

BEFORE THE
BOARD OF TRUSTEES
LAKE ELSINORE UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2009030492

CERTIFICATED EMPLOYEES OF THE
LAKE ELSINORE UNIFIED SCHOOL
DISTRICT LISTED ON EXHIBIT A,

Respondents.

PROPOSED DECISION

On April 15, 2009, in Lake Elsinore, California, Alan S. Meth, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Mark W. Thompson, Attorney at Law, represented the Lake Elsinore Unified School District.

Jon Y. Vanderpool, Attorney at Law, represented the respondents set forth on Exhibit A attached hereto.

Prior to the hearing, the District withdrew layoff notices for Amanda Klopp, Pamela Marks, and Andrea Michelson. During the hearing, the District withdrew the layoff notice for Debra Bare.

The matter was submitted on April 15, 2009.

FACTUAL FINDINGS

1. On or about March 15, 2009, Kip Meyer, Assistant Superintendent, Personnel Services of the Lake Elsinore Unified School District (hereafter, "the District"), made and filed the accusations against respondents in his official capacity.

2. Respondents are certificated employees of the District.

3. Before March 15, 2009, pursuant to Education Code sections 44949 and 44955, Dr. Frank W. Passarella, Superintendent, notified the Board of Trustees of the District

of the Superintendent's recommendation that respondents be notified their services will not be required for the ensuing school year. The Superintendent's notification to the Board of Education set forth the reasons for the recommendation.

4. On or before March 15, 2009, each respondent was given written notice that the Superintendent had recommended that notice be given to respondents, pursuant to Education Code sections 44949 and 44955, that their services will not be required for the ensuing year. Each written notice set forth the reasons for the recommendation. The notices satisfied the requirements of sections 44949 and 44955. *San Jose Teachers Association, Inc. v. Allen* (1983) 144 Cal.App.3d 627, 632; *Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 803-04, distinguishing *Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, 360-63.

5. Each respondent timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year. Accusations were timely served on respondents, and each respondent filed a timely Notice of Defense. All pre-hearing jurisdictional requirements have been met.

6. The Governing Board of the District took action in Resolution No. 08-09-057 to discontinue the following services for the 2009-10 school year:

K-5 Elementary Classroom Teachers	(178 F.T.E.)
Middle School Core Teachers	(18 F.T.E.)
Middle School Science Teachers	(3 F.T.E.)
Middle School Social Science	(2 F.T.E.)
Middle School English Teachers	(2 F.T.E.)
Middle School Math	(1.8 F.T.E.)
Middle School Physical Education	(0.2 F.T.E.)
High School Biology/Environmental Science	(4 F.T.E.)
High School English	(4 F.T.E.)
High School Social Science	(4 F.T.E.)
High School Mathematics	(4 F.T.E.)
High School Athletic Directors	(3 F.T.E.)

The resolution proposed elimination of a total of 224 full-time equivalent positions.

The resolution provided:

That "competence" as described in Education Code section 44955(b) for the purposes of bumping shall necessarily include possession of: (1) a valid credential in the relevant subject matter area; (2) "highly qualified" status under the No Child Left Behind Act in the position to be assumed; and (3) an appropriate formal (not emergency) EL authorization, if required by the position to be assumed.

The services set forth above are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. *California Teachers*

Association v. Board of Trustees of the Goleta Union School District (1982) 132 Cal.App.3d 32, 34-37 and cases cited therein. *See also San Jose Teachers Association v. Allen, supra* at 635-38, in which the court specifically rejected the reasoning of *Burgess v. Board of Education* (1974) 41 Cal.App.3d 571; *Zalac v. Governing Board* (2002) 98 Cal.App.4th 838, 853-54.

Furthermore, these services may be reduced because of budgetary difficulties. *Zalac v. Governing Board, supra*, and cases cited therein. The decision to reduce or discontinue the services is neither arbitrary nor capricious but rather a proper exercise of the District's discretion.

7. No certificated employee junior to any respondent is retained to perform services which any respondent is certificated and competent to render.

8. The reduction or discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees of the District as determined by the Board of Trustees.

