additional credentialed person to replace that certificated employee, the replacement certificated employee shall be subject to the provisions of Section 44918.

This section shall not be construed to apply to any regularly credentialed employee who has been employed in the regular educational programs of the school district as a probationary employee before being subsequently assigned to any one of these programs.

18. When the District first hired respondents Prom and Argain, they entered into contracts that designated them as temporary employees.⁴ Mr. Holtz explained that the contracts of certificated employees in categorically funded programs are annual contracts that expire by their terms at the end of each school year. According to Mr. Holtz, this is so because the funding for categorically funded programs is authorized on an annual basis. While respondents Prom and Argain were in categorically funded positions, they were not paid a salary according to the certificated employee schedule; instead, they were paid the hourly rate applicable to temporary employees.

19. The court in *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260 (*Bakersfield*) addressed whether a school district improperly classified certain certificated employees as temporary employees. With respect to the employees who worked in categorically funded programs, the court stated:

Although such persons are not specifically identified in the Code as temporary employees, they are treated in much the same way in that they may be dismissed without the formalities required for probationary and permanent employees in the event the program expires or is terminated, and their service does not count toward acquiring permanent status (unless they are reemployed the following year in a probationary position). (See *Zalac, supra*, 98 Cal.App.4th at pp. 842-846 [teacher properly classified as temporary employee for two years while working in categorically funded program should have been classified as probationary employee when rehired for third year in regular position after discontinuation of program]; *Schnee, supra*, 125 Cal.App.4th 555, 560-565 [disagreeing with *Zalac* dictum regarding when permanent status accrues].)

“The intent of former section 13329 [now § 44909] was ‘to prevent a person from acquiring probationary status solely through teaching in a categorically funded program. This permits the hiring of qualified persons for categorically funded programs of undetermined duration without incurring responsibility to grant tenured status based on such teaching services alone.’ [Citation.] The section ‘was intended to give school districts flexibility in the operation of special educational programs to supplement their regular program and to relieve them from having a surplus of probationary or permanent teachers when project funds are terminated or cut back.’ [Citation.]” (*Zalac, supra*, 98 Cal.App.4th at p. 845.)

[¶] ... [¶]

⁴ The temporary contracts which the District executed with respondents Prom and Argain were not offered into evidence.

Thus, certificated teachers assigned to a categorically funded program may be laid off without the procedural formalities due a permanent and probationary employee *only* if the program has expired. (*Hart Federation of Teachers, supra*, 73 Cal. App. 3d at pp. 215-216; *Zalac, supra*, 98 Cal.App.4th at p. 852.) Here, so far as the record discloses, none of the programs to which the 19 laid-off employees were assigned had expired. (*Id.* at pp. 1286-1287. Italics in original.)

The court in *Bakersfield, supra*, 145 Cal.App.4th at p. 1301, concluded that a school district:

may classify as temporary employees only those persons who, by virtue of the position they occupy or the manner of service they perform, are defined or described as temporary employees in the Code. All certificated employees who are not so classified as temporary employees, and who are not properly classified under the Code as permanent or substitute employees, must be classified as probationary employees (§ 44915) and must be accorded the rights of probationary employees as provided in the Code, including the right to accrue seniority (§ 44845) and the rights to notice and a hearing in the event of a workforce reduction (§§ 44949, 44955).

20. Respondents Prom and Argain argue that the above-quoted language in *Bakersfield* should be interpreted to mean that the only time employees in categorically funded positions are treated like temporary employees is when they are denied the due process termination protections set forth in Education Code sections 44949 and 44955 at the expiration of their categorically funded programs. According to respondents, because Education Code section 44909 does not explicitly classify certificated employees who work in categorically funded positions as “temporary,” at all other times, they should be treated as probationary employees, the default classification. Respondents recognize that Education Code section 44909 provides that time spent in categorically funded positions does not accrue toward permanent status, unless certificated employees are subsequently hired as probationary employees and worked at least 75 percent of the previous year’s school days. Respondents contend, however, that, even though the time they spent in categorically funded positions may not be counted toward achieving permanent status unless they meet the 75 percent requirement, this limitation affects only their tenure and not their seniority.⁵ In other words, these respondents argue that the District should have considered them as “prob 0” for the time they served in categorically funded positions that was not counted toward permanent status, and their seniority dates should be changed accordingly.

