

BEFORE THE
RIVERSIDE COUNTY OFFICE OF EDUCATION
STATE OF CALIFORNIA

In the Matter of the Employment Status of
Certain Employees of the Riverside County
Office of Education,

Respondents.

OAH No. 2013040215

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Riverside, California on April 29, 2013.

William A. Diedrich, Atkinson, Anderson, Loya, Rudd & Romo, represented the Riverside County Office of Education.

Carols Perez, Reich, Adell & Cvitan, represented all respondents who were present at the reduction in force proceeding.

No respondent represented himself or herself.

The matter was submitted on April 29, 2013.

FACTUAL FINDINGS

The Riverside County Office of Education

1. The Riverside County Office of Education (RCOE) is comprised of three components: the County Superintendent of Schools, who is elected to serve a four year term; seven elected members of the County Board of Education, each of whom serve four year terms; and approximately 1,525 employees, 525 of whom are certificated and employed directly by the County Superintendent of Schools.¹ RCOE provides educational services and supports to meet the needs of students who do not or cannot receive services directly from

¹ A county superintendent of schools directly employs certificated employees under Education Code section 1293. This is not the case with local school districts, where certificated employees are employed by the district.

the 23 local school districts within Riverside County and a portion of Imperial County (e.g., services provided to pregnant teens, juveniles residing in correctional facilities, or students with profound disabilities).

Kenneth M. Young (Superintendent Young) is RCOE's Superintendent of Schools. Paul C. Jessup (Deputy Superintendent Jessup) is the Deputy Superintendent of Schools. Steven Hovey (Mr. Hovey) is the District's Chief Personnel Officer. Maribel Escobar (Ms. Escobar) is RCOE's Director of Classified Personnel. Tracey Vackar (Ms. Vackar) is the Project Coordinator for the District's Career Technical Education Unit.

RCOE's Budget Concerns

2. Based upon budgetary concerns related to California's fiscal crisis and RCOE's loss of grant funding, Mr. Hovey recommended to Superintendent Young on March 11, 2013, that Superintendent Young authorize the reduction and/or elimination of particular kinds of Career Technical Education (CTE) services for the 2013-2014 school year and that he given certain CTE employees notice that their services would not be required for the 2013-2014 school year.

3. On March 11, 2013, Deputy Superintendent Jessup, on behalf of Superintendent Young, signed the following resolution:

**REDUCTION OF PARTICULAR KINDS OF
CERTIFICATED SERVICES**
RESOLUTION NO.: 13-13

WHEREAS, the Superintendent of Schools of Riverside County has determined that it is in the best interests of the County Office and the welfare of the schools and the pupils thereof that the particular kinds of services set forth herein must be reduced or discontinued due to financial conditions; and

WHEREAS, it is the opinion of the Superintendent that because of the aforementioned reason, the number of certificated employees of the Riverside County Superintendent of Schools must be reduced; and

WHEREAS, the Superintendent does not desire to reduce the services of regular certificated employees based upon reduction of average daily attendance during the past two years.

NOW, THEREFORE, BE IT RESOLVED by the Superintendent of Schools for Riverside County as follows:

A. That the particular kinds of services set forth below shall be reduced or eliminated commencing in the 2013-14 school year:

Career Technical Education (CTE) Services as follows:

Instructor, Culinary Arts	0.5	Full Time Equivalent (FTE)
Instructor, Dental Assisting	1	FTE
Instructor, EKG/Allied Health/Medical Asst.	1	FTE
Instructor, First Responder	1	FTE
Instructor, Law Enforcement Occupations	1.375	FTE
Instructor, Law Enforcement/Forensic/Security Guard/Correctional Rehab	1	FTE
Instructor, Medical Assisting-Clinical, Medical Assisting-Admin	1	FTE
Instructor, Medical Assisting/Terminology/Core	0.225	FTE
Instructor, Medical Front Office	0.625	FTE
Instructor, Medical Occupations	0.625	FTE
Instructor, Office Occupations/Word Processing	1	FTE
Instructor, Plant & Soil/Horticulture/Intro to Conservation	1	FTE
Instructor, Sports Therapy & Fitness	0.5	FTE
Total CTE	10.85	FTE

Alternative Education (Alt-Ed) Services as follows:

Instructor, Law Enforcement Occupations	0.957	FTE
Instructor, Office Occupations	0.957	FTE
Teacher/Correctional Ed - Drivers Education	0.957	FTE
Teacher/Correctional Ed - Work Experience	0.4875	FTE
Total Alt Ed.	3.4125	FTE

Total Certificated Employees: 14.2625 FTE

B. That due to the reduction or elimination of particular kinds of services, the corresponding number of certificated employees of the Riverside County Superintendent of Schools shall be terminated pursuant to Education Code section 44955

C. That the reduction of certificated staff be achieved by the termination of regular employees and not by terminating temporary and substitute employees.

D. That, for Alternative Education teachers (not instructors), “competency” as described in Education Code section 44955(b) for the purposes of bumping shall necessarily include (1) possession of a valid credential in the relevant subject matter area, (2) possession of both a special education credential and a single subject or multiple subject credential to bump into a Specialized Academic Instruction position, (3) “highly qualified” status under the No Child Left Behind Act (if required by the position), (4) an appropriate EL authorization (if required by the position), and (5) a completed security clearance (if required by the position).

E. That, for Career Technical Education and Alternative Education Instructors (not teachers), “competency” as described in Education Code section 44955(b) for the purposes of bumping shall necessarily include possession of a valid credential in the relevant Career Technical Education Industry Sector, and the necessary experience as required by the job description.

F. That, as between certificated employees with the same seniority date, the order of termination shall be determined solely by criteria adopted by the Superintendent.

G. That the Superintendent’s designee is directed to initiate layoff procedures and give appropriate notice pursuant to Education Code sections 44955 and 44949.

PASSED AND ADOPTED by the Superintendent of Schools of Riverside County on March 11, 2013.

Respondent Employees

4. The individuals identified as respondents in the Accusation are RCOE certificated employees who currently provide educational services in their capacities as either Alternative Education teachers or as Career Technical Education and Alternative Education instructors.

5. The decision to reduce and eliminate particular kinds of services was the direct result of California's fiscal crisis and RCOE's loss of grant funding. It was not based on a decline in enrollment. The particular kinds of services identified in Resolution No. 13-13 were services that Superintendent Young was authorized to reduce and discontinue. No particular kind of service was reduced or eliminated to a level below that required by state or federal law. The resolution to reduce and eliminate certain services was neither arbitrary nor capricious, and making the decision to do so was a matter squarely within Superintendent Young's sound discretion.

6. Superintendent Young authorized Mr. Hovey to act on his behalf with regard to the reduction in force proceeding that was required under Resolution No. 13-13.

The Reduction in Force and the Issuing of Preliminary Layoff Notices

7. Using Resolution No. 13-13, an updated seniority list and documentation maintained by the District's Career Technical Education Unit that related to the particular kinds of services that were being eliminated and employee experience, Mr. Hovey, Ms. Escobar and Ms. Vackar identified the employees who were subject to Resolution No. 13-13, determined whether any of the employees whose positions were being eliminated had bumping rights, and caused preliminary layoff notices to be issued to and served upon the most junior employees holding the positions that were subject to reduction and elimination. Before issuing the preliminary layoff notices, Mr. Hovey, Ms. Escobar and Ms. Vackar considered all known positive attrition as a result of resignations, retirements and other causes.

Jurisdictional Matters

8. On and before March 15, 2012, RCOE served upon respondents Antonio Alcocer, Bobbie Arterberry III, Yolanda Candelaria, Kathy Cathcart, Jennifer Dimaggio, Valarie Ellis-McCurry, William Ennis, Kathleen Fate, Barbara Fragoso, Lakesha Harris, David Heard, Nancee Hoertz, Eric Huber, Erika Salem, Christine Sanchez, Judy Silva, Lori Suntree, Barbara Tuyen and others written notice of the recommendation made to Superintendent Young that their services would not be required for the 2012-2013 school year, together with other required jurisdictional documents. Each respondent who timely requested a hearing was served thereafter with a notice of hearing. No employee who was providing alternative education services requested a hearing. All jurisdictional requirements were met.

9. On April 29, 2013, the record in the administrative hearing was opened. Attorney William A. Diedrich appeared on behalf of the district. Attorney Carlos Perez appeared on behalf of all respondents who were present at the hearing. He and the respondents were assisted by Elisa Gusdal, a CTA representative, and Michael Bochicchio, President of the RCOE Teachers Association. A stipulation concerning certain jurisdictional documents was reached. Sworn testimony was given and documentary evidence was received. Brief closing arguments were given, after which the record was closed and the matter was submitted.

The Seniority List and Bump Analysis

10. RCOE maintains two seniority lists, one for Alternative Education instructors and one for Career Technical Education-Regional Occupational Program (CTE-ROP) instructors. Because no Alternative Education instructor requested a hearing, it was not necessary to obtain evidence regarding the Alternative Education seniority list. The CTE-ROP seniority list is a continuously evolving list that sets forth each employee's seniority number, seniority date (first date of contract service with RCOE), position/title, amount of service expressed in terms of a full time equivalent (FTE), status code, registered credential, CTE industry sector/subject, EL authorization, educational level, and layoff notes.

11. RCOE sent letters to all employees regarding its seniority lists. RCOE requested that each employee review the information and provide RCOE with any corrections or additional information. The information provided to Director Escobar was verified and was included in RCOE's seniority lists.

12. RCOE staff updated the CTE-ROP master seniority list to produce the "bump analysis" that was used in this layoff proceeding. The bump analysis utilized Resolution No. 13-13 to identify the particular kinds of services that were being reduced or discontinued, the seniority dates of the persons providing those services, the names of the persons providing those services, the amount of services being reduced, and whether the persons who were subject to being displaced under Resolution No. 13-13 possessed the seniority and competence to displace (bump) a more junior employee.² The process that was used to create the bump analysis complied with the economic layoff statutes found in the Education Code, which generally require the retention of senior certificated employees over more junior employees and the retention of permanent employees over probationary employees and others with less seniority. There was no "skipping" of any junior employees.

13. During this reduction in force proceeding, RCOE dismissed the Accusation filed against Nancee Hoertz. There was no objection. The dismissal of the Accusation was in good faith and was appropriate.

14. Ms. Vackar provided expert testimony in the area of what credentials and experience was required to hold CTE-ROP employment. She used this expertise to discuss why some employees were permitted to bump and why other employees did not possess the credential and competence to bump despite being employed by RCOE for a longer period of time than an employee whose service was being retained. Ms. Vackar's testimony on these matters was not refuted, and there was no evidence to the contrary.

² Resolution 13-13, subdivision E, provided that for Career Technical Education Instructors (not teachers), "competency" necessarily included possession of a valid credential in the relevant Career Technical Education Industry Sector *and* the necessary experience as required by the job description.

Ultimate Conclusions Regarding RCOE's Reduction in Force

15. The termination of respondents' positions as a result of Superintendent Young's decision to reduce and discontinue particular kinds of services was unrelated to the quality of the professional services provided by these fine instructors. The length of service provided by most of these instructors bespeaks of their value to RCOE.

16. Superintendent Young resolved to reduce and discontinue particular kinds of services being provided by RCOE certificated employees for legitimate reasons. His decision was unrelated to the competency or dedication of the employees whose services were proposed to be reduced and discontinued. Superintendent Young's determination was lawful, reasonable, and ultimately in the best interest of RCOE and its students.

RCOE's administrative staff initiated and followed a systematic procedure to identify those employees who were directly affected by Resolution No. 13-13. A very careful evaluation was made to determine what education and experience was required to maintain employment and each employee's seniority date, status, credentials and experience in making determinations about what bumping rights, if any, an employee had. RCOE did not retain any junior credentialed employee to provide services which a more senior employee was certificated and competent to render. RCOE properly and in good faith applied relevant provisions of the Education Code in this reduction in force proceeding.

RCOE made assignments and reassignments in such a manner that respondents in this proceeding were retained to render services which their seniority and qualifications entitled them to render, albeit not on a full time basis.

LEGAL CONCLUSIONS

Statutory Authority

1. Education Code section 44949 provides in part:

No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee that it has been recommended that the notice be given to the employee, and stating the reasons therefor

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year If an employee fails to request a

hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

[¶] . . . [¶]

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced

2. Education Code section 44955 provides in part:

(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947,

inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . and when in the opinion of the governing board of the district it shall have become necessary to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the 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.

[¶] . . . [¶]

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof

[¶] . . . [¶]

(c) Notice of such termination of services shall be given before the 15th of May and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The 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. However, prior to

assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

3. Education Code section 1294.5 provides:

Any county superintendent of schools may employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted under contract with public or private agencies, or other categorically funded projects of indeterminate duration. The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the county superintendent and such agreement shall be reduced to writing. Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of county superintendent by which he is employed are maintained, and (2) such person is subsequently

employed as a probationary employee in a position requiring certification qualifications. Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees.

This section shall not be construed to apply to any regularly credentialed employee who has been employed in the regular educational programs of the county superintendent of schools as a probationary employee before being subsequently assigned to any one of these programs.

Jurisdiction

4. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and other jurisdictional requirements contained in those sections were satisfied as to all respondent employees identified herein.

The Reduction of Particular Kinds of Services

5. 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.)

Competence

6. The Education Code leaves to the governing authority the discretion to determine whether in addition to possessing seniority an employee is also "certificated and competent" to be employed in a vacant position. The term "competent" in this regard relates to an individual's specific skills or qualifications including academic background, training, credentials, and experience, but does not include evidence related to on-the-job performance. (*Forker v. Board of Trustees* (1984) 160 Cal.App.3d 13, 18-19.) In addition to seniority the only limitation in placing a teacher in a vacant position is that the teacher that is selected be "certificated and competent" to render the service required by the vacant position. Among employees who meet this threshold limitation, there is no room in the statutory scheme for comparative evaluation. (*Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 299.) An

employee holding a special credential or needed skill, if such credentials or competence are not shared by a more senior employee, may be retained though it results in termination of a senior employee. (*Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648, 655.)

Seniority and Bumping

7. Seniority: Under Education Code section 44845, seniority is determined by the date a certificated employee “first rendered paid service in a probationary position.”

8. Education Code section 44846 provides in part: “The governing board shall have power and it shall be its duty to correct any errors discovered from time to time in its records showing the order of employment.”

9. The Statutory Scheme: Education Code section 44955, the economic layoff statute, provides in subdivision (b), in part:

Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while . . . any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

Documents Filed after March 15, 2012

10. Documents filed after March 15 cannot be used by an employee to assert bumping rights. The practical reason for this rule is that layoff notices must be given by March 15 to effect a reduction in teaching staff for the ensuing school year. If an employee were allowed to present a certificate after March 15 to retain employment, the employer would by that date be precluded from serving a layoff notice to a more junior teacher. This circumstance would result in the employer being forced to retain an extra teacher when the entire purpose of the layoff procedure is to allow the reduction of staff positions because there are fewer services being offered. (*Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, 567-568.)

Cause Exists to Give Notice to Certain Employees

11. As a result of Superintendent Young’s lawful decision to reduce or discontinue particular kinds of service being provided by certain certificated employees, cause exists under the Education Code to give notice to respondents who are identified hereafter that their employment will be terminated at the close of the current school year and that their services will not be needed by the district for the 2013-2014 school year.

Determination

12. The charges set forth in the accusation were sustained by a preponderance of the evidence and related to the welfare of RCOE and the students thereof. RCOE's staff made assignments and reassignments under Resolution 13-13 in such a manner that RCOE employees were retained to render services which their seniority, credential and competence entitled them to render. No RCOE employee with less seniority than any respondent will be retained to render a service which any respondent is certificated, competent and qualified to render.

Superintendent Young's decision to reduce and discontinue particular kinds of services was totally unrelated to the competence of the instructors whose employment is subject to this economic layoff proceeding.

RECOMMENDATION

It is recommended that Superintendent Young give notice to Antonio Alcocer, Bobbie Arterberry III, Yolanda Candelaria, Kathy Cathcart, Jennifer Dimaggio, Valarie Ellis-McCurry, William Ennis, Kathleen Fate, Barbara Fragoso, Lakesha Harris, David Heard, Eric Huber, Erika Salem, Christine Sanchez, Judy Silva, Lori Suntree, and Barbara Tuyen that their services will not be required for the 2012-2013 school year.

DATED: May 1, 2013

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings