

BEFORE THE
GOVERNING BOARD OF THE
ATWATER ELEMENTARY SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

CRYSTAL CLINE, et al.,

Respondents.

OAH No. 2009031292

PROPOSED DECISION

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in Atwater, California, on April 27, 2009.

David A. Soldani, Attorney at Law,¹ represented the complainant, Melinda Hennes, Superintendent, Atwater Elementary School District.

Ernest H. Tuttle, III, Attorney at Law,² represented the respondents. There are 10 respondents, and they are listed in exhibit A.³

The matter was submitted on April 27, 2009.

FACTUAL FINDINGS

GENERAL FINDINGS CONCERNING STATUTORY REQUIREMENTS

1. Respondents are certificated district employees.
2. Not later than March 15, 2009, in accordance with Education Code sections 44949 and 44955,⁴ the superintendent of the school district caused the governing board of the district and respondents to be notified in writing that it was recommended that

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² Ernest H. Tuttle, III, Attorney at Law, 750 East Bullard Avenue, Suite 101, Fresno, California 93710.

³ Sara Murray filed a request for hearing but was late in filing her notice of defense. The district did not waive the defect. Thus, she is not a respondent.

⁴ All references to the Code are to the Education Code unless otherwise specified.

respondents be notified that the district would not require their services for the ensuing school year. The notice stated the reasons for the recommendation. The recommendation was not related to respondents' competency.

3. A notice was delivered to each respondent, either by personal delivery or by depositing the notice in the United States mail, registered, postage prepaid, and addressed to respondent's last known address.

4. The notice advised each respondent of the following: He or she had a right to a hearing. In order to obtain a hearing, he or she had to deliver a request for a hearing in writing to the person sending the notice. The request had to be delivered by a specified date, which was a date that was not less than seven days after the notice of termination was served.⁵ And the failure to request a hearing would constitute a waiver of the right to a hearing.

5. Respondents timely filed written requests for a hearing to determine whether there was cause for not reemploying them for the ensuing year. An accusation was timely served on respondents. Respondents were given notice that, if they were going to request a hearing, they were required to file a notice of defense within five days after being served with the accusation.⁶ Respondents filed timely notices of defense. All prehearing jurisdictional requirements were met.

6. The governing board of the district resolved to reduce or discontinue particular kinds of services. Within the meaning of Code section 44955, the services are "particular kinds of services" that can be reduced or discontinued. The decision to reduce or discontinue these services was not arbitrary or capricious but constituted a proper exercise of discretion.

SERVICES THE DISTRICT INTENDS TO REDUCE OR DISCONTINUE

7. The governing board of the district determined that, because particular kinds of services are to be reduced or discontinued, it is necessary to decrease the number of permanent or probationary employees in the district by 25.5 full time equivalents (FTE).

8. The particular kinds of services the governing board of the district resolved to reduce or discontinue are:

Director of Special Programs	1.00 FTE
Middle School Counselor	1.00 FTE

⁵ Employees must be given at least seven days in which to file a request for a hearing. Education Code section 44949, subdivision (b), provides that the final date for filing a request for a hearing "shall not be less than seven days after the date on which the notice is served upon the employee."

⁶ Pursuant to Government Code section 11506, a party on whom an accusation is served must file a notice of defense in order to obtain a hearing. Education Code section 44949, subdivision (c)(1), provides that, in teacher termination cases, the notice of defense must be filed within five days after service of the accusation.

Counselor – Categorical	1.00 FTE
School Psychologist	0.50 FTE
Reading First Coach	2.00 FTE
Physical Education Teacher	1.00 FTE
Special Education Teachers	2.00 FTE
Elementary Classroom Teaching Positions	
K-6 Elementary Teachers	16.00 FTE
K-8 Vocational Education - Marketing	1.00 FTE

USE OF TIE-BREAKING CRITERIA BASED ON THE CURRENT NEEDS OF THE DISTRICT AND STUDENTS

9. Pursuant to Code section 44955, subdivision (b), the governing board of the district established criteria for determining the order of termination as among employees who first rendered paid service on the same day. Code section 44955, subdivision (b), requires a district to adopt such criteria and provides that the criteria are to be based on the “needs of the district and the students”

10. The board’s resolution provides that the tie-breaking criteria are listed in priority order, and each criterion shall be used only if the preceding criteria do not determine the order of termination. The district’s tie-breaking criteria are as follows:

- a. Possession of a currently valid and properly filed regular credential (clear, professional clear, or preliminary)
- b. Possession of a currently valid and properly filed BCLAD certificate
- c. Possession of a currently valid and properly filed CLAD, EL, SDAIE, or other valid certificate authorizing instruction to English Language Learners
- d. The certificated employee is “Highly Qualified” within the meaning of the No Child Left Behind Act.
- e. The certificated employee whose currently valid and properly filed credentials (including LATP - Limited Assignment Teaching Permit) authorize a broader scope of service. (This tie-breaker is to be repeated as applicable.)