⁵ Tenure is the relationship between a certificated employee and the District which gives the employee greater job security. Seniority defines the relationship of certificated employees to each other. Among the certificated employees credentialed to provide a given service, greater seniority in the District gives greater legal entitlement to a position. (See *Ferner v. Harris* (1975) 45 Cal.App.3d 363.)

21. The *Bakersfield* court addressed the issue of whether employees in categorically funded programs which had not expired should be afforded the due process protections set forth in Education Code sections 44949 and 44955 during a layoff. The *Bakersfield* court was not asked to address whether employees whose programs or contracts had already expired should obtain seniority credit for the time they had worked in categorically funded positions in the past. The rights of certificated employees whose contracts for categorically funded positions had expired were addressed by the courts in *Zalac v. Governing Board of Ferndale Unified School District* (2002) 98 Cal.App.4th 838 (*Zalac*), and *Schnee v. Alameda Unified School District* (2004) 125 Cal.App.4th 555 (*Schnee*).

22. In *Zalac*, the court determined that a teacher who had worked in a categorically funded position during the first two years of her employment was properly classified as a temporary employee during that period. The court found that the “intent of former section 13329 [now Education Code section 44909] was ‘to prevent a person from acquiring probationary status solely through teaching in a categorically funded program. This permits the hiring of qualified persons for categorically funded programs of undetermined duration without incurring responsibility to grant tenured status based on such teaching services alone.’” (*Zalac, supra*, 98 Cal.App.4th at p. 845.) The court explained that the rationale underlying Education Code section 44909 was to permit “school districts to hire additional teachers for special programs so long as the designated funds remain available, while retaining the flexibility to readily lay these teachers off if and when the funding is discontinued.” (*Id.* at p. 851.) The court explained further that “school districts might be disinclined to participate [in a categorically funded program] if there were a risk that teachers hired to implement the program would have seniority rights if the particular program should be discontinued.” (*Ibid.*)

23. In *Schnee*, the court determined that when a certificated employee has been employed for several years in a categorically funded position under Education Code section 44909, and is subsequently employed by the school district in a probationary position, the teacher obtains permanent status only if and when the teacher is retained for the succeeding school year. The certificated teacher in *Schnee* was employed by the school district for eight years as a reading specialist, a categorically funded position. She was thereafter hired by the school district as a full-time third grade teacher, a probationary position. The question before the court in *Schnee* was when did the teacher attain permanent status under Education Code section 44909.

The *Schnee* court found that Education Code section 44909 “does not state that permanent status is obtained as soon as the individual is retained in the probationary position, but merely that none of the service in the categorically funded position may count towards permanent status unless the individual has first been retained as a probationary employee.” (*Schnee, supra*, 125 Cal.App.4th at p. 563.) The court concluded that:

In the context of the employment scheme established in the Education Code, the requirement that the individual be

“subsequently employed” as a probationary employee contemplates that the individual be so employed for a school year. . . . If Schnee’s interpretation of the statute were accepted, on the date on which a teacher who formerly served in a categorically funded program for at least two years first renders paid service in a probationary position (see § 44845), the individual would immediately acquire permanent status. In effect, the individual would never serve as a probationary employee, much less do so for a school year, although section 44909 requires as a condition of receiving credit for service in a categorically funded program that the person be “subsequently employed as a probationary employee.” (*Ibid.*)

The court explained that:

The trial court felt that Schnee’s reading of the statute would require a school district facing categorical program cuts to either “hire or fire” the teacher, and that “[w]ithout the benefits of a year of classroom evaluation, districts most likely will feel compelled to fire.” Whether or not that is so, Schnee’s interpretation unquestionably would deprive the school district of the opportunity to evaluate the performance of the individual as a general curriculum teacher, and would require the district to decide whether to grant tenured status based solely on the individual’s performance in the categorically funded program. . . . But however qualified Schnee may have shown herself to be as a regular classroom teacher by capably performing as a reading specialist, we are in no position to say that this is necessarily true for service in any categorically funded program. (*Schnee, supra*, 125 Cal.App.4th at p. 563.)

The court also stated that it could “perceive no reason for treating persons whose employment is temporary by virtue of section 44909 differently in this respect than temporary employees under section 44919.” (*Schnee, supra*, 125 Cal.App.4th at p. 564.) The court held that a certificated employee must serve for a year as a probationary employee before receiving any credit for his or her prior period of temporary employment in a categorically funded position. (*Ibid.*)

24. The reasoning of the courts in *Zalac* and *Schnee* applies in this case. While respondents Prom and Argain argue that their seniority rights should be separated from their tenure rights, there is no indication in either *Zalac* or *Schnee* that the courts believed that the seniority rights of employees in categorically funded positions should be any different from their tenure rights. To the contrary, the *Zalac* court made clear that it believed that “school districts might be disinclined to participate [in a categorically funded program] if there were a risk that teachers hired to implement the program would have seniority rights if the particular program should be discontinued.” (*Zalac, supra*, 98 Cal.App.4th at p. 851.) The

Schnee court made clear that the time which certificated employees spent in categorically funded positions, no matter how valuable, cannot be equated to the time spent in probationary positions. No matter what the *Bakersfield* court may have found about the due process rights of certificated employees serving in existing categorically funded programs, once an employee is no longer working in such a program, his or her right to probationary status is limited by the provisions of Education Code section 44909 as interpreted by *Schnee*: if the employee is subsequently hired as a probationary employee, the employee is entitled to have one year of prior service in a categorically funded position tacked on, so long as the employee worked at least 75 percent of the regular school days during that prior year. Given the reasoning of the courts in *Zalac* and *Schnee*, the District properly determined the seniority dates of respondents Prom and Argain.

25. There was no evidence that the District proposes to reduce any services that are mandated by state or federal laws or regulations below mandated levels.

26. Any other assertions put forth by respondents at the hearing and not addressed above are found to be without merit and are rejected.

27. Other than as set forth in Finding 12 with regard to respondent Roberts, no junior employees are being retained to render services that more senior respondents are certificated and competent to perform.

28. The District's reductions and discontinuances of particular kinds of services relate solely to the welfare of the District's schools and pupils.

LEGAL CONCLUSIONS

1. The District complied with all notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955.

2. The services identified in the PKS Resolution are particular kinds of services that may be reduced or discontinued under Education Code section 44955. The Governing Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuance of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

3. Cause exists to reduce certificated employees of the District due to the reduction or discontinuance of particular kinds of services. The District properly identified the certificated employees to be laid off as directed by the Governing Board.

4. As set forth in Finding 12, the District failed to establish that Martine Knapp, by reason of her NCLB compliance, has "special training and experience necessary" to teach seventh and eighth grade English that respondent Jennifer Roberts does not possess (Ed.

Code, § 44955, subd. (d)(1).). Because respondent Roberts is credentialed and competent to render services that a more junior employee has been retained to provide, the District must rescind the Notice of Recommended Layoff served upon respondent Roberts.

5. Other than as set forth in Finding 12 and Legal Conclusion 4, no junior certificated employee is scheduled to be retained to perform services that a more senior respondent is certificated and competent to render.

6. Cause exists to give notice to respondents, other than respondent Roberts, that their services will be reduced or will not be required for the 2009-2010 school year because of the reduction and discontinuance of particular kinds of services.

RECOMMENDATION

1. Cause exists for the reduction of 60.1 full-time equivalent certificated positions at the end of the 2008-2009 school year.

2. The District shall rescind the Notice of Recommended Layoff served upon Jennifer Roberts.

3. Notice may be given to respondents other than Jennifer Roberts that their services will be reduced or will not be required for the 2009-2010 school year. Notice shall be given in inverse order of seniority.

DATED: May 12, 2009

KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings