

BEFORE THE  
SUPERINTENDENT OF SCHOOLS  
SACRAMENTO COUNTY OFFICE OF EDUCATION  
COUNTY OF SACRAMENTO  
STATE OF CALIFORNIA

In The Matter of the Reduction In Force of:

OAH No. 2011030545

CERTAIN CERTIFICATED PERSONNEL  
EMPLOYED BY THE SACRAMENTO  
COUNTY SUPERINTENDENT OF  
SCHOOLS,

Respondents.

**PROPOSED DECISION**

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, on April 11, 2011, in Sacramento, California.

Michelle L. Cannon, Attorney at Law, appeared on behalf of Sacramento County Office of Education (SCOE).

Costa Kerestenzis, Attorney at Law, appeared on behalf of respondents.

Evidence and testimony were received. Submission of the matter was deferred pending receipt of supplemental written argument. SCOE's and respondents' arguments were received on April 12, 2011, and marked respectively as Exhibits 8 and H for identification. The case was submitted for decision on April 12, 2011.

**FACTUAL FINDINGS**

1. David W. Gordon is the Superintendent of SCOE. The actions of Mr. Gordon in making and filing the Accusation were taken in his official capacity.

2. Respondents are permanent or probationary certificated employees of SCOE. On March 9, 2011, SCOE 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 be reduced or would not be required for the 2011-2012 school year. Each written notice set forth the reasons for the recommendation and noted that

the County Superintendent had adopted a Resolution reducing the certificated staff by 59.5 full-time equivalent (FTE) positions. Respondents timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year.

3. On March 25, 2011, SCOE timely served Accusations with required accompanying documents and blank Notices of Defense on respondents. Respondent timely filed Notices of Defense to the Accusation.

4. On March 7, 2011, the County Superintendent determined that it was necessary to decrease programs and services and thus it was necessary to reduce teaching and other certificated services affecting employment of 59.5 FTE positions. The County Superintendent adopted Resolution No. 2011-A providing for the reduction or elimination of the following particular kinds of services (PKS):

<u>Services</u>	<u>Equivalent Positions</u>	
Academic Intervention Teacher	2.0	
Counselor, Juvenile Court Schools	1.0	
Counselor, Student Programs		2.0
Resource Specialist	2.0	
ROP Instructor, Athletic Trainer	1.0	
ROP Instructor, Comp. Graphics & Digital Media	3.0	
ROP Instructor, Office Careers	1.0	
ROP Instructor, Office Occupations	1.0	
ROP Instructor, Motorcycle/Rec. Vehicle Repair	1.0	
ROP Instructor, Nursery and Landscape	1.0	
ROP Instructor, Manuf. Tech. Welding/Metal	1.0	
Teacher, County Community Schools	9.0	
Teacher, Juvenile Institutions		17.0
Teacher, Juvenile Institutions reduce work year From 220 days to 200 days	7.0	
Special Education Teacher for Court Schools	1.0	
Administrator, Child Welfare & Attendance		1.0
Curriculum Specialist		1.0
Coordinator, Arts Education	.5	
Director III, Student Programs	1.0	
Principal (Juvenile Court/Comm. & ROP)	4.0	
Project Specialist II, School Readiness	1.0	
Psychologist	1.0	
TOTAL		59.5 FTE

5. On March 8, 2011, the County Superintendent adopted Resolution No. 2011-B providing for tie-breaking criteria to be applied where there are individuals who have the same first date of paid service as probationary certificated employee. Resolution No. 2011-B provided: “A lottery shall be conducted among those individuals and layoff shall be from the lowest number to the highest number from the lottery.”

6. The Superintendent made and filed Accusations against each of the certificated employees of the District who timely requested a hearing after receipt of the preliminary notice or double notice. It was not disputed that the Accusations, with required accompanying documents and blank Notices of Defense, as well as Notices of Hearing, were timely served on the responding employees.

Notices of defense were filed by, or on behalf of, 31 District employees. The District rescinded the preliminary notices to three employees, and did not serve an accusation on a fourth employee, leaving 27 respondents.<sup>1</sup>

Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955.

7. SCOE provides support to Sacramento County’s 13 school districts, serving more than 230,000 K-12 public school students. SCOE Deputy Superintendent Martin Cavanaugh noted that SCOE reviewed its financial situation, uncertainties around the State budget and declining enrollment in determining that it was necessary to reduce or eliminate particular kinds of services, including closure of its five community schools. These schools serve students who have been expelled or referred because of attendance and/or behavior issues. The juvenile institutions program is likewise being reduced because of the Sacramento County Probation Department’s inability to staff juvenile hall.

The County Superintendent’s resolution to reduce or discontinue particular kinds of services was made in anticipation of decreased revenues. The proposed reductions are necessary for SCOE to remain solvent.

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<sup>1</sup> Respondents include Adrian Brown, Betty Buchanan, Frederick Castillo, Christina Charbonneau, Khan Chinn, Kevin Elkington, Jonathon Freer, Todd Gilliahan, Brian Griffith, Donna Hankins, Thomas Jackson, Barbara Lambert, Staffani LaZier, Tereze Lear, Daniel Leonard, Patrick McIntosh, Patricia Millings, Loretta Murray, Marla Nakano, Cristina Romero, Bryan Teafatiller, Cindy Tanaka, Ginger Schlavin, Joseph Clark, Kevin Jordan, Renee Mauricio, and Barbara Fraijo. Notices to the following three individuals were rescinded: Berenice Forward, Ruben Hulan and Joe Kozel. Counsel acknowledge that respondent Roy Gernfell did not receive an accusation, and that SCOE did not intend to serve him with an accusation.

### *Tie-break Criteria*

8. Craig Bradford, Daniel Leonard, Marla Nakano and Matthew Silva have the same SCOE seniority date, August 20, 1996. SCOE determined to apply a tie-breaker to determine who would bump into an instructor position at Sly Park Center, currently held by a junior instructor, Ginger Schlavin (SCOE Seniority Date - 10/17/05). The Sly Park assignment requires a multiple subject teaching credential. Mr. Bradford holds a clear single subject teaching credential in History. He is not certificated and competent to serve in the Sly Park assignment. The remaining three teachers each hold a multiple subject teaching credential. SCOE determined to apply a lottery as to these three. Matthew Silva was selected in this manner to bump into the Sly Park assignment. Respondents Leonard and Nakano challenge the use of the lottery to break the tie.

9. Resolution No. 2011-B provides that for the purpose of determining relative seniority of teachers with the first date of paid service, a lottery would be applied in the first instance. (Finding 5.) SCOE Chief Administrator Effie Crush explained that she determined that the use of a lottery was a simple and fair means of determining relative seniority since all three employees held the same credential and were otherwise equally qualified.

SCOE's resort to a lottery in the first instance was improper. Education Code section 44955, subdivision (b) provides that as between employees with the same seniority date, "the governing board shall determine the order of termination solely on the basis of the needs of the district and the students thereof." At one time, the statute specifically included language allowing a lottery to determine relative seniority. That language was replaced with the current language. (*Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648, 656; *Alexander v. Bd. of Trustees of Delano Joint High School District* (1983) 139 Cal.App.3d 567, 573.) It is permissible to use a lottery as a final tie-breaker after applying other objective criteria based on the needs of SCOE and its students, but this was not done here. Resolution No. 2011-B called for application of a lottery in the first instance. The result in applying a lottery was that relative seniority ranking was not based upon the needs of SCOE and its students.

10. SCOE cites to a 2009 Office of Administrative Hearings decision involving the Los Banos Unified School District as authority for its use of a lottery as the sole criteria. (OAH No. 2009031357.) The Los Banos Unified School District and the Los Banos Teachers Association had entered into a Memorandum of Understanding (MOU) regarding teacher seniority. However, the lottery was not used in the first instance. Criteria two of the MOU provided: "In the event of certificated employees who have the same date of hire, the date the employee initially signed the contract with the District will be used to establish seniority." Although the Los Banos MOU largely provided for a random selection process, it still applied separate criteria prior to a lottery. More typical tie-break criteria include objective measures such as type of credential, certificates, authorizations, language skills, degrees or salary steps. Districts may also weigh criteria by assigning points based upon relative importance. For all these reasons, SCOE's use of a lottery as a tie-breaker in the first instance was improper.

The Superintendent or his designee should adopt specific criteria to be used in ranking each employee relative to other employees with the same SCOE seniority date, and then apply the criteria to the three employees prior to providing notice of termination of services under Education Code section 44955.

### *Bumping*

11. Kevin Jordan. Respondent Kevin Jordan is an ROP Horticulture teacher (Instructor Nursery & Land) assigned to Palmyer High School. His SCOE seniority date is December 12, 2009. He is junior to Joseph Wilson, whose SCOE seniority date is July 23, 2007. Mr. Wilson holds a Preliminary Designated Subjects Vocational credential in Landscaping and Ornamental Nursery Operation. He is currently assigned as an ROP Instructor (Nursery & Land) at North Area Community School. SCOE intends for Mr. Wilson to bump into Mr. Jordan's assignment.

Mr. Jordan noted that his class has evolved into environmental horticulture and that he has changed the course curricula so that students will receive credit from American River College if they successfully pass tests administered in his class.

12. If a permanent certificated teacher is certificated and competent to render a service provided by a more junior teacher, the senior teacher is entitled to bump into the junior position. (Ed. Code, § 44955, subd. (b).) SCOE has demonstrated that Mr. Wilson is certificated and competent to render the services currently performed by Mr. Jordan. Mr. Wilson may bump into this teaching assignment.

13. Betty Buchanan. Respondent Betty Buchanan is an instructor at Gerber Junior/Senior High School. Her SCOE seniority date is September 21, 1992. She holds a multiple subject credential and a Clear Specialist Instruction Credential (Severely Handicapped) that allow her to teach in a self-contained K-8 and severely handicapped assignments, respectively. SCOE approached her about being assigned to positions at either Sly Park or within Special Education as an academic intervention teacher. Ms. Buchanan declined, indicating that her physical condition prevented her from working in either position. Ms. Buchanan had worked in the past in SCOE's Special Education department, but due to some physical limitations and restrictions, and after going through the Americans with Disabilities Act (ADA) interactive processes, she was assigned to her community school position. Based upon Ms. Buchanan's rejection of the offer to be reassigned next year, SCOE issued her a layoff notice because there were not other available positions based upon her credential and seniority where she could be assigned.

14. Respondent Betty Buchanan would again like to engage SCOE in the ADA interactive process prior to the beginning of the 2011 – 2012 school year to determine if she is physically able to teach in other assignments. If she is not physically able to do so, she believes she would be entitled to benefit from medical leave provisions under the Education Code, and be placed on a rehire list until either her restrictions are lifted or another teaching position opens. Respondent contends that whether she is able to physically perform in a

teaching assignment is a question to be resolved under the ADA or Fair Employment and Housing Act.

15. Respondent Betty Buchanan is correct. SCOE cannot properly consider Ms. Buchanan's physical condition in determining whether she is competent to bump into a teaching position. It is undisputed that by virtue of her seniority and credentials, Ms. Buchanan is "certificated and competent" to render service for SCOE in at least two positions currently assigned to junior employees. Issues relating to her physical limitations are also relevant, but resolution must be through discussions contemplated through the FEHA and ADA interactive processes.

*The layoff notice to Betty Buchanan should be rescinded*

16. Khan Chinn. Respondent Khan Chinn has a SCOE seniority date of December 1, 1994. He is assigned to El Centro Junior/Senior High School. He holds Life Standard Secondary (Art, Industrial Arts), Life Standard Designated Subject Adult (Industrial Arts) and Life Standard Designated Subject (Public Safety) teaching credentials. He does not hold a multiple subject credential. He would like to be assigned to assignments held by more junior employees at Sly Park. However, SCOE requires a multiple subject credential, or a single subject science credential, since the Sly Park program is an outdoor science program serving fourth through sixth grade students.

Mr. Chinn has not demonstrated that he is certificated and competent to render the services currently performed by junior Sly Park instructors.

*Classification*

17. Cristina Romero. Respondent Cristina Romero was employed by SCOE on August 28, 1995, as a part-time ROP Instructor. Her employment contract specified that her service year would be four days per week, three hours per day, for a total of 360 hours over the period from August 28, 1995, to June 7, 1996. Her SCOE seniority date is August 25, 1995. Ms. Romero contends that she served in this same capacity since 1989, largely at River City High School, and that she taught essentially the same class, for the same number of days per week, for three hours per day. She would like to have her service over this period characterized as probationary. She contends that she was not a temporary employee because the Education Code limits such classification to teaching duties that last no more than three months of any school term. And since no other provisions of the Education Code regarding temporary employment apply, she must be classified as probationary.

In general, districts may classify teachers as temporary only if, by virtue of the positions they occupied or the manner of services performed, they fall within specific Education Code provisions that define temporary employees. All certificated teachers who are not so classified as temporary employees, and who are not properly classified under the Education Code as permanent or substitute employees, must be classified as probationary

employees. (Ed. Code, § 44915. See *Bakersfield Elementary Teachers Association v. Bakersfield City School District*, *supra*, (2006) 145 Cal.App.4th 1260.)

18. Ms. Romero taught in SCOE's adult education program. This remained the case even when high school students enrolled in her classes. Classes for adults may be maintained in conjunction with day or evening high school, day or evening adult schools, or day or evening regional occupational centers. (Ed. Code, § 52512.) SCOE employed and assigned Ms. Romero to an adult education teaching assignment.

19. Pursuant to SCOE's collective bargaining agreement with the teachers, a full-time certificated position at SCOE is eight hours per day, or a 40-hour week. Education Code section 44929.25 provides as follows regarding adult class teachers:

[¶ . . . ¶]

Notwithstanding any other provision to the contrary, any person who is employed to teach adults for not more than 60 percent of the hours per week considered a full-time assignment for permanent employees having comparable duties shall be classified as a temporary employee, and shall not become a probationary employee under the provisions of Section 44954

20. Ms. Romero worked a total of 12 hours per week. This is approximately one third of a full time position, and well under the 60 percent of the hours per week considered a full-time assignment for comparable SCOE employees. She must be classified as a temporary employee on this basis alone.

21. SCOE correctly noted that Ms. Romero's temporary classification is also supported by Education Code section 44919, which provides that certificated employees teaching evening classes for adults may be classified as temporary if they do not teach for more than four months of any school term. "Term" is equivalent to "semester," and not to "school year" as suggested by respondent. Subdivision (a) of section 44919 provides: "The school year may be divided into not more than two terms for the purposes of this section." The record demonstrated that between 1989 and 1995, Ms. Romero did not teach more than four months of any school term. She taught up to 270 hours over the entire school year.

22. SCOE concedes that Ms. Romero may benefit from tacking provisions of Education Code section 44918, defining circumstances of employment under which service as a temporary employee, for at least 75 percent of the number of days the regular schools of the district were maintained, shall be deemed service for a complete school year as a "probationary" employee. Should SCOE determine that Ms. Romero meets the requirements of this section her SCOE seniority date should be adjusted to reflect the additional year served in and deemed probationary employment.

### *Other Matters*

23. Respondents suggested that when SCOE reduced the hours of seven juvenile institutions teachers from 220 days to 200 days, it did not properly account for this reduction, and over-noticed two FTE. They request that two layoff notices be rescinded. Respondents' argument is not persuasive. SCOE explained that two employees who bumped into remaining 200-day positions are currently in 185-day assignments. They cannot be assigned to more than 185 days next year, and so they will become 185-day employees sitting in 200-day assignments. Although SCOE benefits from some hour savings, it strictly complied with the Resolution 2011-A reduction of juvenile hall positions from 220 days to 200 days. SCOE further noted that should either of the two individuals (185-day employees) resign or retire, the next most senior teacher would be offered the 200-day position.

24. The Superintendent correctly identified the certificated employees providing the particular kinds of services to be reduced or discontinued. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render. 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.

### LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of sections 44949 and 44955 were met. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide them due process. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) The description of services to be reduced, both in Resolution 2011-A and in the notices, adequately describe particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838. See, also, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

2. The Superintendent 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.) The burden is on SCOE to demonstrate that the reduction or elimination of the particular kinds of services is reasonable and that the Superintendent carefully considered SCOE's needs before laying off any certificated employee. (*Campbell Elementary Teachers Association v. Abbott, supra*, 76 Cal.App.3d at pp. 807-808.)

3. The services identified in Resolution No. 2011-A are particular kinds of services that may be reduced or discontinued under sections 44949 and 44955. Legal cause exists to reduce or eliminate 59.5 FTE of particular kinds of services offered by SCOE as set forth in detail in the Factual Findings. The Superintendent's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of his discretion. Cause for the reduction or discontinuance of services relates solely to the welfare of SCOE's schools and pupils within the meaning of section 44949.

4. SCOE was required to exercise tie-break criteria with respect to teachers with a District seniority date of August 20, 1996. As set forth in Findings 8 through 10, SCOE's use of a lottery as a tie-breaker in the first instance was improper. The Superintendent or his designee should adopt specific criteria to be used in ranking each employee relative to other employees with the same SCOE seniority date, and then apply the criteria to the remaining three employees prior to providing notice of termination of services under Education Code section 44955.

5. SCOE improperly determined that respondent Betty Buchanan was not certificated and competent to render service in alternative assignments. It is undisputed that by virtue of her seniority and credentials, Ms. Buchanan is "certificated and competent" to render service for SCOE in at least two positions currently assigned to junior employees. Issues relating to her physical limitations must be resolved through discussions contemplated through the FEHA and ADA interactive processes. (Findings 13 through 15.) The layoff notice to Ms. Buchanan should be rescinded.

6. SCOE correctly determined that respondent Cristina Romero served as a temporary employee over the period 1989 – 1995. (Findings 17 through 21.)

However, Ms. Romero is entitled to benefit from her one year service in a temporary position if she satisfied provisions of Education Code section 44918 defining circumstances of employment under which service as a temporary employee, for at least 75 percent of the number of days the regular schools of the district were maintained, shall be deemed service for a complete school year as a "probationary" employee. (Finding 22.) Should SCOE determine that Ms. Romero meets the requirements of this section her SCOE seniority date should be adjusted to reflect the additional year served in and deemed probationary employment.

7. Cause exists for the reduction of the particular kinds of services and for the reduction of full-time equivalent certificated positions at the end of the 2010 – 2011 school year pursuant to Education Code sections 44949 and 44955. Except as noted above, no employee with less seniority than any respondent is being retained to render a service which any respondent is certificated and competent to render.

8. The Superintendent of Schools of Sacramento County may give remaining respondents whose preliminary notices have not been rescinded final notice before May 15, 2011, that their services will not be required for the ensuing school year, 2011-2012.

## RECOMMENDATION

Cause exists for the reduction of 59.5 full-time equivalent certificated positions at the end of the 2010-2011 school year. After adopting and applying tie-break criteria, and making the adjustments to seniority dates set forth in the Factual Findings and Legal Conclusions, notice shall be given to respondents that their services will be reduced or will not be required for the ensuing school year, 2011-2012, because of the reduction and discontinuance of particular kinds of services. Notice shall be given in inverse order of seniority.

DATED: April 20, 2011

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JONATHAN LEW  
Administrative Law Judge  
Office of Administrative Hearings