- f. Possession of a supplemental authorization to teach in the following areas, in order of the following priority:
 - a. Math
 - b. Science
 - c. English
- g. The certificated employee holding the highest current placement on the salary schedule. (This tie-breaker is to be repeated as applicable.)
- h. If a tie still exists after application of criteria a. to f., the tie shall be broken by lot. Numbers shall be drawn with the lowest number drawn winning the tie and continuing until all remaining tied individuals are ranked in order.

11. Application of the tie-breaking criteria resulted in determining the order of termination solely on the basis of the needs of the district and the students thereof.

RIGHT TO BE RETAINED ACCORDING TO SENIORITY AND QUALIFICATIONS – DATE OF HIRE

12. Job security is not inherent in seniority. The Legislature, however, chose to provide teachers with limited job security according to their seniority.

13. A few of the respondents contend that they are more senior than the district lists them as being. They contend they first rendered paid service to the district in July of 2006 rather than in August of 2006.

14. The difference probably would have no effect on their being subject to termination. The difference might affect their preferential reappointment rights, but those rights are not at issue in this proceeding.

15. In any event, their contention is not well founded. In July of 2006, they attended a training that was not mandatory and for which they were paid a special stipend rather than regular salary. They first rendered paid service to the district in August of 2006.

RIGHT TO BE RETAINED ACCORDING TO SENIORITY AND QUALIFICATIONS – BUMPING

16. The second paragraph of section 44955, subdivision (c), does not add to teachers' seniority rights. It does, however, make it clear that governing boards must make assignments in such a way as to protect seniority rights. Employees must be retained to render any service their *seniority* and qualifications entitle them to render. Thus, if a senior teacher whose regular assignment is being eliminated is certificated and competent to teach a junior teacher's courses, the district must retain the senior teacher to render that service. This is commonly referred to as bumping. The district must either reassign or terminate the junior employee.

17. A few of the respondents contend that section 44955, subdivision (c), requires a school district to take the course assignments of senior teachers away from them so that respondents may have those assignments. Respondents contend this is required because the senior teachers hold certifications that allow them to move into positions held by teachers who are junior to the respondents. If the district made these reassignments, respondents, as well as the senior teachers, would be retained. This is referred to as inverse bumping. Teachers are not entitled to inverse bumping.

18. The second paragraph of section 44955, subdivision (c), speaks of the duty of a school board to make assignments in such a manner that employees will be retained to render any service “their *seniority* . . . [entitles] them to render.” (Italics added.) A teacher’s entitlement to bump a junior teacher out of his or her assignment derives from the senior teacher’s *seniority*. A teacher’s seniority does not entitle him or her to bump a more senior teacher out of his or her assignment just because the more senior teacher could move into some other position. *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, concerned the seniority rights of teachers in community colleges. The bumping rights are similar to those provided by the second paragraph of section 44955, subdivision (c). Mr. Duax, a community college teacher who was being terminated, contended the college was required to bump a more senior teacher out of his position because Mr. Duax was qualified to fill that position, and the more senior teacher had a right to move into a different position. The court rejected Mr. Duax’s claim that he had a right to inverse bumping. The court said the district’s “obligation to make assignments and reassignments . . . is limited to attempting to place an employee who would otherwise be terminated in a position being held by another employee with *less seniority*.” (Italics added.) (*Id* at p. 568.)

SUMMARY OF FINDINGS REGARDING RETENTION OF EMPLOYEES

19. With regard to respondents who are permanent employees, the district is not retaining any probationary employee to render a service that such a respondent is certificated and competent to render.

20. With regard to respondents who are permanent employees, the district is not retaining any employee with less seniority than such a respondent has to render a service that the respondent is certificated and competent to render.⁷

21. With regard to respondents who are either permanent or probationary employees, the district is not retaining any employee with less seniority than such a respondent has to render a service that the respondent’s qualifications entitle him or her to render.⁸

⁷ Code section 44955, subdivision (b), provides seniority protection for a *permanent* employee in terms of the services the employee is “*certificated and competent to render*.”

⁸ Code section 44955, subdivision (c), provides seniority protection for both *permanent and probationary* employees in terms of the services an employee’s “qualifications entitle [him or her] to render.”

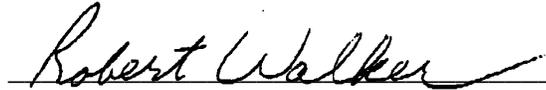
LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Code sections 44949 and 44955. All notice and jurisdictional requirements contained in those sections were satisfied.
2. Within the terms of Code sections 44949 and 44955, the district has cause to reduce or discontinue particular kinds of services and to give notices to respondents that their services will not be required for the ensuing school year. The cause relates solely to the welfare of the schools and the pupils.

ORDER

The district may give notice to the respondents that the district will not require their services for the ensuing school year.

Dated: May 4, 2009



ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT A

Jessica Walker
Rachel Trumm
Cindy Zyskowski
Gwen Dean
Irma Guzman-Ramos
Paula Floro
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Crystal Cline
Deborah Hanning

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