

**BEFORE THE
GOVERNING BOARD OF THE
CONEJO VALLEY UNIFIED SCHOOL DISTRICT**

**In The Matter of the
Non-Reemployment of:**

114 CERTIFICATED EMPLOYEES,

Respondents

OAH No. 2009031288

PROPOSED DECISION

H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 20 and 21, 2009, at the Conejo Valley Unified School District, Thousand Oaks, California.

Mary L. Dowell and Danielle G. Eanet, Attorneys at Law, represented the Conejo Valley Unified School District.

Tareq M. Hishmeh and Jeanne MacCalden Kvale, Attorneys at Law, represented the respondent teachers.

Respondents Genevieve Lundberg and Martin Nichols appeared in pro per on April 20, 2009 only.¹ The District objected to Ms. Lundberg and Mr. Nichols appearing, on grounds that their Notices of Defense were not served in a timely manner. The objection was overruled.

Except for respondents Lundberg and Nichols, defaults were entered against all respondent counselors and administrators.

¹ Ms. Lundberg and Mr. Nichols are school counselors employed by the Conejo Valley Unified School District. After the District rested its case-in-chief, Ms. Lundberg and Mr. Nichols offered no evidence during their cases-in-chief and rested on the first day of hearing. The second day of hearing was devoted to the respondent teachers' case-in-chief. Ms. Lundberg and Mr. Nichols did not appear on that day.

During the hearing, the District dismissed the Accusations against respondents Alan Grant, Amy Goodman, Laura Knopp, Kira Krukowski, JoAnne Riss, Jill Magnante, Kelley Stone, Ramona Hudes, Kari Taketa, and Kelly Mills.

The matter was submitted on April 21, 2009.

SUMMARY OF PROPOSED DECISION

The Governing Board of the Conejo Valley Unified School District (District) determined to reduce or discontinue particular kinds of services provided by teachers and other certificated employees for budgetary reasons. The decision was not related to the competency and dedication of the individuals whose services are proposed to be reduced or eliminated.

Except as noted below, District staff carried out the Board's decision by using a selection process involving review of credentials and seniority, "bumping," and breaking ties between employees with the same first dates of paid service. Except as noted below, the selection process was in accordance with the requirements of the Education Code.

FACTUAL FINDINGS

1. Mario V. Contini is the Superintendent of the District.
2. On or before March 15, 2009, the District served on each respondent a written notice that it had been recommended that notice be given to respondents, pursuant to Education Code sections 44949 and 44955, that their services would not be required for the next school year. Each written notice set forth the reasons for the recommendation and noted that 137.9 full time equivalent (FTE) positions would be discontinued for the 2009-2010 school year.
3. Notice was served by registered mail and/or personal service. Certificated employees timely requested, in writing, a hearing to determine if there is cause for not reemploying them for the ensuing school year.
4. The Superintendent made and filed Accusations against each of the certificated employees who requested a hearing. The Accusations, with required accompanying documents and blank Notices of Defense, were timely served on those certificated employees.
5. Notices of Defense were timely filed by or on behalf of 106 certificated employees (respondents). As noted above, respondents Lundberg and Nichols filed their Notices of Defense after the filing deadline.

6. Respondents in this proceeding are probationary or permanent certificated employees of the District.

7. On March 3, 2009, the Governing Board of the District was given notice of the Superintendent’s recommendation that 138 FTE employees be given notice that their services would not be required for the next school year and stating the reasons for that recommendation.

8. Board Resolution No. 08/09-23, adopted on March 3, 2009, proposed a layoff of 138 FTE certificated employees. Specifically, Board Resolution 08/09-23 provided for the reduction or elimination of the following particular kinds of services:

| Particular Kind of Service | Number of FTE Positions |
|---|--------------------------------|
| Middle School Dean | 5.0 |
| High School Dean | 6.0 |
| Elementary Principal | 2.0 |
| District Office Director | 8.0 |
| AB 1802 Counselor | 7.5 |
| Elementary Counselor | 4.4 |
| Elementary K-5 Teacher | 65.0 |
| Middle School Math | 4.0 |
| Middle School Social Studies | 4.0 |
| Middle School Science | 3.0 |
| Middle School Reading | 4.0 |
| Middle School English | 1.0 |
| High School Social Studies | 4.0 |
| High School English | 6.0 |
| High School Foreign Language | 3.0 |
| High School Librarian | 3.0 |
| High School School-To-Career | 3.0 |
| High School Auto Shop | 1.0 |
| BTSA Support Teacher | 4.0 |
| Total Full Time Equivalent Positions | 137.9² |

9. Subsequent to adoption of the Board’s Resolution, the District identified vacancies for School Year 2009-2010 due to retirements, release of temporary teachers, and resignations. In consideration of such attrition, the District concluded that the number of certificated employees required to be terminated pursuant to this proceeding was 114 FTE.

