

BEFORE THE GOVERNING BOARD
OF THE
SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of
Certain Employees of the San Bernardino
City Unified School District,

Respondents.

OAH No. 2009030791

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on April 13, 2009.

Sherry Gordon, Attorney at Law, and Todd Robbins, Attorney at Law, represented the San Bernardino City Unified School District.

Elizabeth Garfield, Attorney at Law, and Chi-Young Min, Attorney at Law, represented most of the certificated employees who were named as respondents in this layoff proceeding.

Respondents Maria Jimenez-Garcia, Vanessa Johns-King, Dimitrios Chronopoulos, and Maribel Alba represented themselves.

The matter was submitted on April 13, 2008.

FACTUAL FINDINGS

The San Bernardino City Unified School District

1. The San Bernardino City Unified School District (SBCUSD or the district) is located in San Bernardino, California. The district serves the City of San Bernardino, part of the City of Highland, and the unincorporated areas of Muscoy and Devore. SBCUSD is currently the seventh largest school district in California, with 65 schools in operation and a student enrollment of more than 54,000. SBCUSD employs approximately 7,000 persons, more than 3,000 of whom are certificated employees. Its annual budget is approximately \$600 million, about 85 percent of which pays employee salaries and benefits.

2. The District is governed by an elected seven-member Board of Education (the governing board). Arturo Delgado, Ed.D. (Dr. Delgado), the Superintendent of Schools, is the Board's Chief Executive Officer. Harold J. Vollkommer, Ed.D. (Dr. Vollkommer) is the Assistant Superintendent of Schools, Certificated Human Resources.

3. For the past several years, the district has taken reasonable efforts to become fully compliant with federal No Child Left Behind¹ (NCLB) standards. On October 16, 2007, SBCUSD's governing board enacted a board policy specifically requiring the hiring of highly qualified NCLB teachers.

In its NCLB policy, the governing board stated its intent to recruit and hire teachers who possessed the subject matter knowledge and teaching skills required by NCLB for educationally disadvantaged students and for students in core academic subjects. Notice was taken of that resolution, which provides in part:

¹ Notice is taken that the No Child Left Behind Act of 2001 (Public Law 107-110) was signed into law on January 8, 2002. NCLB was designed to improve the performance of primary and secondary schools by increasing the standards of accountability for states, school districts, and schools within the United States. NCLB enacted standards-based education reform (formerly known as outcome-based education) in the belief that setting high standards and establishing measurable goals improves individual outcomes in education. NCLB requires states seeking federal funding to develop assessments in basic skill instruction given to all students in certain grades.

NCLB requires that all teachers teaching in core academic subjects be "highly qualified" no later than the end of the 2005-06 school year. Core academic subjects include reading, English-language arts (including the English language development component of an adopted program), mathematics, science, foreign languages, civics/government, economics, arts, history, and geography. To become NCLB "highly qualified" in California, a teacher must meet three criteria: Possession of a bachelor's degree; possession of an appropriate California teaching credential; and demonstrated core academic subject area competence by means of examination, coursework, advanced certification, or completion of the California High Objective Uniform State Standard of Evaluation (HOUSSE) in the subject area being taught.

Self-contained elementary school teachers (who typically hold a multiple subject teaching credential) must demonstrate competence in those areas generally taught as part of the elementary school curriculum to become highly qualified. NCLB requires that all "new" elementary school teachers demonstrate subject-matter competency by exam. (California Administrative Code, tit. 5, § 6102.) All "new" teachers who receive a Multiple Subject Preliminary, Clear, Professional Clear or an intern credential on or after July 1, 2002, must pass a Commission on Teacher Credentialing (CTC) approved subject-matter exam to become NCLB-compliant (even though that may not be required to receive a credential). Currently, the CSET is the only CTC-approved exam for "new" school elementary teachers. "Not new" elementary school teachers have two options to demonstrate subject-matter competency: the exam option (passing any current or prior CTC-approved multiple-subjects exam), or meeting HOUSSE standards through a process that evaluates the teacher's knowledge and ability based on a high, objective uniform standard of evaluation that meets federally established criteria.

For "new" middle school and high school teachers (who typically hold a single subject credential) there are several ways to become highly qualified: the exam option requires the applicant to pass a CTC-approved subject-matter exam in the NCLB core academic subject area; the course work option requires (a) the completion of CTC-approved single subject matter program in the core area; (b) a major in the core area; (c) a graduate degree in the core area; (d) a major equivalent in the core area (32 non-remedial units earned with a grade of C or higher); or (e) advanced certification (National Board Certification) in the core area. For "not new" middle and high school teachers there are four options to demonstrate subject-matter competency: the exam option (CTC-approved single subject matter program in the core area); the course work option (major or major-equivalent in the core area); advanced certification (National Board Certification) in the core area; or the completion of HOUSSE requirements.

“All teachers hired after the first day of the 2002-03 school year to teach core academic subjects in a program supported by Title I funds shall be ‘highly qualified’ as defined by federal law and the State Board of Education, upon hire.”

The resolution also provides:

“All teachers who were hired prior to the beginning of the 2002-03 school year in Title I programs shall demonstrate that they are highly qualified not later than the end of the 2006-07 school year . . .

The Superintendent or designee shall monitor the distribution of ‘highly qualified’ teachers among district schools and develop strategies, as needed, to encourage teachers who meet NCLB requirements to teach in schools with the lowest student performance . . .

The Superintendent or designee shall inform teachers of NCLB requirements and shall identify the additional qualifications, if any, that individual teachers need to demonstrate in order to meet the requirements”

4. On January 22, 2009, Dr. Delgado received notice from the California Department of Education that SBCUSD had “not met the 100 percent Highly Qualified Teacher (HQT) requirement for three consecutive years as mandated by the No Child Left Behind Act (NCLB) of 2001.” The district was placed into Level C of the Compliance, Monitoring, Interventions, and Sanctions (CMIS) program for the 2008-09 school year.

5. SBCUSD currently has a 96 percent compliance rate with the NCLB requirement that its teachers be “highly qualified.”

The Fiscal Crisis – Economic Layoffs

6. Proposition 13 limited the imposition of local property taxes and reduced a major source of assured revenue for funding public education in California. Since the passage of Proposition 13, public school districts have looked primarily to the State of California and to other governmental entities for funding.

A school district cannot determine the level of state funding it will receive until the state budget is chaptered, an event usually occurring in late June, but sometimes taking much longer as occurred in 2008. Before then, the school district’s governing board must take steps to make certain that ends meet if the worst-case financial scenario develops.

A school board’s obligation to balance its budget often requires that some teachers, administrators or other certificated employees be given preliminary layoff notices, warning them that their services will not be required for the next school year. Under Education Code section 44949, these preliminary layoff notices must be given no later than March 15.

The economic layoff statutes found in the Education Code generally require the retention of senior employees over more junior employees and the retention of permanent employees over probationary employees and other employees with less seniority. A public school district may deviate from the general rule requiring termination in reverse order of seniority only if it can demonstrate that identifiable junior employees possess a credential, special training or experience necessary to teach a course of study or to provide services which more senior employees do not possess.

The District's Response

7. In early 2009, SBCUSD's governing board and administration (as well as the governing boards and administrators of most other school districts) became acutely aware of the State of California's massive budget deficit and its crippling fiscal impact. As a result of the financial crisis, SBCUSD projected a budget deficit of about \$82 million. The district was required to look into ways to balance its budget including the reduction of certificated and classified staff and various programs.

Dr. Vollkommer and the district staff prepared a recommendation for Dr. Delgado to present to the governing board which outlined the reduction and elimination of particular kinds of services being provided by certificated employees.

8. On March 10, 2009, under Education Code sections 44949 and 44955, Dr. Delgado recommended to the governing board that the district notify certain certificated employees that their services would not be required in the 2009-10 school year and the reason for the recommended reduction in force.

9. On March 10, 2009, at a special session, the governing board passed the following resolution:

**“BOARD OF EDUCATION OF THE
SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT**

REDUCTION OF PARTICULAR KINDS OF CERTIFICATED SERVICES

WHEREAS, the Board of Education of the San Bernardino City Unified School District has determined that particular kinds of services set forth herein must be reduced or discontinued; and

WHEREAS, it is the opinion of the Board that because of the aforementioned reason, the number of certificated employees of the District must be reduced; and

WHEREAS, this Board does not desire to reduce the services of regular certificated employees based upon reduction of average daily attendance during the past two years.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the San Bernardino City Unified School District as follows:

A. That the particular kinds of services set forth below be reduced or eliminated commencing in the 2009-2010 school year:

Elementary K-5 Teaching Services	227	F.T.E.
Secondary Teacher	35	F.T.E.
English	10	F.T.E.
Social Studies	8	F.T.E.
Math	5	F.T.E.
Science	5	F.T.E.
Physical Education	5	F.T.E.
Foreign Language	2	
TOTAL CERTIFICATED POSITIONS	262	F.T.E.

B. That due to the reduction or elimination of particular kinds of services, the corresponding number of certificated employees of the District shall be terminated pursuant to Education Code section 44955.

C. That the reduction of certificated staff be achieved by the termination of regular employees and not by terminating temporary and substitute employees.

D. That ‘competency’ as described in Education Code section 44955(b), 44956, and 44957, for purposes of bumping and reemployment shall necessarily include possession of a valid credential in the relevant subject area.

E. That, as between certificated employees with the same seniority date, the order of termination shall be determined solely by Board-adopted criteria.

F. That the District Superintendent or designee is directed to initiate layoff procedures and give appropriate notice pursuant to Education Code sections 44955 and 44949.

PASSED AND ADOPTED this 10th day of March, 2009, in the County of San Bernardino, California.

AYES: Flores, Parra, Penman, Tillman, Valdez

NAYES: Ayala”

The governing board’s resolution did not refer to an employee’s NCLB highly qualified status in defining “competency.” Nor did the resolution contain any “skipping” criteria.

Non-Exclusive Delegation of Authority/Initiation of Layoff Proceedings

10. On March 10, 2009, Dr. Delgado designated Dr. Vollkommer to act on his behalf for purposes of initiating and implementing the reduction in force. Dr. Vollkommer and his staff thereafter took those steps necessary to identify certificated employees who should receive a preliminary layoff notice and to identify those employees whose seniority and competence entitled them to bump more junior employees.

11. On and before March 15, 2009, each certificated employee who is a respondent in this layoff proceeding was given written notice that the Superintendent of Schools had recommended that his or her services be terminated at the conclusion of the current school year and that those services would not be needed for the upcoming 2009-10 school year. Each respondent was notified of the right to a hearing. Each respondent who filed a request for a hearing was thereafter served with an accusation and other required jurisdictional documents.

The Administrative Hearing

12. On April 13, 2009, the record in the administrative hearing was opened. Jurisdictional documents were presented. Several stipulations were reached, official notice was taken, sworn testimony was given, documentary evidence was received, closing arguments were given, the record was closed, and the matter was submitted.

At the outset of the administrative hearing, and as a result of positive attrition and other matters, the preliminary notices and accusations served on respondents Jessica Aguilar, Dee Cajuat, Eric Dorame, Monica Ann Hidalgo, Ramona Rae Phillips, Santos Rodriguez III, Lanaya Marie Silva, and Kristy Annette Williams were dismissed. There was no objection.

The Particular Kinds of Services

13. The services identified in the governing board's resolution were services the governing board could properly reduce or discontinue. The reduction of those services was neither arbitrary nor capricious, and the reduction of services was a matter within the board's discretion. Before issuing preliminary layoff notices, the district's administrative staff considered all known positive attrition including resignations, retirements and probationary non-reelects to determine the number of layoff notices that needed to be issued. No particular kinds of services were lowered to levels below those levels mandated by state or federal law.

The Seniority List

14. SBCUSD maintained a seniority list, a living document that was updated as new employees were hired and as other employees retired or resigned. An employee's seniority date was based on the employee's first date of paid service with the district in a probationary position.²

² Education Code section 44845 provides:

A teacher who voluntarily attended the district's new teacher academy, which was held before the employment contracts went into effect, was not given a seniority date related to the dates on which the teacher attended the academy even though the teacher may have been paid a stipend, but was, instead, given a seniority date consistent with that teacher's first paid date of probationary service with the district under the employment contract.

A teacher hired as a probationary employee who had worked as a substitute or temporary employee for at least 75 percent of the school days during the previous year and had performed the duties normally required of a certificated employee of the school district was deemed to have served a complete school year as a probationary employee if that teacher was employed as a probationary employee in the following school year. A teacher was entitled to have that earlier year served as a long-term substitute teacher counted as a year of probationary service. The prior year was "tacked" on for seniority purposes.³

Before issuing preliminary layoff notices, the district's administration provided to the seniority list to the teachers' association with a request that certificated employees be given the opportunity to review the seniority list and, through the association, notify the district of any changes or modifications to seniority dates. Several necessary changes were brought to the district's attention and the seniority list was updated to reflect those changes.

15. Under Dr. Vollkommer's supervision, the truncated seniority list used in these layoff proceedings (Exhibit 10) was organized to include a reference number, the employee's name, the employee's seniority date (the first date of paid service in a probationary position), the employee's status (tenure, probationary 2, probationary 1, or intern), the employee's assignment, a summary of the employee's teaching credentials and authorizations, and whether the employee had sufficient seniority to bump into an existing position in the event the particular kind of service that employee had rendered was subject to the layoff but that employee was certificated and competent to render services being provided by a more junior employee.

16. There were no temporary employees or substitute employees involved in this layoff proceeding. The use of tie-breaking criteria to determine the order of layoff between employees having the same seniority date was not required. SBCUSD did not skip an appropriately credentialed junior employee to fill a position that was held by a more senior employee, even if the senior employee was not NCLB highly qualified. It was not planned that

"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 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."

any long term substitutes or temporary employees be hired to fill any of the positions being reduced through the layoff proceedings.

The District's Layoff Notices

17. In implementing the reduction in force resolution, administrators mistakenly failed to issue a preliminary layoff notice to Thomas S. Muller (Muller), a probationary middle school teacher with a multiple subject teaching credential with a seniority date of July 29, 2008. Several competent and certificated teachers with more seniority than Muller received preliminary layoff notices. As a result of the district's failure to issue a preliminary layoff notice to Muller, Muller's services for the 2009-10 school year were retained.⁴

18. Laura Marruffo, a probationary elementary school teacher with a seniority date of July 2, 2007, was the most senior employee who was competent and qualified to hold the position for which Muller did not receive a notice. As a result of the district's error in failing to serve Muller with a preliminary layoff notice, the preliminary layoff notice issued to Laura Marruffo must be rescinded. No other senior employee was prejudiced by this error.

Seniority Date Issues

19. Respondents Kelly Basoco, Callie Atencio, Victoria Dandridge, Ana Demarco, Farah Agha, Bonnie Warren, Melissa Esquibel, Michelle Bracken, and Mary Gillespie asserted that their seniority dates were incorrect.

A. Kelly Basoco claimed she worked for the district as a long-term temporary substitute teacher in the 2005-06 school year and was employed by the district as a school site substitute during 2006-07 school year.⁵ On this basis, Basoco asserted she held an earlier seniority date, one that would have avoided her being issued a preliminary layoff notice. During the hearing, the district reviewed its payroll records and confirmed that Basoco's assertion was correct. And, given Basoco's appropriate seniority date, a preliminary notice should not have been issued to Basoco; her services should be retained by the district as a result of her seniority.

B. Callie Atencio claimed she worked for the district as a long-term substitute teacher in 2007 before she was hired as a full-time probationary employee on October 6, 2009, and that her seniority date should be changed as a result of her service as a long-term substitute teacher. Even if Atencio were credited with a different seniority date as

⁴ Under Education Code section 44955(c), if "a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year."

⁵ Education Code section 44917 provides in part:

"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."

a result of this service, Atencio's position on the seniority list would not change to the extent that she could avoid the issuance of a preliminary layoff notice.

C. Victoria Dandridge claimed she worked for the district as a long-term substitute teacher from January 2007 through February 2009. Dandridge did not work 75 percent of the 2006-07 school year and thus she cannot be credited with a prior year's service. Even if Dandridge were credited with a different seniority date as a result of that service, her seniority position would not change to the extent that she could avoid the issuance of a preliminary layoff notice.

D. Ana Demarco claimed she worked from July 2007 through July 2008 as a long-term substitute teacher, and that she was hired by the district as a full time employee in 2008. Even if Demarco were credited with a different seniority date as a result of this previous service, her seniority position would not change to the extent that she could avoid the issuance of a preliminary layoff notice.

E. Farah Agha testified she worked from July 2007 through July 2008 as a long-term substitute teacher, and that she was hired by the district as a full time employee in 2008. Even if Agha were credited with a different seniority date as a result of this previous service, her seniority position would not change to the extent that she could avoid the issuance of a preliminary layoff notice.

F. Bonnie Warren testified that she had worked for the district since 2002. Warren testified that she separated from the district when her credential lapsed, but that she served as a full-time substitute teacher during her period of separation until her credential was reinstated and she was rehired in December 2008. Warren did not obtain a leave of absence from the district during the period her credential lapsed. Warren did not have the right to a different seniority date in this layoff proceeding, although Warren's previous service with the district was credited for other purposes.

G. Malissa Esquibel began her employment with the district in December 2003, after which she became the district's first resident substitute teacher. Esquibel terminated her employment with the district as a result of her pregnancy. She did not request a leave of absence. She was rehired by the district on a full-time basis in August 2008. Esquibel did not have the right to a different seniority date in this layoff proceeding, although her previous service with the district may entitle her to credit for other purposes.

H. Michelle Bracken was a long-term substitute teacher with the district beginning in January 2006, working more than 75 percent of the school year. She became a full-time employee in July 2007. On this basis, Bracken asserted she held an earlier seniority date, one that would have avoided her being issued a preliminary layoff notice. During the hearing, the district reviewed its payroll records and confirmed that Bracken's assertion was correct. And, given Bracken's appropriate seniority date, a preliminary notice should not have been issued to Bracken; her services should be retained by the district as a result of her seniority.

I. Mary Gillespie worked as a long-term substitute teacher for the district from October 2006 to July 2007, serving more than 75 percent of the school year. During the hearing, the district reviewed its payroll records and confirmed that Gillespie was entitled to a different seniority date. And, given Gillespie's appropriate seniority date, a preliminary layoff notice should not have been issued to Gillespie; her services should be retained by the district as a result of her seniority.

Denying Bumping to Non-NCLB Highly Qualified Senior Employees

20. The most hotly contested issue involved the administrators' decision to permit senior teachers who were NCLB highly qualified to bump junior employees so long as the senior teachers were credentialed and NCLB highly qualified in the subject area being taught by the junior employee, but to not permit a senior teacher who was not NCLB highly qualified to bump a junior employee from an existing position even if the senior employee held an appropriate authorization to teach in the junior employee's subject area. Dr. Vollkommer testified that section D of the governing board's resolution (" . . . 'competency' as described in Education Code section 44955(b), 44956, and 44957, for purposes of bumping and reemployment shall necessarily include possession of a valid credential in the relevant subject area") specifically authorized the district's implementation of this bumping procedure. The resolution certainly implied the use of objective criteria such as NCLB highly qualified status and it did not exclude the use of relevant criteria.

The district asserted that no certificated employee was laid off as a result of the employee's failure to be NCLB highly qualified, and that the policy precluding non-NCLB highly qualified teachers from bumping less senior NCLB highly qualified teachers was not inconsistent with the statutory directive that the services of no permanent employee be terminated while any employee with less seniority was retained to render a service which the permanent employee was certificated and competent to render, arguing that competence under Education Code section 44955, subdivision (c), included both seniority and qualifications. The administration asserted that the district was entitled to conclude that an employee's NCLB highly qualified status in a subject area demonstrated "competence" for bumping purposes and that NCLB highly qualified status was an objective measure of competence. The administration argued that having NCLB highly qualified status was extremely relevant since the California Department of Education (CDE) placed SBCUSD into a compliance, monitoring, intervention and sanction program for the 2008-09 school year for not being NCLB compliant. The administration asserted that the governing board was not required to establish more specific skipping or bumping criteria than were included in the resolution and that in implementing the reduction in force, the administration was reasonably required to consider NCLB highly qualified status for bumping purposes on the basis of the governing board's 2007 resolution wherein the board stated its intent to recruit and hire NCLB highly qualified teachers.

Respondents contended that the administration's bumping procedure denied non-NCLB highly qualified senior employees the right to bump into positions held by junior employees, even though these senior employees held appropriate authorizations to teach the subjects being taught by the more junior employees. Respondents argued that the governing

board's resolution made no reference to NCLB highly qualified status, that NCLB highly qualified status was not equivalent to a credential, that the administration's refusal to permit an appropriately credentialed senior non-NCLB highly qualified employee to occupy a junior employee's position amounted to the skipping of junior employees who were NCLB highly qualified, that the implementation of the bumping procedure was arbitrary and capricious, and that the district's failure to permit non-NCLB teachers bumping rights resulted in the improper termination of qualified and competent senior employees, thereby violating the district's obligation under Education Code section 44955, subdivision (c), to "make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render."

21. There is no legal requirement mandating that skipping criteria be contained in a governing board's resolution. SBCUSD's administration was required to implement the governing board's resolution in a manner that was consistent with the board's policies and the district's effort to remain fully NCLB compliant. While NCLB highly qualified status is not the same as a teaching credential, NCLB highly qualified status is an objective measure of competence, and the use of NCLB highly qualified status as a basis to permit bumping did not involve the application of an arbitrary or capricious standard. The implementation of a policy that precluded an employee who was not NCLB highly qualified from taking the position of a junior employee who was highly qualified (whether that process is called bumping or skipping) involved considerations of both seniority and qualifications, and the evidence established that implementation of that policy was in the best interests of the district and the students. The policy that non-NCLB employees should not be allowed to bump less senior NCLB compliant teachers was not inconsistent with the statutory directive requiring the retention of the most senior qualified certificated employees.

Core Assignments

22. Another contested issue was whether several senior middle school teachers who received preliminary layoff notices held the appropriate credentials or authorizations needed to bump into positions that were being retained by more junior employees. According to Dr. Vollkommer, the resolution of the middle school bumping issue required that "core subjects" be distinguished from "core assignments" and then determining if the senior employee possessed the appropriate credential required to bump into a core assignment. Respondents believed the "core subject"- "core assignment" was a false distinction.

Determining what was a "core assignment" and whether teaching a core assignment required a special qualification was an issue that required specialized education, training and experience. Knowledge and familiarity with the concept of a "core assignment" and concerning the various credentials and authorizations issued by the California Commission on Teacher Credentialing (CCTC) was required to sort through and resolve these issues.

23. Most elementary schools, regardless of the grade level configuration, are organized around a self-contained classroom where all, or most, subjects are taught to the same group of children by a single teacher. Most elementary school teachers hold a Ryan Multiple Subject Teaching Credential, although teaching under a Multiple Subject University Internship

or a Multiple Subject District Internship is not uncommon. These credentials and authorizations permit individuals to teach multiple subjects to students in a self-contained classroom.

24. Middle schools and junior high schools⁶ provide a transition from the elementary school's self-contained classroom model to departmentalized programs offered in high schools. As a result, middle schools and junior high schools may incorporate some features not generally present at the elementary school or high school levels, and some authorizations to teach middle school are unique. Many authorizations designed for middle schools do not apply to grade nine.

If a middle or junior high school program is arranged so that one teacher provides instruction in several subjects, it is a self-contained classroom and that middle school or junior high school teacher must have a credential that authorizes that service. But, when a middle school or a junior high school teacher teaches one subject to several groups of students, he or she needs to have a credential that authorizes the teaching the subject in a departmentalized setting.

Within the middle school and junior high school milieu, a "core assignment" exists, as defined in Education Code section 44258.1. A core assignment involves a middle school or junior high school teacher who provides instruction in a self-contained classroom where he or she teaches two or more subjects for two or more periods per day to the same group of pupils, and, in addition, teaches any of those subjects to a separate group of pupils at the same grade level for an additional period or periods, provided that the additional period or periods do not exceed one-half of the teacher's total assignment.

25. Most high schools have departmentalized classes. Most high school teachers hold a single subject teaching credential. Under the single subject teaching credential, a teacher may teach any class within the broad single subject area listed on the document. Departmentalized classes also may be taught by persons holding a Single Subject University Internship or a Single Subject District Internship, but service is restricted to the participating employing agencies.

26. The California Commission on Teacher Credentialing Administrator's Assignment Manual (the CCTC assignment manual) is used by school site administrators, personnel officers, and credential technicians responsible for assigning teachers and other certificated employees to specific positions including "core assignments."

Based on his education, training, and many years of experience as an administrator, Dr. Vollkommer established that he was extremely familiar with the kinds of credentials and authorizations required to teach in various subject matter areas and was knowledgeable about what constituted a core assignment. Dr. Vollkommer was familiar with the kinds of credentials and authorizations required to teach as an alternative teacher or in such specialized programs as AVID and Opportunity. On the basis of his expertise, Dr. Vollkommer concluded the assignment and reassignment of certificated employees providing services in middle schools as set forth in the seniority list and bumping chart was appropriate.

⁶ Middle schools are defined as schools that most frequently include grades six through eight but may have any combination of grades five through eight. Junior high schools often also include grade nine.

On cross-examination, Dr. Vollkommer was asked if certain middle school assignments classes were core assignments, and whether particular respondents were competent and qualified to teach a core assignment by reason of that respondent's credential or other authorization. When he was uncertain, Dr. Vollkommer was given the opportunity to review the seniority list, the bumping chart, and other relevant documents. Following his review of all relevant documents, Dr. Vollkommer again concluded the layoff order set forth in the seniority list was correct. Dr. Vollkommer explained in detail how he reached the conclusion that no competent and qualified middle school teacher was issued a preliminary layoff notice when there was a position into which that senior employee could bump and why particular respondents were or were not correctly issued preliminary layoff notices. Dr. Vollkommer explained why some respondents who did not hold appropriate credentials were not authorized to teach core assignments, even though those respondents may have been authorized to teach in a core subject matter area, and why junior employees who were properly credentialed to teach core assignments were retained over those respondents.

27. Vanessa Johns-King provides services at Aurora Valley High School as a support teacher in the Reading 180 program. Her seniority date with SBCUSD is August 20, 2007, although she enjoys a wealth of experience as a result of having taught in other districts. Johns-King has a clear multiple subject teaching credential and she was NCLB highly qualified when she was employed by the Anaheim Union High School District, but she was not NCLB highly qualified at SBCUSD. Dr. Vollkommer testified the HOUSSE certification issued to Johns-King by another school district did not make her NCLB highly qualified at SBCUSD, and that she was thus not eligible to bump into a core assignment. Johns-King was bumped by Patricia Jackson, an elementary school teacher with tenure whose seniority date is July 3, 2006. Jackson had the credentials, authorizations and competence required to provide the services Johns-King had been providing.

28. Respondents made an effort to qualify Johns-King as an expert in the area of what teaching credentials and authorizations entitled a certificated employee to teach a core assignment and what, if anything, constituted a core assignment. Johns-King had taken a few courses related to obtain an administrative credential, but she had never served as a site administrator, had no experience in completing a master schedule, and lacked other relevant education, training and experience sufficient to compel a conclusion that Dr. Vollkommer's testimony was incorrect.

Misassignments

29. A "misassignment"⁷ occurs when a certificated employee teaches a course or provides services without an appropriate credential. Mistakes sometimes happen. The

⁷ California Education Code sections 33126 and 351186 define "misassignment" as follows:

"'Misassignment' means the placement of a certificated employee in a teaching or services position for which the employee does not hold a legally recognized certificate or credential or the placement of a certificated employee in a teaching or services position that the employee is not otherwise authorized by statute to hold.

district attempts to correct these mistakes when they are brought to the district's attention, so that a misassignment is not continued from year to year.

Jacqueline Davis (Davis), a probationary middle school teacher (seniority date: August 4, 2008) held a multiple subject teaching credential, but her credential did not permit her to provide services in the core assignment to which she was assigned for the 2008-09 school year, thereby resulting in a misassignment. Another misassignment involved Talena Hill-Jackson (Hill-Jackson), a probationary middle school teacher (seniority date: July 29, 2008) who held a multiple subject teaching credential, whose credential did not permit her to provide service in a core assignment, but who nevertheless was missassigned to a core assignment in the 2008-09 school year.

Several teachers with more seniority than Davis and Hill-Jackson who held exactly the same credentials as Davis and Hill-Jackson were not permitted to bump into the positions held by Davis and Hill-Jackson because, according to Dr. Vollkommer, they (as with Davis and Hill-Jackson) were not qualified to provide core assignment services and bumping those unqualified senior employees into the positions would have resulted in more misassignments. Respondents claimed the failure to permit these senior employees to bump (misassigned) junior employees resulted in the wrongful retention of more junior employees.

30. The district is under a positive duty to prevent misassignment. Authorizing senior certificated employees to bump into a position for which that senior employee does not hold an appropriate authorization would create a misassignment, which would impact the district's accountability and make the district subject to possible sanctions imposed by the CCTC under Education Code section 44258.9. A reduction in force proceeding is not the mechanism by which a school district should correct a misassignment. And, a school district is not required to break the law in order to retain unqualified senior certificated employees over unqualified junior certificated employees.

The Layoff Procedure

31. The governing board resolved to reduce or discontinue particular kinds of services provided by teachers and other certificated employees for budgetary reasons. This decision was not related to the competency or dedication of the employees whose services were proposed to be discontinued.

The district's administrative staff initiated and followed a systematic procedure for identifying employees directly affected by the governing board's reduction and elimination of particular kinds of services. Careful evaluation of each employee's seniority date, credential, and qualifications preceded the determination of what bumping rights, if any, an employee had. Adjustments were made to the seniority list where indicated.

The administrative staff's determination that non-NCLB employees should not be allowed to bump less senior NCLB compliant teachers was lawful, reasonable, and in the best interest of the district and its students. The administrative staff's determination that employees without proper authorization should not be permitted to teach a middle school

“core assignment” was lawful, reasonable, and in the best interest of the district and its students. The administrative staff’s determination to not effect a misassignment by bumping a more senior employee without proper authorizations into a position held by a misassigned junior employee was reasonable, consistent with the governing board’s resolution, required by the Education Code, and in the best interests of the district and its students.

Except as otherwise noted, no junior credentialed employee was retained by the district to provide services which a more senior employee was certificated, competent and qualified to render.

Teacher Testimony

32. The heartfelt, painful testimony of respondents including Johns-King, Trimonisha Singer, Jessica Lyon, and Francine Blacksher and others about their love of teaching and their desire to retain their employment with the district was insufficient to overcome the evidence to the contrary. More than anything, this testimony established the frustration, sorrow and inevitable loss that accompany the termination of bright, young, highly skilled, enthusiastic teachers.

LEGAL CONCLUSIONS

Statutory Authority

1. Education Code section 44944 provides in part:

“No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year . . . the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor . . .

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year . . . If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing . . .

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with . . . the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

. . .

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. . . .”

2. Education Code section 44955 provides in part:

“(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever . . . 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 . . .

. . .

(c) Notice of such termination of services shall be given before the 15th of May . . . and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the

provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(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. . . .”

Jurisdiction

3. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied as to all respondent employees who were identified in Exhibit 1 to the accusation.

The Reduction of Particular Kinds of Services

4. A school board's decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. Where a governing board determines to discontinue or reduce a particular kind of service, it is within the discretion of the board to determine the amount by which it will reduce a particular kind of service as long as a district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.)

Seniority, Bumping, and Skipping

The Statutory Scheme

5. Education Code section 44955, the economic layoff statute, provides in subdivision (b), in part, as follows: “Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while . . . any

other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.” Essentially this language provides “bumping” rights for senior certificated and competent employees, and “skipping” authority to retain junior employees who are certificated and competent to render services which more senior employees are not. Subdivision (d)(1) of section 44955 provides an exception to subdivision (b) where a district demonstrates specific need for personnel to teach a specific course of study and that a junior certificated employee has special training and experience necessary to teach that course that the senior certificated employee does not possess. (*Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 134-135.)

Bumping

6. The district has an obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. (*Bledsoe v. Biggs Unified School Dist.*, *supra*, at 136-137.)

Skipping

7. Subdivision (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. (*Bledsoe v. Biggs Unified School Dist.*, *supra*, at 138.)

Cause Exists to Give Notice to Certain Employees

8. As a result of the governing board’s lawful reduction of particular kinds of service, cause exists under the Education Code for the district to give notice to those respondents who are identified hereafter that their employment will be terminated at the close of the current school year and that their services will not be needed by the district for the 2009-10 school year.

Determination

9. The charges set forth in the accusation were sustained by the preponderance of the evidence and were related to the welfare of the San Bernardino City Unified School District and the pupils thereof. SBCUSD’s administrative staff made necessary assignments and reassignments in such a manner that the most senior employees were retained to render services which their seniority and qualifications entitled them to render, except as otherwise noted herein. No employee with less seniority than any respondent will be retained to render a service which any Respondent is certificated, competent and qualified to render.

This determination is based on all factual findings and on all legal conclusions.

RECOMMENDATION

It is recommended that the governing board give notice to respondents whose names are set forth below that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2009-2010 school year.

DATED: _____

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

The following certificated personnel will receive a final layoff notice:

Abrahamson, Julie
Agha, Farah
Alas-Negri, Marisela
Alba, Maribel
Amador, Martha
Anderson, Kristin
Applegate, Valerie
Arreola, Fiorella A.
Arroyo, Nancy
Atencio, Callie
Back, Tiffany Moree
Baker, Diana
Barbu, Diana
Barone, Debra
Bautista, Patricia
Besheer, Rebecca Marie
Beuler, Joyella Jane
Blacksher, Francine
Blacksher, Kristina
Bogarin, Alexis R.
Boren, Alba
Brink, Jennifer
Brown, Eboni
Brown, Nicole
Brown, Norma
Bruce, Pamela Sue
Burg, Kevin
Cachu, Laura

Cals-Southern, Jennifer
Camacho, Lisa
Campbell, Kimberly Leanne
Carmargo, Veronica
Carson, Wendi
Castillo, Cynthia
Chamberlain, Vanessa C.
Chavez, Patricia
Chen, Susan
Chronopoulos, Dimitrios
Cooney, Melody
Cooper, John D.
Cordova, Erika
Cote, Marlene
Cure, Kathryn
Danridge, Victoria
Dean, Cassandra
Dean, Kristen M.
Demarco, Ana
Duag, Elaine
Duran, Samuel
Eck, Barbara
Elliott, Lindsay
Esquibel, Malissa
Fernandez, Diego Fields, Mary B.
Fletcher, Rochelle
Florez, Marisa
Garcia, Grisel
Garcia, Helen
Garcia, Sofia
Girasek, Berenise
Goebel, Kristen
Grajeda, Marie
Guillen, Karla
Gutierrez, Julio
Gutierrez, Mayra
Guzman, Cynthia
Hamner, JoAnn
Hardy, Lawrence
Harrison, Lisa Marie
Hart, Cassandra
Henao, Jennifer
Hendricksen, Matthew David
Hewlett, Albert
Hodges, Rosario
Hogg, Antonia

Horta, Naomi
Hudson-Cousins, Shakirah Nar
Hunter, Marcia
Jimenez-Garcia, Maria
Johns-King, Vanessa
Kathol, Sara
Kessen, Lauren
Kuld, Gregory
Licon, Joseph
Lingenfelter, Tina
Lopez, Elizabeth
Lopez-Alonso, Monica
Lovett, Wikitoria
Luna, Felicia
Lyons, Jessica Lynn
Madrigal, Anacelia
Manjarrez, Amanda
Mao, Elisa
Marruffo, Laura
Marshall, Renita
Martin, Marrina R.
Martinez, Alicia
Martinez-Guzman, Cecilia C.
Mayor, Kassy
McGee, Arlene
McNair, Lisa Renee
Meaca, Marisol
Mojica-Mastranzo, Diana
Moneta, Katie
Morales Alfonso, Sarah Mary
Moreno, Denise
Morrison, Mary T.
Murguia, Anna
Ochoa, Mayra
Ortega, Anna Marie
Ortega, Paulette
Pantoja, Jessica
Parrish, Janet
Pelayo, Nora
Perez, Angela I.
Peterson-Funn, Holly A.
Podolak, Carolyn
Ponce, Christine
Ponsler, Shawn
Quezada, Rosalinda Vera
Quintero, Alicia

Raef, Teresa
Ramirez, Melissa Yong
Ramirez, Veronica
Ramirez-Pena, Alba
Ramos, Pedro
Reyes, Nancy V.
Reynolds, Julia
Rios, Erika
Robinson, Deidre
Robles, Rebecca Alexandra
Rodriguez, Kimberly
Romero, Sara Victoria
Rosales, Crystal
Roundy, Robin
Ruffin, Cameron
Russo, Iris
Salazar, Mayra
Sanz, Lizette
Sargent, Kimbre
Sassaman, Sandra
Schlagel, Lacie
Schmidt, Amy
Scoggin, Kelly
Shih, Angela
Simental-Gladin, Maribel
Singer, Trimonesha
Smith, Kevin
Solano, Jenai
Sorrell, LaTonya
Stallings, Amber
Stephens, Eileen Catherine
Thach, Hue Thi
Thissen, Kimberly Anne
Tornero, Jessica Christine
Torres, Angela
Torres, Oscar
Verduzco, Georgina
Visser, Sharon G.
Warren, Bonnie
Westerhaus, Anja
Willemse, Brian
Willis, Kathleen
Wilson, Danielle
Wong, Jessica
Younglove, Gina
Zapata, Norma Angelica