

BEFORE THE
GOVERNING BOARD OF THE
SOUTHERN KERN UNIFIED SCHOOL DISTRICT
COUNTY OF KERN, STATE OF CALIFORNIA

In the Matter of the Layoffs of:

OAH No. 2012030748

GERRY BLUNDELL, ROBERT D.
HORNER, JAMES E. JOHNSON, and
KATHY MOSHIER,

Respondents.

PROPOSED DECISION

This matter was heard by Mark Harman, Administrative Law Judge (ALJ) of the Office of Administrative Hearings, State of California, on April 24, 2012, in Rosamond, California.

Salvador O. Holguin, Jr., Attorney at Law, represented the Southern Kern Unified School District (District). Gerry Blundell (Respondent Blundell), James E. Johnson (Respondent Johnson), and Kathy Moshier (Respondent Moshier) (collectively, Respondents) were present and represented themselves during the hearing. There was no appearance by or on behalf of Respondent Robert D. Horner (Horner).¹

The District decided to reduce or discontinue certain educational services and gave Respondents and other certificated District employees notice of its intent not to reemploy them for the 2012-2013 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2012-2013 school year.

Oral and documentary evidence was received. The matter was submitted for decision on April 24, 2012.

FACTUAL FINDINGS

1. Kent Taylor is the Superintendent of the District. He filed the Accusation in his official capacity. The Superintendent and his staff were responsible for implementation of the technical aspects of the layoff.

¹ On April 18, 2012, Horner notified the Superintendent that he intended to retire from the District on June 2, 2012; Horner's retirement notice, however, has not yet been accepted by the Board, and the Order that follows authorizes the District to lay off Horner.

2. Respondents are permanent certificated employees of the District who currently are serving in administrative positions: Blundell is an Assistant Principal (Secondary Schools); Johnson is the Principal of the alternative high school, and Moshier is an Assistant Principal at Tropico Middle School. In late February 2012, the Superintendent notified Respondents that they would be released from their administrative positions and would be reassigned to teaching positions at the close of the 2011-2012 school year.

3. On March 7, 2012, the Governing Board of the District (Board) determined that it was necessary to reduce or discontinue particular kinds of services for the 2012-2013 school year and, for that reason, that it was necessary to decrease the number of certificated employees of the District for the 2012-2013 school. On the same date, the Board adopted Resolution No. 11-12-41 (the Resolution) to reduce or discontinue the following services:

| PARTICULAR KINDS OF SERVICES | NO. OF FULL TIME EQUIVALENT (FTE) POSITIONS |
|--|---|
| Alternative Education Science/Independent Study (IS) | 0.6 |
| Alternative Education Social Science/IS | 1 |
| Alternative Education Physical Education/IS | 0.4 |
| Alternative Education Principal Services | 1 |
| Assistant Principal High School Services | 1 |
| K-6 Classroom Instructional Services | 3 |
| Physical Education Instructional Services | 1 |
| Elementary L.E.P. Instructional Services | 2 |
| <u>Total FTE Reduction</u> | <hr/> 10 |

4. Pursuant to the Resolution, on or before March 15, 2012, the District served preliminary layoff notices, via certified mail and first class mail, to 10 certificated employees, including Respondents. These notices state that the District's Superintendent had recommended to the Board that the District give notice to these employees that their services

will not be required in the 2012-2013 school year. All employees who received these notices, including Respondents, timely requested a hearing to determine if there was cause for not reemploying them for the 2012-2013 school year. The Superintendent then served Accusations, dated March 27, 2012, and their related documents, upon these 10 employees, including Respondents, all of whom timely filed their Notices of Defense.² All prehearing jurisdictional requirements have been met.

5. The services set forth in factual finding number 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.³

6a. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments, and credentials. Respondent Johnson is number 6 on the seniority list. His seniority date is August 26, 1986. He holds a single subject credential in physical education (PE) and an administrative services credential. In addition to his responsibilities as a Principal, Respondent Johnson has taught PE, Driver's Education, has been a Dean, was on the Board, and was Assistant Superintendent in charge of District personnel in prior years. He is senior to every other certificated employee in the District holding a credential to teach PE with the exception of Rodney Van Norman, whose notice of retirement at the close of the current year has been accepted by the Board. No other District PE teacher received a preliminary lay off notice this year. Respondent Johnson asserts that the District has improperly identified him for lay off, and identified Mishell Prothro, with a seniority date of August 7, 2008, and Stanley Lyons, with a seniority date of August 18, 2008, as the two most junior PE teachers in the District.

6b. Respondent Blundell has a seniority date of August 23, 1989, and holds multiple subject and administrative services credentials. Before becoming an administrator, Respondent Blundell taught second, fifth, and sixth grades, and was a District dean. Respondent Moshier has a seniority date of July 3, 1997. She holds preliminary administrative services and clear multiple subject credentials. She taught first and sixth grades before assuming her duties as an Assistant Principal. David Dixon (Dixon) is the only certificated employee who holds a multiple subject credential and whose seniority date is earlier than either Respondent Blundell or Respondent Moshier. Dixon is currently teaching

² Before March 15, 2012, the District gave notice to, and received requests for a hearing from, 10 certificated employees including Respondents. On April 17, 2012, the District sent a letter to six of these employees, Lon Boyett, Angela Canham, David Dixon, Christine Dorman, Michelle Hubkey, and Cindy McNutt, which states: "circumstances have changed since the issuance of [the preliminary layoff notices and Accusations], which include certain known resignations and retirements, thus permitting the District to rescind the March 13, 2012 notice and dismiss the Accusation." (Exhibit 10.) Thus, Respondents and Horner are the only persons still affected by the District's lay off determinations.

³ All further statutory references are to the Education Code.

fifth graders. The District rescinded Dixon's preliminary notice, dismissed the Accusation as to him, and he will be retained for the 2012-2013 school year. The District also rescinded or withdrew the preliminary notices and Accusation served on four other certificated employees, Angela Canham, Christine Dorman, Michelle Hubkey, and Cindy McNutt, who currently are teaching classes pursuant to their multiple subject credentials. These four are the most junior employees serving in K-6 Classroom Instruction Services positions. Each of these employees is more junior than Respondent Blundell or Respondent Moshier.

The District's Implementation of Layoff Analysis

7. Economic layoffs are generally to be carried out on the basis of seniority. A teacher with more seniority typically has greater rights to retain employment than a junior teacher. A senior teacher whose position is discontinued has the right to a position held by a junior teacher if the senior teacher is properly credentialed and competent. That displacement of a junior teacher is known as "bumping." In the District's implementation of the Resolution with regards to Respondent Blundell and Respondent Moshier, it determined not to reassign them but made its own "bumping" analysis; however, the District's analysis was flawed because the District's junior teachers who currently are serving in the teaching positions the Board intends to eliminate are the ones who can "bump," and the District's analysis fails to recognize these Respondents have seniority within the District. Respondent Blundell and Respondent Moshier would not be "bumping" junior teachers since their positions are not being discontinued through the lay off; rather, they are returning to positions that were vacated when these Respondents became administrators because they are being released from their administrative positions. Further, the District erroneously has asserted that Respondents are not competent, and therefore, are not able to "bump" any junior employees. In addition, the District has failed to demonstrate with regard to Respondents that it has a specific need for personnel to teach "a specific course or course of study" and that the junior employees that will be retained have the special training and experience to teach this course or course of study, which Respondents do not possess. The District's failure to demonstrate these elements of "skipping" prevents the District from deviating from terminating employees in order of seniority. (§ 44955, subd . (d)(1).)

Discussion of the Resolution's Competency Criterion

8. The Board adopted as part of Resolution No. 11-12-41 a definition of competency that pertains to each and every teaching position in the District. The District maintains Respondents are not "competent" to serve in any teaching position within the District because they do not possess English Learner (EL) authorizations. Respondents' primary contention is that, as the more senior certificated employees, they have preferential rights in this proceeding and the District must reassign them to teaching positions under section 44955, subdivision (b), so long as the District continues to provide services they are certificated and competent to render and no one with more seniority is able to "bump" them. Respondents also argue that the District may not impose EL authorization as one of the criteria that the more senior employees must meet before they are retained, particularly since the District is retaining more junior employees whom they could bump and who also have

not obtained their EL authorizations. The District's competency standard must be reasonable and valid; and the District must apply its competency rule fairly before it decides it cannot reassign Respondents into positions currently held by more junior employees, whom the District has retained and who presumably have the work experience, skills, and qualifications (competency) necessary for these positions, which Respondents purportedly do not possess.

9. In support of its competency standard, the Board determined that it had a significant population of EL students with specialized educational needs, and a compelling need to employ and retain certificated employees who have authorizations to teach EL students. The District did not offer any substantial evidence at the hearing in support of this factual determination and, therefore, the actual or specific needs of the District for teachers with EL authorizations has not been established. While it is true every district is required to make reasonable efforts to staff classrooms containing one or more EL students with a certificated employee possessing an appropriate EL authorization to provide instruction for English language development (§ 44253.10), the law has provided districts with many ways to achieve this result. For example, a district may make provisional assignments of teachers who are pursuing the necessary training (§ 44253.10, subd. (e)) or seek an emergency permit from the California Commission on Teacher Credentialing (CTC).⁴ The Board's Resolution correctly references that a "misassignment" can result in sanctions imposed by the County Superintendent of Schools. The District further asserts, without establishing, that the needs of the District and the students "should not, and cannot, be adequately served by concentrating EL students in particular classrooms in such a manner as to lessen the need for certificated employees with EL authorizations." (Exhibit 1.) Assuming that the Resolution is sufficient to establish the District's needs in this proceeding, the Board still must demonstrate that its "competency" definition is reasonable and valid. There are "limitation on a board's discretion . . . the Board must act in good faith and not resort to a reduction in services as a subterfuge to rid itself of an unwanted teacher. '[The law] will not . . . permit the dismissal of that employee for the sole purpose of employing another whose qualifications may seem more desirable.' [Citation omitted.]" (Ozsogomonyan, *Teacher Dismissals Under Section 13447 of the California Education Code*, 30 Hastings L.J. 1401, 1414-1415, fn. 97.) The Board cannot properly determine whether a teacher's specific skills and qualifications are related to his or her competence for a particular position by evaluating the needs of the District and students. "With respect to teachers having different seniority dates, 'needs' are considered only in relation to the program requirements." (*Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567, 573.)

⁴ The Resolutions states that the senior employee is competent if he or she, among other things, has authorization to teach English Learner students, as determined by the CTC, "and be able to perform such services without Board authorization." (Exhibit 1.) This limitation upon the District's power to grant provisional assignments is more evidence tending show that the Board and the Superintendent took explicit measures to make it more difficult to reassign Respondents to teaching positions that require EL authorizations.

The Board's Definition of Competency Is Neither Reasonable Nor Valid

10. Section 44955, subdivision (b), provides, in pertinent part: “[t]he 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.” (Italics added.) “Certificated” is defined by the provisions of the Education Code pertaining to credentials, but “competent” is not specifically defined. In *Forker v. Board of Trustees* (1994) 160 Cal.App.3d 13, 19, the Court defined the term in a reemployment proceeding under section 44956, in terms of the teachers’ skills and qualifications, specifically, as “relating to special qualifications for a vacant position, rather than relating to the on-the-job performance of the laid-off permanent employee.” In doing so, the Court noted that courts in reduction in force cases, namely *Brough v. Governing Board* (1981) 118 Cal.App.3d 702, 714-15, and *Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, 654-55, had interpreted the term in a similar manner. Courts have recognized that school districts have discretion to establish rules to define teacher competency. Thus, after reviewing earlier cases, the Court in *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 565 (*Duax*), wrote: “Hence, from these authorities we conclude that a board’s definition of competency is reasonable when it considers the skills and qualifications of the teacher threatened with layoff.”

11. A standard that is “clearly related to skills and qualifications to teach,” and which does not define “competency” too narrowly, is a reasonable one. (*Duax*, at p. 567.) However, the District’s competency rule does not relate to the skills and qualifications of a certificated employee in the same manner as the rule in *Duax*. Rather than defining skills and qualifications in terms of past experience, the District’s rule relies exclusively on teacher certification or other credential authorizations. And while such certificate-based qualifications may indeed bear on competency, section 44955 precludes its use to define competency. The District’s competency rule blurs the distinction between the two requirements and makes possession of certain credentials the basis to also establish competency. There are two problems with such a competency rule. First, the District modifies “certificated” in a manner not authorized by 44955 or any other statute, in effect imposing a “super certificated” criteria for more senior employees to meet before they are retained. Second, it renders the “competent” requirement partially superfluous, as credentials become determinative. Such additions to, and subtractions from, the statutory language are inconsistent with established rules of statutory construction and are contrary to expressed legislative intent.

The District's Application of the Competency Criterion was Arbitrary

12. The Resolution’s competency rule, in trying to address a larger District issue along with the District’s other policies that deal with the underlying problem – too few teachers with EL authorizations – has been applied inconsistently and in a way that has adversely affected Respondents’ rights in this layoff proceeding. Since the Superintendent was hired by the Board in July 2011, more than 10 percent of the District’s certificated employees have been providing services to the District either without EL authorizations or with emergency permits that are good for only one year and must be obtained from the CTC by the District.

The District will not only be retaining junior certificated teachers in the coming school year, but for many of these teachers, the District again will apply for the emergency permits they need by certifying to the CTC that it has a need for fully qualified educators. If the District can certify that it needs junior teachers who are serving in their positions without EL authorization, there is no rational basis upon which the District can argue that it does not need senior teachers to render these services. As administrators, Respondents are not legally required to have EL authorizations in their positions. After they received notice they would be released and reassigned to teacher positions at the close of this school year, Respondent Blundell and Respondent Mosher earnestly began working to obtain EL authorizations.

13. In July 2011, the District and the Rosamond Teacher's Association (Association) entered into a memorandum of understanding (MOU) authorizing the District's teachers who had not yet obtained EL authorizations one last chance, until June 30, 2013, either to possess a Cross-cultural Language and Academic Development (CLAD) certificate or some other form of EL authorization, or to resign. The MOU required each affected teacher to submit a description of his or her plan to obtain the required certification for the District's review and approval by September 30, 2011, e.g., the teacher had to state how her or she intended to satisfy the requirement, by taking coursework or by taking the CTEL (California Teachers of English Learners) examination. The MOU further required teachers to demonstrate satisfactory progress toward passage of CTEL coursework or passage of at least one-third of the CTEL examination on or before June 30, 2012. The MOU offered a third option, i.e., a teacher could indicate that he or she intended to retire by June 30, 2013. (Exhibit D.)

14. The MOU provides that the "District's denial of a unit member's plan may not be arbitrary or capricious and the reason for the District's denial of a unit member's plan shall be provided to the unit member in writing, upon request." The agreement further stipulates that, if statutes and regulations change the requirements pertaining to EL authorizations, the parties would meet and negotiate the implications of those changes. The district, however, has refused to allow Respondents to benefit from this agreement. Since Respondents currently are administrators and are not unit members, they cannot assert the rights and protections bargained for and afforded to the other teachers under the MOU. The MOU does not govern the order of layoff, but the District's unequal treatment of Respondents relative to MOU tends to show that a different standard has been applied to Respondents in comparison with the teachers the District wants to retain. After the Board had determined in February 2012 to release Respondents from their administrative positions and reassign them to teaching positions at the close of the school year, the only fair thing to do under the circumstances would be to extend the MOU's provisions to Respondents.

15a. In August 2011, the Superintendent had indicated that he wanted all certificated District administrators to have EL authorizations and offered to allow these administrators the same period of time to obtain their CLAD certificates or other types of EL authorizations as had been provided to the certificated teachers under the MOU. He sent out a memorandum on December 9, 2011, which advanced the date by which administrators would need to have obtained their EL authorizations to June 30, 2012, and also required

administrators to submit to him no later than February 10, 2012, a plan for the completion of the necessary coursework or examinations. Respondent Blundell and Respondent Moshier both enrolled in the coursework needed to obtain the EL authorization. Respondent Blundell anticipated that he will complete the coursework by the middle of May. Respondent Moshier did not pass one of her examinations, but will be retaking it and others and anticipates that she will complete her coursework in June 2012. Johnson intends to retire by June 30, 2013.

15b. Respondent Blundell and Respondent Moshier believe that they did what the Superintendent asked them to do. In February 2012, Respondent Blundell and Respondent Moshier submitted their applications for Emergency CLAD permits to the Superintendent for submission to the CTC. Shortly before the Board adopted the Resolution, the Superintendent rejected Respondent Blundell's and Respondent Moshier's Emergency CLAD Permit applications. The Superintendent refused to execute this ministerial act, thereby making reassignment of Respondents that much more problematic. The Superintendent offered no valid reason for his refusal to apply for the emergency permits or for his refusal to offer Respondents any additional time to get their EL authorizations.

15c. With regard to the refusal to apply for emergency permits with the CTC, the Superintendent testified that, because Respondents currently were not serving in teaching positions, he was unable to certify to the CTC where they might be employed or what position they might hold or where the position would be located on their emergency permit applications. His testimony in this regard was not credible. The District's refusal to offer this accommodation to Respondents, but make it available to every other certificated employee in a teaching position, is striking not only because it goes against the District's own policy of retaining certificated employees who demonstrate a good faith effort in obtaining their EL authorizations, but for its refusal to offer any justification for treating Respondents differently.

16. The Superintendent revealed his hand in part during his testimony at the administrative hearing. He indicated that Respondents' poor performance as administrators had been a reason for their releases, and by implication, that they were subject to lay off for these reasons as well. The Superintendent appeared to blame Respondents for having failed to implement the District's policy by requiring teachers to obtain EL authorizations. The Superintendent's testimony suggested that he had recommended termination of Respondents for causes that were not related to economic reasons. When Respondents cross-examined him, he showed animus toward them; he became condescending and refused to answer Respondent Johnson's questions when Johnson was unable to state them with ease. He offered no rational explanation for refusing to facilitate Respondents' obtaining emergency permits. His testimony on this point was not credible. He never explained why the District was permitting all other certificated employees who still lacked EL authorizations not only the opportunity to retain their positions but also the opportunity to obtain their EL authorizations on or before June 30, 2013.

17. Except as otherwise provided herein, the District did not retain any certificated employee junior to Respondents to render a service which these Respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 5.

2. The services listed in factual finding number 3 are particular kinds of services that could be reduced or discontinued under section 44955.

3. The District has failed to establish that the reduction or elimination of three FTE's of K-6 instructional services, as listed in factual finding number 3, relates solely to the welfare of the District's schools and pupils within the meaning of section 44949. As set forth in the factual findings and discussion, the District has acted arbitrarily and capriciously to terminate Respondents through this lay off proceeding. Respondents are competent to render services as teachers in the District. The District's decision to terminate Respondents regardless of their seniority, and without properly examining their qualifications to render services to the District, is arbitrary and capricious. The District's actions with regard to Respondents are not related to the welfare of the District and its pupils and cannot be sustained under section 44949, subdivision (c)(3), which requires the ALJ to determine whether "the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof."

4. The bleak outlook for the State's finances resulted in the District's determine to reduce school services. The District's decision has not been challenged and appears reasonable. As long as a decision to reduce or discontinue services is reasonable, the motivation is not open to challenge. (*Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796.) The District, however, has failed to establish facts that reasonably support its actions to terminate Respondents. In general, the District has an affirmative obligation to reassign a senior teacher who is losing his or her position into a position held by a junior teacher if the senior teacher has both the credentials and is competent to serve in that position. "Competency becomes an issue only when the least senior employee performing a service that is being reduced or discontinued is credentialed to perform a service being rendered by a more junior employee whose position is being retained." (Ozsogomonyan, *Teacher Layoffs in California: An Update*, 30 Hastings L.J. 1727, 1750, fn. 143.) Respondent Johnson, whose Principal position was eliminated through layoff, was entitled to "bump" the most junior employee teaching PE classes. The District's determination that Respondent Johnson was not competent to "bump" is erroneous. The District failed to demonstrate that its bumping analysis should even have applied to Respondent Blundell or Respondent Moshier in this matter, particularly since the District's analysis resulted in the retention of junior teachers whose competencies to meet the District's program needs were materially no different than Respondents.

5a. The District has failed to properly identify the correct employees it needed to lay off, either because these employees served in one of the positions being eliminated or because they were being bumped by a more senior employee who served in one of these positions. Respondents did not fit either of these categories. The District has denied Respondents reassignment rights that entitle them to teach in the 2012-2013 school year. The District arbitrarily applied its competency rule to circumvent these rights and retain its junior employees. The District failed to demonstrate any rational relationship between its actions and a proper objective of reducing the number of employees through a seniority-based economic layoff. “When a service is reduced, the most junior person performing the serve is generally either laid off or reassigned. If a more senior employee performing the service is incompetent, the only means of dismissing that employee is termination for cause.” (Ozsogomonyan, *Teacher Layoffs in California: An Update*, 30 Hastings L.J. 1727, 1750, fn. 143.) The District attempted to dismiss Respondents for cause, which is not appropriate in a layoff proceeding. (See *Governing Bd. Of Ripon Unified School Dist. v. Commission on Professional Conduct* (2009) 177 Cal.App.4th 1379, where it was found proper for a district to commence proceedings to terminate a tenured music teacher who refused to earn a CLAD certificate or other EL authorization. The teacher’s life credential did not preempt the district from conditioning her employment on obtaining new certifications. The teacher’s actions constituted “persistent refusal to obey reasonable regulations prescribed by the district,” under the statute defining grounds for termination of a tenured teacher.)

5b. Furthermore, the District failed to establish all facts necessary to establish a basis for “skipping” Respondents. For these reasons, the preliminary lay off notices sent to Respondents must be rescinded, and the Accusation as to them must be dismissed.

6. Cause does not exist to terminate the services of Respondents Gerry Blundell, James E. Johnson, or Kathy Moshier for the 2012-2013 school year due to the reduction of particular kinds of services, by reason of factual finding numbers 1 through 17 and legal conclusion numbers 1 through 5.

ORDER

1. The Accusation is dismissed as to Respondents. The District shall not give notice to Respondents Gerry Blundell, James E. Johnson, or Kathy Moshier that their services will not be needed during the 2012-2013 school year due to the reduction of particular kinds of services.

2. The Accusation is sustained as to Respondent Horner, and the District may give notice to Respondent Horner that his services will not be needed during the 2012-2013 school year due to the reduction of particular kinds of services.

Dated: May ____, 2012

MARK HARMAN
Administrative Law Judge
Office of Administrative Hearings