9. The Board of Trustees considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

10. The Board of Trustees established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. The Board of Trustees provided the order of termination shall be based on the needs of the District and its students. The criteria were to be applied based on information on file as of February 13, 2009, one step at a time, until the tie was broken in accordance with the following:

- “1. Highly Qualified Status under NCLB in area of assignment.
2. Possession of an authorization to teach English Language Learners in order of priority:
 - a. Bilingual Cross Cultural Language and Academic Development (BCLAD);
 - b. Cross Cultural Language and Academic Development (CLAD);
 - c. San Bernardino 1969 or San Bernardino 395 Certificate, Language Development Specialist Certificate, or Specially Designated Academic Instruction in English (SDAIE) authorizations.
3. Credential status in area of assignment, in order of priority:
 - a. Clear, Life, Standard Secondary, etc.;

- b. Preliminary;
 - c. Intern;
 - d. Provisional or STP.
4. Total number of Clear or Preliminary credential in different subject areas.
 5. Total number of supplementary authorizations in different subject areas.
 6. Possession of a Doctorate Degree (Ph.D. and/or Ed.D. only), earliest date prevails.
 7. Possession of a Masters Degree, earliest date prevails.
 8. Possession of National Board of Certification.
 9. Number of years of credentialed (contracted) teaching experience prior to employment with District.
 10. Total number of post-secondary credits on file with the District by February 13, 2009.”

11. If ties cannot be broken by using the above criteria, then order of seniority shall be determined by a random drawing of lots among employees in the individual tie.

12. The District created a Seniority List which contains employees’ seniority dates (first date of paid service), current assignments and site, status, credentials and authorizations, and NCLB area. The District used the Seniority List to develop a proposed layoff and "bumping" list of the least senior employees currently assigned in the two 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 determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and whether they could “bump” other employees.

13. Respondents Joyce Alford, Laurie Peters, Dana Chandler, and Patrick Webb have the same seniority date, August 18, 2003. They were hired out of the internship program at California State University, San Marcos and were mandated to receive special training by the superintendent at the time, Keith McCarthy, before the beginning of the school year. They did not have an option to attend the training. They were paid on an hourly basis. Because they were mandated to attend the special training caused by their hiring out

of the internship program, they should be given credit for those days of service, and their seniority dates should be adjusted August 12, 2003 to reflect this training.

14. Respondent Virginia Redd is the coordinator of the Advancement Via Individual Determination (AVID) program at Elsinore Middle School. She testified that both the teachers who teach in the AVID program as well as the program itself needs certification from the Riverside County Department of Education. Ms. Redd testified that four teachers in the AVID program at Elsinore Middle School and three at Canyon Lake Middle School were subject to the layoff. She testified that she had been advised that the program could not continue without trained teachers, and the District could lose a source of funding without the requisite certification which was based on teacher training.

15. Respondents Dana Chandler and Susan Fannon, among others, are involved in a multi-year study conducted by the District and the University of Nebraska with a \$500,000 federal grant. The layoff of teachers who participate in the study might affect the continuation of the grant.

16. Respondents Kiara Wade, Brenda Ackerman, Bradley Tucker, Rosa Meza, Jesse Rubner, Teresa Casey, and Christina Viveros are Collaborative for Success in Science teachers. It is a training program for science teachers at the fourth through eighth grade levels. The program could be severely impacted if the teachers in the program are laid off.

17. Respondent Lori Edwards teaches at the elementary school level. She is of African-American descent. She challenged the District's layoff because it adversely impacted the number of African-American teachers. She noted that about half of the District's African-American teachers would be laid off, and this constituted a gross statistical disparity. She further pointed out the District was required to meet affirmative action requirements and believed that protected groups should be skipped.

18. Respondent Edwards also testified that her layoff was motivated by prior conflicts she had had with the District, but she offered no evidence to support this claim, and it therefore must be rejected.

19. Respondent Chris Rogers testified he teaches seventh and eighth grade life and physical science at Elsinore Middle School. He is a first year probationary teacher with a preliminary single subject credential in science. He was bumped by Anthony Peralta, a tenured teacher who has a clear single subject credential in physical education and a supplementary authorization in biology. Mr. Peralta lost his position as a high school athletic director when the District reduced that service.

Respondent Laurie O'Neil testified she is a second year probationary teacher with credentials similar to respondent Rogers. She is senior to Mr. Rogers and can teach seventh and eighth grade science. She was bumped by Tom Halderman, a tenured fourth grade teacher with a preliminary multiple subject credential and supplemental authorizations in science and physics.

Both respondents Rogers and O'Neil question whether Mr. Peralta and Mr. Halderman are qualified to teach seventh and eighth grade science.

Mr. Meyer testified that Mr. Peralta, a high school teacher holding a credential in science, can teach any science subject in middle school. He also testified that Mr. Halderman can provide the same services that respondent O'Neil can provide, that is the teaching of science classes in middle school. Thus, the bumping of respondents Rogers and O'Neil was proper.

20. Michelle Campbell is a tenured teacher with a multiple subject credential and a supplemental authorization in English. She is Highly Qualified under No Child Left Behind. She has taught eighth grade English and currently teaches K-8 CORE. She compared her qualifications to Andrea Michelson, whose qualifications and seniority were similar, but whose layoff was rescinded, and she asked why she was not retained.

Mr. Meyer agreed that she has the supplemental authorization in English and was Highly Qualified, and noted that if there were someone on the list she could bump, she would. However, she was lower on the seniority list than Ms. Michelson. He further explained there had been some confusion over her qualifications, but they would be corrected for purposes of rehire. Her layoff must therefore be upheld.

21. Respondent Jennifer Smith testified that she began the 2005-06 school year as a long-term substitute, but on September 22, 2005, she signed a contract to teach in the position of a probationary teacher. When she taught as a substitute, she was paid on that pay rate, but after she became a probationary teacher, the District paid her the difference between the long-term substitute rate and a probationary teacher contract for the time she served as a substitute. She believed her seniority date should be the start of the school year, that is August 18, 2005, instead of September 26, 2005. Other teachers in similar positions are Cathy Lockey, Monica Grefe, Julie Dietsch, Debra Meece, Melody Patula, Sandra Nicholson, and Pamela Walton.

22. Respondent Jamie Archer, a tenured teacher, possesses a clear designated subjects vocational education teaching credential: full-time in the authorized subject of office occupations and recently obtained a clear career technical education full-time authorization in finance and business, information technology, and arts, media, and entertainment. She teaches virtual enterprise and leadership in the alternative education program. Erika Bermudez, a teacher more senior than respondent Archer, possesses a multiple subject credential and a supplemental authorization in business. Respondent Archer does not believe Ms. Bermudez can teach information technology and believed she should be able to keep a portion of her assignment.

Mr. Meyer testified that Ms. Bermudez' business credential allowed her to teach all the classes that respondent Archer taught in alternative education. Accordingly, the District properly determined that Ms. Bermudez could bump respondent Archer.

23. Respondent Judith Freund is a tenured teacher with a seniority date of August 19, 2004, and has a preliminary multiple subject credential and EL authorization. She testified she began working for the District in 1989 as a para-educator (a classified position), and moved to the Head Start program in 1993, where she taught preschool as a certificated employee. She did not know if she became tenured while in this position. She resigned this position at the end of 2001, and in January 2002, began working as a long-term substitute. In September 2004, she became a probationary teacher. She believed her seniority date should be either 1993 or 2002.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter relating to the elimination of 224 full-time equivalent positions exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. Education Code section 44955 provides in relevant part:

...

(b) [W]henver a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . and when in the opinion of the governing board of the district it shall have become necessary . . . to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render. . . As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, 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. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

...

(d) *Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:*

(1) *The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.*

(2) *For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.*

To put it more succinctly, 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. See *Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469. Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. See *Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; see also *Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831.

Regarding Factual Findings 14, 15, 16, and 17, the teachers who testified in support of the AVID program, the federal grant, and the Collaborative for Success in Science, painted pictures of worthy programs. Racial diversity, of course, is another worthy goal. However, it is clear from section 44955, subdivision (d), that the decision to continue a particular program or maintain efforts at reaching a particular goal such as racial diversity is vested in a school district’s discretion. Under section 44955, subdivision (d), the District had the authority to skip junior teachers in order to address these matters, but it chose not to do so. There is no requirement that a district must skip junior teachers in order to advance a program or goal. For this reason, respondents’ arguments must be rejected.

3. Education Code section 44917 provides in part:

Except as provided in Sections 44888 and 44920, governing boards of school districts shall classify as substitute employees those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service.

...

Any person employed for one complete school year as a temporary employee shall, if reemployed for the following school year in a position requiring certification qualifications, be classified by the governing board as a probationary employee and

the previous year's employment as a temporary employee shall be deemed one year's employment as a probationary employee for purposes of acquiring permanent status.

Education Code section 44918 provides in part:

(a) 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.

With regard to Factual Finding 21, there is no dispute that each respondent was first hired as a substitute teacher and paid as such. Accordingly, each respondent was properly classified as a substitute teacher under section 44917. See *Vasquez v. Happy Valley Union School Dist.* (2008) 159 Cal.App.4th 969, 984-85; *Rutley v. Belmont Elementary Sch. Dist.* (1973) 31 Cal.App.3d 702. There is also no dispute that each respondent became a probationary teacher upon the signing of a contract about a month after the school year began.

The statutory authorization for retroactively altering the status of a substitute teacher to a probationary teacher is contained in sections 44917 and 44918. Neither applies to this situation. Nor is there evidence to suggest that respondents were not properly notified prior to the commencement of their service as substitute teachers that they were, in fact, to be serving as substitute teachers. Accordingly, the decision in *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, does not apply.

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.

It, therefore, follows that the District properly determined that respondents' seniority dates were the dates they commenced service to the District as probationary teachers and not earlier.

4. With regard to Factual Finding 23, no evidence was offered to show how many days respondent Freund worked as a substitute during the 2003-04 school year. If she worked at least 75 percent of the days the regular schools of the District were maintained in that school year, and if she performed the duties normally required of a certificated employee of the District, then pursuant to section 44918, that year would be deemed to be a probationary year since she was employed as a probationary employee for the 2004-05 school year. However, respondent Freund's resignation precludes her from obtaining seniority back to 1993, and section 44918 only allows retroactive credit as a substitute of one year, not two.

In the absence of evidence showing the number of days respondent Freund worked during the 2003-04 school year and her duties, the District is directed to determine these matters and if it finds that she satisfies the requirements of section 44918, then the District shall recalculate her seniority date.

5. Respondents challenge the Board's resolution that sets forth the tie-breaking criteria and argue it constitutes an abuse of discretion because it credits aspects of employment in an arbitrary and/or discriminatory manner. The criteria have to meet the requirements of section 44955:

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. (See also § 44846.)

Prior to 1978, ties between teachers who shared the first date of paid service were broken by lotteries, but the system was changed by what was called the Behr Bill. Its purpose, according to the legislative counsel, was "to enable districts to respond efficiently to declining enrollment by laying off the less essential of the certificated staff hired on the same date." Ozsogomonyan, Teacher Layoffs in California: An Update, 30 *Hast. Law Journal* 1746.

On its face, the criteria set forth in the resolution appear to meet the needs of the district and its students. No evidence was offered to establish that the criteria were applied in an erroneous or discriminatory manner. The tie-breaking criteria are upheld.

6. Cause exists under Education Code sections 44949 and 44955 for the District to discontinue particular kinds of services relating to 224 full-time equivalent positions. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. A preponderance of the evidence sustained the charges set forth in the Accusation. It is recommended that the Board give respondents notice before May 15, 2009, that their services will no longer be required by the District.

ORDER

1. Regarding respondent Freund, the District is ordered to review its records to determine how many days she worked and her duties during the 2003-04 school year, and if she satisfied the requirements of section 44918, to adjust her seniority date to the beginning of the 2003-04 school year.

2. The accusations served on respondents Amanda Klopp, Pamela Marks, Andrea Michelson, and Debra Bare are dismissed.

3. The seniority dates of respondents Joyce Alford, Laurie Peters, Dana Chandler, and Patrick Webb shall be adjusted to August 12, 2003.

4. The Accusations served on all the remaining 211 respondents are sustained. Notice shall be given to each respondent before May 15, 2009 that his or her services will not be required for the 2009-10 school year pursuant to the Governing Board's resolution because of the reduction of particular kinds of services.

Notice shall be given in inverse order of seniority.

DATED: _____

ALAN S. METH
Administrative Law Judge
Office of Administrative Hearings