

BEFORE THE
BOARD OF EDUCATION
OF THE
BARSTOW UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2010030307

Respondents listed in Appendix A.

PROPOSED DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Barstow, California on April 26, 2010.

Todd M. Robbins, Atkinson, Andelson, Loya, Ruud & Romo, Attorneys at Law, represented the Barstow Unified School District.

Kent Morizawa, Reich, Adell & Cvitan, Attorneys at Law, represented the respondents listed in Appendix A, except for respondent Pamela Brown.

No appearance was made by or on behalf of respondent Pamela Brown.

The matter was submitted on April 26, 2010.

FACTUAL FINDINGS

1. Jeff Malan, Assistant Superintendent, Personnel Services of the Barstow Unified School District, made and filed the accusation dated March 10, 2010, in his official capacity as the designee of Susan Levine, District Superintendent.

2. Respondents¹ are certificated district employees.

¹ The district initially identified 25 certificated employees as respondents designated for layoff. The district subsequently dismissed one of these employees (Anastasia Curran), and three employees (Janice Plazola, Jennifer Sample, and Stephanie Strait) did not request a hearing or file a notice of defense. Accordingly, by the conclusion of the hearing, there remained as respondents in this matter the 21 persons identified in Appendix A.

3. On March 9, 2010, in accordance with Education Code sections 44949 and 44955, the superintendent notified the Board of Education of the Barstow Unified School District in writing of her recommendation to reduce or discontinue particular kinds of services for the upcoming school year. The superintendent stated the reasons for the recommendation. The recommendation that respondents be terminated from employment was not related to their competency as teachers.

4. On March 9, 2010, the board adopted Resolution No. 28, determining that it would be necessary to reduce or discontinue particular kinds of services at the end of the current school year. The board determined that the particular kinds of services that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Elementary K-6 Teaching Services	24
Grades 9-12 Special Education Mild/Moderate Teaching Services	3
Grades 7-8 Middle School SAI Teaching Services	2
Secondary Art Teaching Services	1
Secondary Computer Teaching Services	1
Elementary Music Teaching Services	1

The proposed reductions totaled 32 FTE positions.²

5. The board further determined in Resolution No. 28 that “competency,” as described in Education Code section 44955, subdivision (b), for the purposes of bumping, “shall necessarily include: (1) possession of a valid credential in the relevant subject matter area; (2) ‘highly qualified’ status under the No Child Left Behind Act in the area to be assigned; (3) an appropriate EL authorization (if required by the position).”

6. The board directed the superintendent or her designee to determine which employees’ services would not be required for the 2010-2011 school year as a result of the reduction of the foregoing particular kinds of services. The board further directed the superintendent or her designee to send appropriate notices to all certificated employees of the district who would be laid off as a result of the reduction of these particular kinds of services.

7. On or before March 15, 2010, the district timely served on respondents a written notice that the superintendent had recommended that their services would not be required for the upcoming school year, along with the related accusation. The notice set forth the reasons for the recommendation. The notice advised respondents of their right to a hearing, that each respondent had to deliver a request for a hearing in writing to the person

² Because of attrition (e.g., resignation and retirement), the number of certificated employees identified for layoff is substantially less than the 32 FTE PKS designated for reduction.

sending the notice by the date specified in the notice, a date which in each case was more than seven days after the notice was served, and that the failure to request a hearing would constitute a waiver of the right to a hearing.

The recommendation that respondents be terminated from employment was not related to their competency as teachers.

8. Respondents timely filed written requests for hearing and notices of defense. All pre-hearing jurisdictional requirements were met.

9. Respondents are probationary or permanent certificated employees of the district.

10. The services the board addressed in Resolution No. 28 were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The board’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious and constituted a proper exercise of discretion. No particular kinds of services were lowered to levels less than those levels mandated by state or federal law.

11. The reduction or discontinuation of particular kinds of services related to the welfare of the district and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the district as determined by the board.

12. The board considered all positively assured attrition, including resignations, retirements and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees.

13. The district has advertised openings for two independent study teaching positions for the 2010-2011 school year. The board has not yet authorized the district to fill either of these positions, and it is not known whether and when the board will do so.

14. Olivia Dilbeck teaches middle school language arts and AVID. She has a multiple subject credential and board authorization to teach English and AVID pursuant to Education Code sections 44256 and 44865 respectively.³

Respondents identified three elementary school teachers (Linsey Chavez, Joshua Jauss, and Shannon VandeBrake) who have greater seniority than Dilbeck, and who have been slated for layoff, even though they have sufficient undergraduate units to qualify for board authorization to teach secondary English. Respondents asserted that since these three

³ Section 44256 permits a local school board on an annual basis, to authorize a teacher with a multiple subject credential to teach departmentalized subjects (e.g., English) up to the ninth grade level. The teacher must have completed at least 12 undergraduate semester units in the subject in question. Section 44865 permits teachers with any credential to teach in certain special areas, including AVID.

individuals are eligible for board authorization to teach secondary English, the district should permit them to bump into middle school teaching positions held by more junior employees, or at least the position held by Dilbeck. However, *eligibility* for board authorization does not equate to *possession* of such authorization. Further, since these individuals are not highly qualified to teach secondary English, they are not competent under the board's bumping criteria to displace more junior employees. Accordingly, none of the three named individuals may bump Dilbeck or any other less senior employee.⁴

15. Respondent Douglas Campbell teaches elementary school music. He holds a single subject credential in music and is highly qualified in that subject. He has about 28 years of secondary school teaching experience. He is unable to bump into a position held by a junior employee, but he believes that he meets the minimum qualifications for either of the two independent study positions the district hopes to fill for the 2010-2011 school year.

Respondents argued that it is "reasonably certain" that the board will authorize the two independent study positions and that Campbell should therefore be permitted to bump into one of those positions. The evidence did not, however, establish such a reasonable certainty and it would therefore be premature for the administrative law judge to issue the requested order at this time.

16. Christina Tomkins teaches elementary school. She holds a clear multiple subject credential and a supplementary authorization in English. She is *not* highly qualified to teach English, and thus does not possess the competency to bump more junior employees pursuant to the criteria set forth in the board's Resolution. The district nonetheless permitted Tomkins to bump the more junior Mark Ferrara, a middle school language arts teacher. This was not an oversight on the district's part. Instead, the district made a deliberate decision in this regard on the basis that both Tomkins and Ferrara have precisely the same credentials and authorizations, i.e., they both have a multiple subject credential,⁵ a supplementary authorization in English, EL authorization, they are both highly qualified in elementary education, and they both lack such status in English. Under these unique circumstances,⁶ the district felt that it should retain Tomkins, the more senior of the two teachers, as this seemed consistent with the spirit of the layoff statute.

⁴ Respondents suggested that Dilbeck may be displaced because her board authorization expires at the end of the present school year. However, the fact remains that Dilbeck is presently (and validly) in a middle school position. While it is certainly possible that she will be returned to an elementary teaching position next year, it is also possible that she will receive another annual board authorization to teach middle school English. Accordingly, it would be improperly speculative to find — and accordingly it is not found — that Dilbeck is being retained to perform services which any more senior respondent is certificated and competent to render.

⁵ Tomkins' credential is clear, Ferrara's is preliminary.

⁶ As discussed below, respondents Ferrara and Maxey were not permitted to bump the more junior Wharmly because they lacked highly qualified status and because Wharmly himself does have such status. The situation of Ferrara and Maxey vis-à-vis Wharmly is thus distinct from the situation of Tomkins vis-à-vis Ferrara.

This is the only instance when the district deviated from the bumping criteria set forth in the board resolution. The district's decision was neither arbitrary or capricious, but instead constituted a proper exercise of its discretion. No authority was presented that a district's otherwise reasonable decision to deviate from a school board's bumping criteria necessarily constituted an abuse of discretion.⁷

17. Respondent Mark Ferrara is a middle school language arts teacher. He holds a preliminary multiple subject credential and a supplementary authorization in English. As noted above, Ferrara was bumped by the more senior Tomkins. Ferrara asserted at the hearing that he is highly qualified in English and is thus competent to bump the more junior Charles Wharmby III, who is presently in a middle school language arts reading assignment. Wharmby is himself highly qualified in English.

Ferrara's assertion that he is highly qualified in English was based on a single subject evaluation worksheet, which reflects that he completed 27 post-secondary units in English classes, and six additional units in Speech classes. Gail Hanoumis, a district credential technician who reviewed Ferrara's documentation, concluded that all 33 of these units qualified as English units for NCLB purposes. As such, it appeared to Hanoumis that Ferrara had sufficient post-secondary units to attain highly qualified status.⁸ Ferrara also asserted that Assistant Superintendent Malan told him in around June 2009 that he was highly qualified. During the same general period (March to June 2009), Ferrara had several conversations with Hanoumis, who did *not*, however, tell him that he was highly qualified.

The testimony of Hanoumis and a California Department of Education document received in evidence established that an individual may achieve highly qualified status by demonstrating core competence⁹ in one of several ways: (i) an exam (such as a CSET exam) in the core subject; (ii) a subject matter waiver; (iii) an undergraduate major or graduate degree in the core subject; (iv) advanced certification in the core subject; or (v) completion of a HOUSSE evaluation.¹⁰ Notably, all five of these alternatives involve formal determinations made by a body other than the school district. It thus appears that the district's role is not to *determine* highly qualified status, but simply to *verify* whether such a determination has been made by another body.

⁷ Of course, a decision to deviate from duly-authorized bumping criteria could raise a red flag, if other circumstances suggesting an abuse of discretion (e.g., the desire to retain or layoff an employee for improper motives) existed. No such evidence is reflected in the present record, however.

⁸ Hanoumis testified that highly qualified status may be achieved through the completion of 32 post-secondary semester units in the core subject.

⁹ Other requirements to achieve highly qualified status (such as an appropriate credential) were not at issue and thus need not be addressed.

¹⁰ HOUSSE refers to "High Objective Uniform State Standards of Evaluation," a process for which Ferrara was not eligible, due to the date on which he received his credential.

It was not established that Ferrara has achieved highly qualified status through any of the foregoing means. Further, Hanoumis testified that documentation she received from the California Commission on Teaching Credentialing (CCTC) did not reflect highly qualified status on Ferrara's part. Thus, despite her initial view that Ferrara was highly qualified, her initial view was not corroborated by CCTC documentation. Accordingly, Ferrara is not highly qualified within the meaning of the NCLB Act and he is not competent to bump Wharmly.

18. Respondent Christine Maxey is an elementary school teacher. She has a clear multiple subject credential and a supplementary authorization in English. The district identified her for layoff within the elementary school teaching PKS. Like Ferrara, Maxey contended that she is highly qualified in English and is thus competent to bump the more junior Wharmly. In support of her contention, she proffered transcripts from three post-secondary institutions, which she claimed established that she completed over 32 semester units of English. However, whether 32 of those units were in English was not clear from the course names.¹¹ More importantly, and as found above, the determination of highly qualified status is to be made by a body other than the school district.¹² No evidence of any such determination was proffered at the hearing. Accordingly, Maxey is not highly qualified within the meaning of the NCLB Act and she is not competent to bump Wharmly.

19. Respondent Joshua Jauss teaches elementary school, and has a clear multiple subject credential. The district assigned him an August 21, 2006, seniority date. Jauss believes that his seniority date should be August 8, 2006, based on his participation in certain in-service training he testified he was required to attend before commencing his teaching duties with the district. The most important document bearing on this issue is Jauss's initial district employment contract, which neither party proffered at the hearing. Absent this document, the facts presented were insufficient to reach a definitive finding as to his seniority date.¹³ Further, it was established that Jauss would still be subject to layoff if he were given the earlier seniority date.¹⁴ For these reasons, the administrative law judge declines to make a finding on this issue.

¹¹ Maxey claimed, for example, that 24 of her units completed at Azuza Pacific University had an English "component," or had English "embedded" in them, or were "related" to English. It was impossible to discern from the record whether such claims, assuming that they are true, would qualify the classes in question as English classes for NCLB purposes.

¹² Maxey's circumstances in fact provide an excellent example as to why the determination of highly qualified status is not to be made by the district: a district would simply not have the means to verify and evaluate for NCLB purposes claims like those Maxey made with regard to the nature of her coursework.

¹³ For example, Jauss did not recall whether the in-service training days were within his district employment contract.

¹⁴ More senior elementary teachers were laid off, and Jauss holds no credentials or authorizations beyond his single subject credential that could possibly make him competent to bump a more junior employee in another position.

20. Respondent Sabrina Gilmore teaches high school drama (two periods) and art, has a clear single subject art credential, majored in technical drama at Cal State San Bernardino, and is highly qualified to teach both art and drama. In addition to her formal teaching assignments, Gilmore is the thespian coordinator (i.e., faculty member associated with the student theater club) and is responsible for two student theater productions per academic year. She accepted a position teaching drama at the request of the district because no other teacher had her experience. She does not believe that any other teacher could perform in her position as a drama teacher. She is the only drama teacher at her school and, in fact, in the district. The district has not yet decided whether it will eliminate its drama program next year.

Respondents argue that since Gilmore is the district's only drama teacher, her layoff constitutes a de facto implementation of a PKS reduction (i.e., high school drama teaching services) that is outside the scope of the board's authorization. The layoff of Gilmore does not necessarily imply the discontinuation of the district's drama program, however. For example, the district could possibly grant board authorization to teach drama to another teacher. While such an individual would presumably lack Gilmore's experience and highly qualified status, the district nonetheless retains the discretion to determine how to provide instruction in drama to its students, in the broader context of providing for all of the educational needs of its students. Even if the district ultimately decides to eliminate its drama program for next year (which for now is speculative), such a decision would not constitute a PKS reduction of services subject to Education Code section 44955, because it would not involve the layoff of certificated staff.¹⁵

21. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

LEGAL CONCLUSIONS

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

2. 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.)

¹⁵ Gilmore is being laid off in connection with the board's secondary art PKS reduction. The district does not consider drama to be a subcategory within the scope of art. As such, it does not appear that the district was required to lay Gilmore off completely. Instead, the district could have achieved its 1.0 FTE reduction in secondary art by designating Gilmore for partial layoff (i.e., representing the portion of her teaching assignment that is comprised of art classes), and designated another art teacher for partial layoff as well. However, respondents did not challenge the district's decision not to split the secondary art PKS reduction between two employees, and whether the district properly exercised its discretion in that regard was not litigated at the hearing.

3. Pursuant to section 44995, 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; *Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 134-135.)

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.)

4. The decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. It is within the governing authority’s discretion to determine the amount by which a particular kind of service will be reduced or discontinued as long as the 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.) A school district has wide discretion in setting its budget and a layoff decision will be upheld unless it was fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. (*California Sch. Employees Assn. v. Pasadena Unified Sch. Dist.* (1977) 71 Cal.App.3d 318, 322.)

5. School districts have broad discretion in defining positions within the district and establishing requirements for employment. This discretion encompasses determining the training and experience necessary for particular positions. Similarly, school districts have the discretion to determine particular kinds of services that will be eliminated, even though a service continues to be performed or provided in a different manner by the district. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.)

6. Pursuant to Education Code section 44845, certificated employees are deemed “to have been employed on the date upon which he first rendered paid service in a probationary position.”

7. A preponderance of the evidence sustained the charges set forth in the accusation. Cause exists under Education Code sections 44949 and 44955 for the district to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. Cause exists to reduce the number of certificated employees of the district due to the reduction and discontinuation of particular kinds of services. The district identified the certificated employees providing the particular kinds of services that the Board be directed be reduced or discontinued. It is recommended that the board give respondents notice before May 15, 2010, that their services are no longer required by the district.

ADVISORY DETERMINATION

The following advisory determination is made:

The accusations served on respondents are sustained. Notice may be given to respondents before May 15, 2010, that their services will not be required because of the reduction or discontinuation of particular services as indicated.

DATED: _____

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings

Appendix A

1. Nichole Alvarez
2. Alicia Arch
3. Amber Baker
4. Erica Bravo
5. Pamela Brown
6. Douglas Campbell
7. Linsey Chavez
8. Shelie Crowley
9. Julie Diza
10. Mark Ferrara
11. Katherine Gaeta
12. Theresa Ganchoero
13. Sabrina Gilmore
14. Patricia Hailey
15. LaKisha Harris
16. Joshua Jaus
17. Christine Maxey
18. Joy Mendoza
19. Angela Stepp
20. Karen Tupman
21. Shannon VandeBrake