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² Board Resolution 08/09-23 reflects a total of 138 FTE. The actual total is 137.9.

10. Board Resolution 08/09-24, adopted on March 3, 2009, established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. It provided that the order of termination shall be based on the needs of the District and its students.

11. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments and locations, advanced degrees, credentials, and authorizations. Credential and authorization data are obtained from the records of the County Office of Education, at which certificated employees must register such documents.

12. Jeffrey L. Baarstad, the District's Deputy Superintendent, was responsible for implementation of the technical aspects of the layoff. To assure the accuracy of seniority dates and other data, affected employees were notified of the District's records of their first dates of paid service and credentials. The District made the seniority list available to employees and requested the employees' input regarding its accuracy.

13. The District used the seniority list to develop a proposed layoff and "bumping" list of the least senior employees currently assigned in the various services being reduced. The District then determined whether the least senior employees held credentials in another area and were entitled to "bump" other employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and 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.

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14. In Board Resolution No. 08/09-25, the Board established competence criteria according to which the “bumping” rights of more senior employees over junior employees could be determined. That resolution read in part:

NOW, THEREFORE BE IT RESOLVED that as to any employee who seeks to move into a position requiring certification qualifications held by a less senior certificated employee, the following criteria will be used to determine competency for retention in the position:

1. Credential in the discipline – Clear or preliminary
2. NCLB compliance in the discipline
3. EL authorization of any kind
4. Verifiable teaching experience in the discipline or area of certificated service for at least one semester within the last five years.

15. To implement the Board’s competency criteria set forth in Board Resolution 08/09-25, District staff created a set of “definitions” to apply to each of the tie-breaking criteria. The definitions read as follows:

1. Credential in the discipline – Clear or preliminary:
Clear or preliminary credential that allows employee to bump less senior employee in relevant particular type of service.
2. NCLB compliance in the discipline:
NCLB compliant in current position assumes compliance in potential bumping position.
3. EL authorization of any kind:
Any California approved EL authorization
4. Verifiable teaching experience in the discipline or area or certificated service for at least one semester within the last five years:
Teaching experience in the appropriate grade level (K-5-Elementary or 6-12-Secondary) and subject area (Core (6th), English, math, social studies, science, P.E., art, business, music, home economics, foreign language) for at least one semester in the past 5 years (2004-05 through 2008-09)

16. In creating the definition for Competency Criterion No. 4 in Board Resolution 08/09-25, District staff exceeded the authority granted by the Board. No discretion to deviate from, qualify, limit, or expand the Board's criteria, or to change any of them in any way, was granted by the Board in its resolution, and the testimony of Dr. Baarstad that the definition for Criterion No. 4 was based on staff's comments to the Board not only was based on inadmissible hearsay, it failed to establish any discretion to deviate from the language of the resolution granted to staff members by the Board.

17. Education Code³ section 44955 states in relevant part:

(b) 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.

[¶] . . . [¶]

(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.

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³ All statutory references are to the Education Code.

18. The staff's definition for Competency Criterion No. 4 does not comply with the provisions of Code section 44955, subdivisions (b) and (d), for the following reasons:

a. For approximately the past 10 years, the District has been transitioning its sixth grade classes from its elementary schools to its middle schools. The sixth grade classes are taught in two-subject "core" segments, but are still considered self-contained classrooms such that the holder of a clear multiple-subject credential is qualified to teach sixth grade within the District. A "core" teacher teaches more than one class per day. As a result, he/she teaches a higher number of students per day than if he/she was teaching in a completely self-contained classroom such as those found in kindergarten through fifth grade. Accordingly, the teacher interacts with a correspondingly increased number of parents. However, according to the definition to Criterion No. 4, a teacher holding a clear multiple-subject credential is not competent to teach sixth grade unless he/she has taught at that grade level at least one semester during the past five years. Thus, under the definition, a fifth-grade teacher without that experience is competent to teach kindergarten, but not the grade level immediately higher to his/her current grade, despite being credentialed to teach kindergarten through eighth grade in a self-contained classroom (special education excluded). The evidence established that it would be easier for a fifth grade teacher to transition to sixth grade than to the primary grades.

b. As written, the Board's Competency Criterion No. 4 allows a teacher holding a clear multiple-subject credential to bump a junior teacher with the same credential, regardless of the elementary grade assigned to each teacher. However, the definition to Competency Criterion No. 4 creates an arbitrary and unnecessary barrier between the sixth grade and the other elementary grades. Dr. Baarstad testified that the one semester's teaching experience in sixth grade within the past five years was necessary because a teacher bumping into sixth grade without that experience would be far behind the other sixth grade teachers with respect to his/her knowledge of the applicable curriculum standards. That testimony was not convincing. The evidence established that the current curriculum standards have been in effect since 1997, and that textbook changes occur every seven years. Thus, the standards have been the same, and many of the textbooks presently being used have been in service, longer than the five years referenced in the criterion and its definition. To the extent that training and standards are different between fifth and sixth grades, the same could be said for a teacher going from any elementary grade to another, since he/she would not have had the benefit of earlier grade level meetings and/or grade-specific training.

c. Many of the District's fifth grade teachers use sixth grade textbooks for their more advanced students.

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d. With the approval of their principals, a number of the District's elementary school teachers team-teach their students. Thus, in a K-5 elementary school, a teacher may teach only specific subjects to more than one class, and each class will have more than one teacher per day. A team-teacher has more students than he/she would in a standard self-contained classroom, and he/she is responsible for interacting with a correspondingly higher number of parents.

e. Pursuant to Code section 44955, subdivision (d), the definition of Competency Criterion No. 4 does not justify a junior sixth grade teacher being skipped. The District failed to establish that any more senior teacher with a clear multiple-subject credential is not properly credentialed and competent to teach sixth grade, and it did not establish that any junior teacher has such "special training and experience necessary to teach that course or course of study," that a more senior teacher lacks, as to justify being skipped at the expense of a more senior teacher. In fact, the evidence showed that no special training was "necessary" to teach sixth grade other than the training received in earning the credential and the additional training afforded all of the District's elementary teachers. Although the focus of classroom management training is somewhat different in middle school than in elementary school, the differences are not great enough to satisfy the statute's requirements.

19. The law is well-settled that a district may impose timely experience in a given area as a criterion of competence for the purpose of a senior employee bumping a junior employee. (See, e.g., *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555 [241 Cal.Rptr. 860].) The law is also well-settled that a board has broad discretion in determining its competency criteria when establishing bumping rights⁴. It is not the Board's criteria that is questioned in this case, but rather the unauthorized refinement of one of those criteria by District staff members, that draws Criterion No. 4 out of the scope of Code section 44955.

20. Board Resolution No. 08/09-23 sets forth the "skipping" criteria the Board elected to use in determining which employees would be retained regardless of seniority (unless bumped by a more senior and competent employee). Those positions were limited to special education. Respondents did not object to the District's determination with respect to any of those positions.

⁴ Thus, despite a certain logical disconnect, since the law grants a board discretion in determining its needs, this Board properly exercised its discretion in not permitting Lauren Looker, a senior secondary School-To-Career Coordinator, to bump a junior secondary physical education teacher even though Dr. Looker holds bachelor's and master's degrees in physical education, a doctorate in educational leadership, and a clear single-subject credential in physical education. The Board based its decision on the fact that Dr. Looker has not taught physical education in the past five years.

21. The District used information from its Seniority List to apply the tie-breaker criteria of Board Resolution No. 08/09-24. That resolution stated in part:

NOW, THEREFORE BE IT RESOLVED that as among employees who first rendered paid service [on the same day], the order of seniority shall be determined by application of the following criteria in the following order:

1. Verifiable teaching experience at different grade and/or subject levels in the District or other verifiable certificated service in the District
2. Credentials:
 - a. Quality of credential – Clear or preliminary
 - b. Additional authorizations
 - c. More than one credential
3. EL Authorization:
 - a. BCLAD/BCC
 - b. Other EL authorization
4. Professional preparation – Dr., MA, additional units from an accredited college assignment-related subject area
5. Verifiable teaching experience at different grade and/or subject levels outside the District, or other verifiable certificated service outside the District

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22. To implement the Board's tie-breaking criteria set forth in Board Resolution 08/09-24, District staff created a set of "definitions" to apply to each of the tie-breaking criteria. The definitions read as follows:

1. Teaching Experience in the District

- a. K-5 (Elementary) – Each grade level equals 1 point
- b. 6-12 (Secondary) – Each subject area equals 1 point – Core (6th), English, math, social studies, biological science, chemistry, geosciences, physics, P.E., art, business, music, home economics, foreign language – Electives not counted
- c. Experience for at least 1 year. No substitute, short-term or summer school experience counted.

2. Credentials

- a. Must be clear or preliminary – no intern or emergency credential
- b. 1 point for each separate credential or authorization

3. EL Authorization – BCLAD/BCC = 2; Another EL = 1; No EL = 0

4. Degree – Each separate degree equals 1 point. Degrees are BA/BS, MA/MS, PHD/EDD. Double majors do not count as 2 degrees.

5. Non-CVUSD Experience – Same as 1 above.

23. As was the case involving the Board's competency criteria, in creating their definitions, District staff exceeded the authority granted by the Board. No discretion to deviate from, qualify, limit, or expand the Board's criteria, or to change any of them in any way, was granted by the Board in its resolution, yet the definitions contain criteria not even remotely suggested by the Board.

24. Code section 44955, subdivision (b), states in pertinent part:

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.

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25. In creating the definitions of the criteria set forth in Board Resolution No. 08/09-24, District staff failed to comply with the requirements of Code section 44955, subdivision (b), in that they created and utilized their own criteria in lieu of those specified by the Board. Therefore, although the Board's criteria were based on the needs of the District and its students, they were not applied in that manner. For example:

a. In implementing Board Resolution No. 08/09-24, District staff decided that it was too difficult to "operationalize" (Dr. Baarstad's term) the Board's intent that credit be given for "additional units from an accredited college assignment-related subject area." Therefore, the staff chose not to utilize that criterion in calculating employees' tie-breaker points. This resulted in certain employees being awarded fewer tie-breaker points than those to which they were entitled. During the hearing, Dr. Baarstad conceded that staff could have created "milestones" (Dr. Baarstad's term) to denote the number of additional units earned toward advanced degrees.

b. In evaluating employees' "teaching experience at different grade and/or subject levels . . . or other verifiable certificated service . . ." both in and outside of the District, the staff did not give credit for summer school or the teaching of elective subjects.

c. In evaluating similar employment experience outside the District, staff members reviewed employees' employment records in the District. However, the District failed to establish that staff looked into the nature or extent of previous employment in other districts.

26. By creating their own criteria beyond those which the Board authorized, District staff rendered at least three of the Board's tie breaking criteria arbitrary and capricious. Because the criteria were composed and implemented by the staff rather than the Board, the District failed to prove that the criteria are based on the needs of the District or its students.

27. Respondents argued that the Board's first tie-breaker criterion was arbitrary and capricious because several respondents had requested grade level changes, but were denied those requests by their principals. Therefore, accruing points under that criterion was beyond their control. Unquestionably, this was an unfortunate and disappointing development. However, respondents cannot be granted the relief they seek because, although the additional tie-breaker points would have inured to their benefit, the tie-breaker criteria must be based on the needs of the District and its students rather than on the needs of the teachers. Additional experience in other grade or subject levels satisfies that requirement even though certain employees did not have the opportunity to accrue tie-breaker points by acquiring that experience.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met.

2. The services identified in Board Resolution #08/09-23 are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The 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 discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

3. A District may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

4. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. Except as indicated in Factual Findings 10 through 26, above, and Legal Conclusions 7 and 8, below, the District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued.

5. Except as indicated in Factual Findings 10 through 19, above, and Legal Conclusion 7, below, no junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

6. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) 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. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.)

7. Several respondents were prejudiced and inappropriately positioned on the seniority list because of the improper definitions and criteria composed and utilized by District staff in implementing the Board's tie-breaking criteria. The District shall re-calculate the seniority list in proper accordance with the Board's tie-breaking criteria.

8. Several respondents were prejudiced and denied the opportunity to bump less senior employees because of the improper definitions and criteria composed and utilized by District staff in implementing the Board's competency criteria. The District shall re-evaluate Respondents' bumping rights in proper accordance with the Board's competency criteria.

9. All other contentions and claims not specifically mentioned were considered and are denied.

ORDER

1. The District shall comply with Legal Conclusions 7 and 8.

2. Except as noted above, notices shall be given to respondents that their services will not be required for the 2009-2010 school year because of the reduction or discontinuation of particular kinds of services. Notice shall be given to respondents in inverse order of seniority.

DATED: April 28, 2009

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings