

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

In the Matter of the Employment Status of:

MICHELLE BLANCO, et al.,

Respondents.

OAH No. 2009060451

PROPOSED DECISION

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in Atwater, California, on July 14 and 17, 2009.

Todd A. Goluba, 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 14 respondents, and they are listed in exhibit A.

The matter was submitted on July 17, 2009.

FACTUAL FINDINGS

FINDINGS CONCERNING STATUTORY REQUIREMENTS FOR SUMMER LAYOFFS

1. The budget act for fiscal year 2009-2010 was enacted on February 20, 2009, when the governor signed it. The Legislature placed Propositions 1A through 1E, on the ballot for a special election on May 19, 2009. Many people hoped that, if the voters approved those propositions, the state's substantial budget deficit would be eliminated. The voters, however, rejected those propositions, and for more than two months, the Legislature failed come to an agreement as to how to satisfy the constitutional requirement that the state have a balanced budget. On July 24, 2009, the Legislature enacted certain measures that are intended to give California a balanced budget. Respondents contend that the February 20,

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2009, budget was enacted only conditionally and that, when the voters rejected the Propositions, the enactment of the budget failed. Respondents, however, failed to prove this contention. Complainant proved that a budget act was passed and signed into law. Respondents contend that the passage of the act failed because of the failure of a condition subsequent. The burden shifts to the respondents to prove that, and respondents failed to satisfy that burden.

2. On June 9, 2009, the Governing Board of the Atwater Elementary School District passed a resolution in which the board determined that the district's total revenue limit per unit of average daily attendance for the fiscal year 2009-2010 has not increased by at least two percent. The evidence supports the board's determination.

3. In that same resolution, the board expressed the opinion that, because the revenue limit has not increased by at least two percent, it is necessary to decrease the number of permanent employees in the district.

4. June 9, 2009, the date of the board's determination and expression of opinion, is within the time period of five days after the enactment of the budget act and August 15, 2009.

FINDINGS CONCERNING OTHER STATUTORY REQUIREMENTS

5. Pursuant to Education Code section 44955.5,³ the board adopted a schedule of notice and hearing.

6. Respondents are certificated district employees.

7. In accordance with the board's schedule of notice and hearing and in accordance with sections 44949 and 44955, 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. An accusation was served with each notice. 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.⁴ And the failure to request a hearing would constitute a waiver of the right to a hearing.

³ All references to the Code are to the Education Code unless otherwise specified.

⁴ 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."

8. Respondents timely filed written requests for a hearing to determine whether there was cause for not reemploying them for the ensuing year, and respondents timely filed notices of defense. All prehearing jurisdictional requirements were met.

9. Five teachers on whom the district served notices and accusations did not return requests for hearing or notices of defense. They are Curtis Boyenga, Michelle Gieling, Maria Nuci, Nicole Unruh, and Robin Woods-Palumbo. They are not respondents in this matter. The district did not have a record of Ronalee Johnson's having filed a request for hearing or notice of defense, but the district waived any objection on that ground and stipulated that Ms. Johnson should be deemed to have filed a request for hearing and notice of defense.

10. The governing board 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

11. The governing board 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 16 full time equivalents.

12. The particular kinds of services the governing board resolved to reduce or discontinue are elementary classroom teaching positions, multiple subjects – grades K-6.

DISTRICT'S INTENTION TO DEVIATE FROM SENIORITY (SKIPPING)

13. Pursuant to Code section 44955, subdivision (d)(1), a district may deviate from terminating employees in the order of seniority if the district demonstrates a specific need for personnel to teach a specific course of study and a junior employee has special training or experience that employees with more seniority do not possess. The governing board resolved to deviate from terminating employees in the order of seniority. The board identified a specific need for personnel to teach a special course of study as follows:

[D]ue to the specific need of the District to hire and retain only teachers who possess a currently valid and properly filed CLAD, EL, SDAIE, or other valid certificate authorizing instruction to English Language Learners, the Superintendent and/or his designee is authorized to deviate from terminating certificated employees in order of seniority in instances where the less senior employee possesses a currently valid and properly filed CLAD, EL, SDAIE, or other valid certificate authorizing instruction to English Language Learners and the more senior employee does not possess a currently valid and

properly filed CLAD, EL, SDAIE, or other valid certificate authorizing instruction to English Language Learners for the position to which he/she will be assigned at the beginning of the 2009-2010 school year.

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

14. Pursuant to Code section 44955, subdivision (b), the governing board 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 be based on the “needs of the district and the students”

15. 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.

16. 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

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

RIGHT TO BE RETAINED ACCORDING TO SENIORITY AND QUALIFICATIONS – BUMPING

18. 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.

19. 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.

20. Also, if a senior teacher asks for reassignment to a position he or she is certificated and competent to fill and if that reassignment would open a position that would save another teacher from layoff, the district must make that reassignment. Assume the following: Teacher A is senior to teacher B, and teacher B is senior to teacher C. A position opens that teacher A and teacher C are qualified to fill, and teacher A asks to be transferred into it. Teacher B is qualified to fill the position teacher A would be vacating but not qualified to fill the open position. The district may not assign teacher C to the open position if that assignment would cause teacher B to be laid off. Rather, the district must honor teacher A's request for transfer because that will permit the district to move teacher B into the position teacher A vacates and retain teacher B. As noted above, Code section 44955, subdivision (c), provides that a "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."

INVERSE BUMPING

21. 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.

22. 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

23. Ms. Widman, who is in seniority position number 214, teaches eight grade, a position that does not come within the particular kinds of services the governing board resolved to reduce or discontinue. But Ms. Lopez, who is in seniority position 192, and who would be subject to layoff, has a right to bump into Ms. Widman’s position. Therefore, for layoff #1, the district may lay off Ms. Widman.

24. It is found that, within the terms of Code section 44955, subdivision (d)(1), teaching English language learners is a specific course of study. It is found that the district demonstrated a specific need for personnel to teach that course of study. For layoff #2, the district may preliminarily skip teachers who hold CLAD, EL, SDAIE, or other valid certificates authorizing instruction to English language learners, and may lay off Mr. Irby, who is in seniority position 114. Mr. Irby contends the district should arrange student assignments so that there will be at least one class with no English language learners in it. Mr. Irby further contends as follows: The district administration is annoyed by his failure to obtain a CLAD certification, and in refusing to accommodate him, the district is acting out of pique. But Mr. Irby failed to prove that contention. The district proved that it would be difficult to arrange student assignments so that there would be a class with no English language learners in it. It would be difficult because of the large number of English language learners and because of the significant reduction in the number of classes to be taught this year. The district also proved that English language learners benefit from being in classes with students who are fluent in English. Thus, intentionally segregating students to create a class in which there were no English language learners would be pedagogically unsound.

25. The district may lay off the following teachers:

Layoff #3 Ms. Dewitt, who is in seniority position 207

Layoff #4 Ms. Unruh, who is in seniority position 206

Layoff #5 Ms. Olds, who is in seniority position 196

Layoff #6 Mr. Boyenga, who is in seniority position 195

Layoff #7 Ms. Blanco, who is in seniority position 194

Layoff #8 Ms. Hunter, who is in seniority position 193

Ms. Lopez, who is in seniority position 192, would be layoff #9 if were not for the fact that she has a right to bump into Ms. Widman's eight grade English position.

Layoff #9 Ms. Nuci, who is in seniority position 190

Layoff #10 Mr. Munoz, who is in seniority position 189

Layoff #11 Ms. Munoz, who is in seniority position 187

Layoff #12 Ms. Castellanos, who is in seniority position 186

Layoff #13 Ms. Macias, who is in seniority position 185

Layoff #14 Ms. Palumbo, who is in seniority position 184

Layoff #15 Ms. Gieling, who is in seniority position 183

26. The district seeks to lay off Ms. DeSousa or Ms. Contreras, who are in seniority positions 180 and 179. The district may not do that because the district could have made reassignments that would have caused both of them to be retained to render services their seniority and qualifications entitle them to render.

27. Mr. Fernandez and Mr. Alvernaz, who are in seniority positions 208 and 204, have schedules that could be combined to create a position for either Ms. DeSousa or Ms. Contreras. Mr. Fernandez has a single period assignment that requires a single subject credential. Mr. Alvernaz, also, has a single period assignment that requires a single subject credential. A teacher with only a multiple subject credential could not teach those courses. Therefore, it is not the case that Ms. DeSousa could have bumped into one of those positions and Ms. Contreras into the other. But the balance of Mr. Fernandez and Mr. Alvernaz's assignments are block classes that could be combined to create a position that a teacher with a multiple subject credential could fill. The district failed to prove that it would be impractical or inconvenient to combine the block assignments. The district also failed to prove that combining the block assignments would harm the district's educational program.

The district may not retain Mr. Fernandez and Mr. Alvernaz to render a service that Ms. DeSousa and Ms. Contreras are qualified to render.

28. The second reassignment the district could have made was to assign Mr. Gamble, who is in seniority position 149, to teach eighth grade science. When a science position became available, Mr. Gamble, who was teaching kindergarten, asked for the assignment. He has an appropriate credential, and he has experience as a science teacher. The district offered no evidence that he is not qualified and competent to teach eighth grade science. If the district had reassigned Mr. Gamble to the eighth grade science position, Ms. DeSousa or Ms. Contreras could have moved into his kindergarten position. When the district made a reassignment to fill the science position, however, it reassigned the most junior teacher in the district. The district contends that it had no obligation to make a reassignment that would open Mr. Gamble's position for Ms. DeSousa or Ms. Contreras because Mr. Gamble is senior to them. The district argues that requiring it to make such a reassignment would permit Ms. DeSousa or Ms. Contreras to engage in inverse bumping. As noted above, a junior teacher has no right to bump a more senior teacher out of his or her assignment. But the matter regarding Mr. Gamble has nothing to do with bumping. This is a simple matter of making assignments and reassignments. The eighth grade science position was available. Mr. Gamble was qualified for the position and applied for it. If the district had assigned Mr. Gamble to the position, his kindergarten position would have become available so that the district could have retained Ms. DeSousa or Ms. Contreras to render a service they were qualified to render. Code section 44955, subdivision (c), required the district to assign Mr. Gamble to the science position – not a teacher junior to Ms. DeSousa and Ms. Contreras.

29. The district served a precautionary layoff notice on Ms. Lopez but may not lay her off because, as noted above, she has a right to bump into Ms. Widman's eighth grade English position, which is not within the particular kinds of services the governing board resolved to reduce or discontinue.

30. Mr. Cardoza, who is in seniority position 177, has a date of hire of August 11, 2003, and the district applied tie-breaking criteria within that date of hire. Application of the tie-breaking criteria caused other teachers with that date of hire to be subject to layoff before Mr. Cardoza. The district did not serve Mr. Cardoza with a layoff notice. Ms. Johnson teaches seventh grade, a position not within the particular kinds of services the governing board resolved to reduce or discontinue. If Mr. Cardoza had been sent a notice, he would have had a right to bump into Ms. Johnson's position. If, in the present proceeding, it were determined that the tie-breaking criteria had not been applied correctly and that the district should have sent Mr. Cardoza a notice, the district wanted to be able to lay off Ms. Johnson. Therefore, the district sent Ms. Johnson a precautionary layoff notice. But there was no evidence that the tie-breaking criteria were not applied correctly or that the district should have sent Mr. Cardoza a notice. Therefore, there are no grounds to lay off Ms. Johnson.

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

32. With regard to respondents who are permanent employees, except as discussed above, 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.⁵

33. With regard to respondents who are either permanent or probationary employees, except as discussed above, 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.⁶

PLOOG'S TESTIMONY REGARDING THE EFFECT OF THE DISTRICT'S RECEIPT OF FEDERAL STIMULUS FUNDS

34. Marisa Ploog is a certified public accountant and the district's assistant superintendent for administrative services. Ms. Ploog testified regarding the district's financial picture and her calculations as to the probable effect of the district's receipt of federal stimulus funds.

35. The following is a paraphrased summary of part of Ms. Ploog's testimony.

36. The district must submit a three-year budget to the County Office of Education. The budget must provide for a reserve of at least 3%. Most California school districts provide for a 10 % reserve. Atwater's 3% reserve is meager and causes the district to be highly exposed to risk if unknown factors affect finances negatively.

37. The district received approximately \$1,300,000 in federal stimulus funds.

38. On June 25, 2009, the board adopted a budget that was based on assumptions and projections Ms. Ploog had made as of the end of May. That budget included the federal stimulus funding and did not anticipate summer layoffs. That is, it contemplated retaining all of the teachers whom the district now seeks to lay off. That budget provided for a 3.08% reserve at the end of three years. The district submitted that budget to the County Office of Education.

⁵ 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.*"

⁶ 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."

39. Since the end of May, however, a number of matters have come to Ms. Ploog's attention that cause her to conclude that the June 25, 2009, budget was based on assumptions and projections that no longer can be defended. Ms. Ploog has concluded that, in order to maintain even a meager three-year reserve, the district must lay off 16 teachers. The matters that have come to her attention include the following: In past years, the teachers' union has agreed to waive added salary for teachers who must teach large classes, but this year, the union has not agreed to a waiver. Ms. Ploog anticipates the added salaries will cost more than \$300,000 a year. In past years, the teachers' union has agreed to waive added salary for teachers who must stay after school because of scheduling problems, but this year, the union has not agreed to a waiver. Ms. Ploog anticipates the added salaries will cost \$144,000 a year. Title II funding no longer can be used to fund class size reduction wages. Ms. Ploog anticipates the negative effect will be \$267,000 a year. Because teachers who have been laid off have certain rights as substitute teachers, Ms. Ploog anticipates the district's cost for substitute teachers will increase by \$660,000 this year. There will be added costs if student enrollment exceeds projections. Ms. Ploog now anticipates further negative financial effects from measures the Legislature uses to balance the budget. She also anticipates further reductions in the Legislature's budget for the 2011-2012 year.

40. Because of the federal stimulus funding, the district could avoid summer layoffs this year. But without summer layoffs this year, the district would be in a precarious position in the following two years.

RESPONDENTS' CONTENTIONS REGARDING THE EFFECT OF THE DISTRICT'S RECEIPT OF FEDERAL STIMULUS FUNDS

41. Respondents contend that it is wrong of the district to include the federal stimulus funds in a three-year budget. Respondents contend that the district should plan to spend all of the federal stimulus funds within the current year because the federal government's purpose was to stimulate the economy immediately. Ms. Ploog testified, however, that there is no requirement as to when the federal funds must be spent.

42. Respondents also contend that the apparent purpose of permitting summer layoffs is to provide school districts with a means of coping with a legislative failure to provide adequate funding. Respondents contend that, if a district is fortunate enough to receive other funds that offset the loss of state funding, the reason for summer layoffs fails. Respondents conclude that, if the reason fails, a district should not be allowed to engage in summer layoffs.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Code sections 44949, 44955, and 44955.5. All notice and jurisdictional requirements contained in those sections were satisfied.

2. Within the terms of Code sections 44949, 44955, and 44955.5, the district has cause to reduce or discontinue particular kinds of services and to give notices to certain 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.

3. Respondents contend that Education Code section 44955.5, subdivision (a), should be read as not permitting summer layoffs if a district receives funds from some source other than the state budget and if those funds are sufficient to enable the district to avoid layoffs. For two reasons, this contention is not persuasive. First, Ms. Ploog's testimony was compelling. She said the district must have a three-year budget with a reserve of at least 3%. She testified convincingly that defensible assumptions and projections lead to a conclusion that, in order to have such a budget, the district must eliminate 16 positions. The second reason respondents' contention is not persuasive has to do with statutory construction and interpretation. The language of Education Code section 44955.5 is clear. If a governing board determines that a district's total revenue limit per unit of average daily attendance has not increased by at least two percent and if, in the opinion of the board, it is therefore necessary to decrease the number of permanent employees, the board may do that. Section 44955.5 does not require a school board to look only to the current year; section 44955.5 does not make it inappropriate to look at a three-year financial picture.

ORDER

1. The accusations against Renee Contreras, Nancy DeSousa, Ronalee Johnson, and Tina Lopez are dismissed.

2. The district may give notices to the persons identified above as Layoff #1 through Layoff #15, inclusive. The notices may provide that the district will not require their services for the ensuing school year.

Dated: July 28, 2009

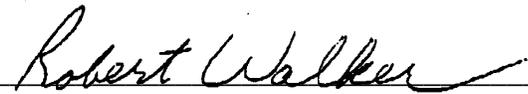

ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT A

Respondents:

Blanco, Michelle

Castellanos, Vicky

DeSousa, Nancy

Dewitt, Pati

Hunter, Tracey

Irby, Marcus

Macias, Alma

Munoz, Ismael

Munoz, Lydia

Olds, Lindsay

Widman, Janine

Contreras, Renee

Johnson, Ronalee

Lopez, Tina