

BEFORE THE
GOVERNING BOARD
LOWELL JOINT SCHOOL DISTRICT
LOS ANGELES AND ORANGE COUNTIES
STATE OF CALIFORNIA

In the Matter of the Layoffs Of:

Keith Collins and Other
Certificated Employees of the
Lowell Joint School District,

Respondents.

Case No. 2010030556

PROPOSED DECISION

Nancy Beezy Micon, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 26, 2010, in Whittier, California.

Atkinson, Andelson, Loya, Ruud & Romo, by Barbara J. Ginsberg, Attorney at Law, represented Patricia A. Howell, Ed.D. (Howell), Superintendent, Lowell Joint School District (District).

Trygstad, Schwab & Trygstad, by Deborah Eshaghian, Attorney at Law, represented Keith Collins and Tamara Irving, collectively referred to as Respondents.

The District has decided to reduce or discontinue certain educational services and has given Respondents and other certificated employees of the District notice of its intent not to reemploy them for the 2010-2011 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2010-2011 school year.

Oral and documentary evidence, and evidence by oral stipulation on the record, was received at the hearing, and the matter was submitted for decision.

FACTUAL FINDINGS

1. Superintendent Howell filed the Accusation in her official capacity.
2. Respondents are certificated employees of the District.

3. On March 1, 2010, the Governing Board of the District (Governing Board) adopted Resolution 2009/10 No. 505, reducing or discontinuing the following services for the 2010-2011 school year:

<u>Service</u>	<u>FTE¹ Positions</u>
Elementary Instruction	19.0
Intermediate English/Language Arts Instruction	2.0
Intermediate Social Studies Instruction	1.0
Intermediate Counseling	1.0
Independent Study Program Instruction	0.2
Special Education (Mild/Moderate – RSP)	<u>1.0</u>
Total	24.2

4. On or about March 1, 2010, Superintendent Howell notified the Governing Board that she had recommended that notice be provided to Respondents that their services will not be required for the 2010-2011 school year due to the reduction of particular kinds of services.

5. On or about March 2, 2010, the District provided notice to Respondents that their services will not be required for the 2010-2011 school year due to the reduction of particular kinds of services.

6. Respondents timely requested a hearing to determine if there is cause for not reemploying them for the 2010-2011 school year.

7. On or about March 11, 2010, the District issued the Accusations, and served them on Respondents.

8. Respondents thereafter filed timely Notices of Defense.

9. All prehearing jurisdictional requirements have been met.

10. The services set forth in factual finding number 3 are particular kinds of services within the meaning of Education Code² section 44955.

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11. The Governing Board took action to reduce the services set forth in factual

¹ Full-time equivalent.

² All further statutory references are to the Education Code.

finding number 3 because of the anticipated decline in State funding. The decision to reduce or discontinue the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

12. The reduction or discontinuance of services set forth in factual finding number 3, in the context of the anticipated decline in revenue, is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

13. a. Respondent Tamara Irving (Irving) is an elementary school teacher (1.0 FTE) currently assigned to teach fifth grade. She was first employed by the District during the 1999-2000 school year. She became tenured in 2001. In 2007, Irving resigned from the District to accept a teaching position in the Anaheim Union School District, a placement she believed had the potential to allow her to advance into an administrative assignment. Irving was laid off from her teaching position in Anaheim due to a reduction in its work force. Irving was then hired by the District as a permanent employee with a seniority date of August 28, 2008. Irving holds an elementary school teaching position that is being eliminated by the District.

b. Respondent Irving asserts that she can teach the position, which is not being eliminated by the District, that Respondent Keith Collins (Collins), a probationary employee, is assigned to teach in middle school. Collins is currently assigned to teach Computers classes and an elective course called Careers in Technology. Irving holds a clear multiple-subject teaching credential with a cross-cultural, language and academic development (CLAD) certificate. She has a supplemental authorization in business, which authorizes her to teach computers, and a supplemental authorization in English. The Careers in Technology course is an elective course, which does not require an authorization. District acknowledges that Irving is certificated and competent to teach the courses.

c. Irving possesses the training and experience necessary to teach the Computers and Careers in Technology courses. Irving taught the Computers course during the 2005-2006 school year at a middle school in the District. She also taught the Computers course at the high school level in the Fullerton Joint Union School District during the summer of 2006. Irving holds a Bachelor of Science degree in business management. She has eight units of computer courses, five at the graduate level. The Computers course curriculum covers the basic Microsoft package. Irving is proficient in the use of Microsoft and Macintosh computers, including the use of the Microsoft software programs taught in the Computers course. Irving's testimony that the Careers in Technology elective course had previously been taught by a math teacher was not disputed by the District.

d. If a permanent teacher whose assignment is being eliminated is certificated and competent to teach a probationary teacher's courses, the District must reassign the permanent teacher to render that service. The District must then either reassign or terminate

the probationary employee. (§ 44955, subd. (b).) As a permanent employee who is certificated and competent to render services currently being rendered by a probationary employee, Respondent Irving must be retained.

14. a. Respondent Collins is a middle school teacher (1.0 FTE) with a clear single subject (social science) credential. He is currently assigned to teach Computers and one section of an elective course called Careers in Technology. He receives a stipend for being a “technical lead” for grades seven and eight. The stipend is for services, including maintenance of the computer network, that are not part of his teaching position. Collins was first employed by the District during the 2007-2008 school year as a temporary teacher. He taught Social Studies and Careers in Technology. During the 2008-2009 school year, Collins was again hired as a temporary teacher. He again taught Social Studies and the Careers in Technology elective course. During the 2009-2010 school year, Collins was initially hired under a temporary contract. On February 22, 2010, after a determination that Collins had replaced a teacher³ who resigned, Collins was offered and signed a “retroactive Probationary (Year 2)” contract “effective Thursday, September 3, 2009, open-ended through Friday, June 18, 2010.” The contract states: “Your services have been scheduled as a computer teacher.” The contract does not mention the Careers in Technology elective course. The Governing Board approved the contract on April 19, 2010. The position held by Collins is not being eliminated by the District. Collins was served with a layoff notice because the District was uncertain whether Irving could displace (“bump”) Collins from his position. Collins is a probationary employee who has been assigned a seniority date of August 28, 2008.

b. Respondent Collins asserts that he should be retained because he possesses special knowledge, training, and experience that are necessary to teach the courses he was assigned and that Respondent Irving lacks these special skills. Collins contends his special training from Apple and Macfusion, a specialized network support provider, enable him to maintain and configure the computers at his school. Collins argues that, without his special knowledge, training, and experience, the classrooms would be disrupted when computers fail to operate. He can also set the computers to run in a manner that prevent students from accessing inappropriate material. He can also modify the computers so they are compatible with the teaching environment. As a result of his ability to correct computer problems, the class does not have to wait for the District’s technical director to arrive to fix a problem. Collins has a board authorization under the Education Code, which enables him to teach the Computers course. Collins developed the curricula for the elective course he teaches in Careers in Technology, although the course was originally taught by another teacher who is no longer with the District.

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15. The District did not demonstrate a specific need for Respondent Collins to teach

³ The teacher who taught Computers.

the Computers or the Careers in Technology courses. Superintendent Howell believes both Collins and Irving are very professional and that both are highly qualified. In looking at the assignment, Howell felt, although a difficult decision, that Collins was “more experienced” and thus “more competent” for the assignment.

16. a. On March 1, 2010, the Governing Board adopted Exhibit B to Resolution 2009/10 No. 505, setting forth its criteria for breaking seniority ties for employees with the same first date of paid service with the District. In pertinent part, the Resolution provides that the order of termination would be decided “based solely on the needs of the Lowell Joint School District and the students thereof.” Twelve criteria were used in determining this need, in order of priority, and each criterion was used only if the preceding criteria did not delineate the order of termination.

b. Irving and Collins were considered equal in a comparison of the first nine criteria. The final provisions read, as follows:

10. Persons with years of service in any district within the subject matter or field of current assignment.
11. Length of service in the District.
12. Persons with multiple teaching credentials.

c. Superintendent Howell applied the tie-breaking criteria to rank the relative seniority between Irving and Collins. In applying the tenth criteria, Howell interpreted the language “years of service in any district within the subject matter or field of current assignment” to mean the number of years of service in the assignment the person was seeking to fill (rather than in the person’s “current” assignment). Howell testified that she looked at the assignment in question in order to determine whether the person was more qualified to bump into the assignment he or she was seeking to fill.

i. Howell gave Collins credit for three and one-half years of teaching the Careers in Technology course. He was also credited with one and one-half years of teaching the Computers course.

ii. Irving was given credit for one year of teaching computers. She was not given credit for the summer school computers course Irving taught in 2006.

iii. There were a total of seven employees who held the seniority date of August 28, 2008. No evidence was presented to show how seniority was established between the entire group of employees who shared this same seniority date.

d. Superintendent Howell did not apply the tie-breaking criteria based on the

evidence in the record. Collins was given credit for one and one-half years for teaching the computers course but the evidence showed he had just begun teaching the course in September 2009. He therefore would have been teaching the course for approximately six or seven months at the time the tie-breaking criteria were applied. Irving, on the other hand, was given credit for only one year of teaching the computers course when, in fact, she had taught computers for a full school year and a summer school session. Irving thus had more experience teaching in the subject matter, computers. It was also factually inaccurate to give Collins credit for three and one-half years of teaching Careers in Technology when the evidence shows Collins was primarily a social studies teacher for the 2007-2008 and the 2008-2009 school years. The Careers in Technology course was only a fraction of his teaching assignment. Also, Collins had been teaching for the District for only two and one-half years, not three. The Careers in Technology elective was also not included as part of the position in the contract offered to Collins. The position was for a computers teacher. If Howell was comparing the years of service in the assignment to be filled, she should have focused on years of experience in the computers position.

e. Consistent application of criteria requires all employees to be evaluated in the same manner. Under a plain reading of the words of the criteria, all employees should have been evaluated on the basis of their “current” assignments. Since five other employees also held the same date of first paid service and were not being compared for a potential assignment, the District did not use the same standard in determining the seniority as between the other employees with the August 28, 2008 seniority date. If Respondents had been compared based on their current assignments, Irving would have been found to be senior. If Respondent had been compared based only the years of experience teaching computers, Irving would still have been senior. Irving would also have been found senior under the next criteria, which required a comparison of length of service in the District. Irving had ten years teaching experience in the District. Collins had less than three.

f. Superintendent Howell’s use of tie-breaking criteria number ten to determine Respondents’ relative qualifications for a potential assignment was improperly applied. Tie-breaking criteria are not to be used to determine a person’s qualifications for an assignment. The use of criteria ten as a basis to determine competency is inherently unfair since the person currently holding the potential assignment is likely to have more years of service in the subject matter or field. The majority of employees who have the same first date of paid service are not being compared for potential assignments. The criteria are intended to be used to rank seniority based on the needs of the District. In this case, the wording of tie-breaking criteria number ten was vague and it led to the application of tie-breaking criteria number ten in a manner that was arbitrary and capricious.

g. Respondent Irving contests the District’s seniority determination. She notes the Resolution states it is to be applied to determine the order of layoff for certificated employees with the same date of “first paid **probationary** service.” Irving argues that, since she

was a permanent employee on August 28, 2008, the date the District asserted was Respondent Collins' first paid date of probationary service, the criteria for determining layoff should not have been applied because only Respondent Collins is a probationary employee. Section 44955, subdivision (b), however, requires school districts to determine the order of termination as between employees "who first rendered paid service to the district on the same date." Under section 44848, when a teacher has resigned and thereafter been reemployed by a District, the employee's employment date is "deemed" to be the date on which he or she first accepted reemployment, or rendered paid service after his or her reemployment. The title of the document in this case does not change that the District's governing board adopted the resolution for the purpose of determining the order of termination as between employees sharing the same seniority date. Respondent Irving is correct that she, in fact, had seniority under a proper, consistent application of the tie-breaking criteria. Respondent Irving is also correct that she was entitled, as a permanent employee, to displace a probationary employee who holds a position that Irving is certificated and competent to render.

17. With the dismissal of the Accusation against Respondent Irving, it is the case that no certificated employee junior to any Respondent was retained to render a service which any Respondent is 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 9.

2. The services listed in factual finding number 3 are particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 3 and 10.

3. Cause exists under sections 44949 and 44955 for the District to reduce or discontinue the particular kinds of services set forth in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 17.

4. Employment as a substitute or other temporary status may become employment in a probationary capacity in some circumstances. "A year of employment as a temporary teacher may, in some cases, be treated as a year of probationary service for purposes of attaining permanent status if the employee is rehired for the following year 'as a probationary employee in a position requiring certification qualifications' (§ 44909); 'in a position requiring certification qualifications' (§ 44917); 'as a probationary employee' (§ 44918); or 'in a vacant position requiring certification qualifications' (§ 44920). . . ." (*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1278-1279, fn 11.)

5. Section 44955, subdivision (c) provides, in pertinent part: "[t]he governing board

shall make assignments and reassignments in such manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render.” The statute, in subsection (b), gives preference to permanent employees: “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.”

Section 44955, subdivision (b), addresses the rights of permanent employees. That subdivision prohibits a school district from terminating a permanent employee while retaining a probationary employee to render a service the permanent employee is certificated and competent to render. That subdivision also prohibits a school district from terminating a permanent employee while retaining any other employee with less seniority to render a service the permanent employee is certificated and competent to render. “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.

Sections 44949 and 44955 set forth the process through which certificated employees may be laid off following reduction or discontinuation of particular kinds of services. The statutes embody a legislative choice for seniority-based layoffs, subject to specific limitations set forth in the statutes. Section 44955 plainly requires examination of both certification and competence in reduction in force decisions.

Respondent Tamara Irving is both certificated and competent to teach the Computers classes and the Careers in Technology elective course currently assigned to Respondent Keith Collins, a probationary employee. She possesses the knowledge and experience to hold the position. The District does not dispute Irving’s certification or competency to render the services. Irving must therefore be retained to render the services in those courses.

6. Respondent Keith Collins, relying upon the case of *Bledsoe v. Biggs Unified School District* (2009) 170 Cal.App.4th 127, argues that he should be retained because he possesses “special knowledge, training, and experience” required to teach the Computers classes and the Careers in Technology elective course. In *Bledsoe*, the district skipped two junior teachers who were teaching in the district’s community day school, a special school for students who had been expelled or who had behavior problems that had prevented them from being in a regular classroom. Mr. Bledsoe, who was certificated and competent to teach

the day school classes, was senior to the teachers the district skipped. Nevertheless, the district served him with a layoff notice. The court held that, pursuant to Code section 44955, subdivision (d)(1), the district had demonstrated a specific need for personnel to teach in the day school and that in order to teach there special training and experience were necessary. The court found that Mr. Bledsoe did “not possess the special training and experience” the junior teachers possessed.⁴ The court did not make an express finding as to whether Mr. Bledsoe did “not possess” the “special training and experience necessary.” The district in the *Bledsoe* case demonstrated, within the terms of section 44955, subdivision (d)(1), that it had a specific need for personnel to teach a specific course of study for which special training and experience were necessary.

In this case, the District did not demonstrate a specific need for Respondent Collins to teach the Computers classes or the elective course in Careers in Technology. In addition, the District, unlike the district at issue in *Bledsoe*, did not demonstrate that special training and experience was necessary to teach the courses. Also, the District did not demonstrate that Collins possessed special training and experience “necessary” for the position, and that Irving lacked the necessary training and experience. The District, in fact, acknowledges that Irving is competent to teach the position. This is supported by the evidence, which shows that Irving has more experience than Collins does in teaching the computers course.

Respondent Collins currently teaches the courses and there is no doubt he possesses knowledge which is beneficial for teaching the course. Collins did not demonstrate, however, that his particular academic attributes are necessary in order to teach the courses. The technical skills possessed by Collins were not shown to be necessary for teaching the courses. It was established that the District employed a technical director, who was responsible for maintaining the computer network. This is a separate job that is not part of the necessary duties of a computers course teacher. Respondent Irving’s background in business administration and her years of teaching experience will also benefit the students. Both Respondents possess knowledge, training, and experience that make them qualified to teach the courses.

A senior teacher has a right to have competence determined with a view to courses and programs. A senior teacher has a right to have a competency determination focused on his or her specific training and experience as they relate to the duties of a position.⁵ A school district may not, in the guise of determining whether a teacher is competent, promote some policy that is not focused on that question.

⁴ *Bledsoe v. Biggs Unified School District* (2009) 170 Cal.App.4th 127, 142.

⁵ In *King v. Berkeley Unified School District* (1979) 89 Cal.App.3d 1016, 1019, note

If a senior teacher is competent, that is the end of the inquiry, and a district may not change the focus of the inquiry in order to pursue a policy of retaining the *most* competent teacher. In *Martin v. Kentfield School District* (1983) 35 Cal.3d 294, a former elementary school teacher who had been terminated pursuant to Code sections 44949 and 44955 asserted the teacher's preferred right of reappointment pursuant to Code section 44956. The Court observed that employers have adopted a broad spectrum of policies regarding the weight to be given to seniority in making personnel decisions. The Court said, however, that the California Legislature has clearly articulated the preferred right of reappointment of teachers on lay-off status.

[T]he Legislature has made seniority the *sole* determinant as to which tenured teachers on lay-off status should be appointed to a vacant position. The only limitation is that the teacher selected be "certificated and competent" to render the service required by the vacant position. *Among the employees who met this threshold limitation, there is not room in the statutory scheme for comparative evaluation. Thus, . . . which of the two employees under consideration . . . was "better" qualified for the job is not the question* here, nor was it properly the question before the board. The question for the board's determination was simply whether Martin, the senior tenured teacher on layoff status, was "certificated and competent" to render the required service.

Respondent Irving is certificated and competent to render the services currently assigned to Collins. She has the training and experience necessary to perform the duties of the position currently held by Respondent Collins. Respondent Irving must therefore be retained.

7. Cause exists to terminate the services of Respondent Keith Collins, by reason of factual finding numbers 1 through 17 and legal conclusion numbers 1 through 6.

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8. Cause does not exist to terminate the services of Respondent Tamara Irving, by reason of factual finding numbers 1 through 17 and legal conclusion numbers 1 through 6.

2, the Court of Appeal noted the trial court's conclusions of law – one of which was that competence has to do with "the correlation between [a teacher's] specific training and experience and the duties of the available position."

RECOMMENDATION

1. It is recommended that the Accusation against Respondent Keith Collins be sustained and the District notify him that his services will not be needed during the 2010-2011 school year.

2. It is recommended that the layoff notice be rescinded, and the Accusation be dismissed as to Respondent Tamara Irving.

DATED: May 6, 2010

Nancy Beezy Micon
Administrative Law Judge
Office of Administrative Hearings