BEFORE THE
GOVERNING BOARD
OF THE BONITA UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against: Certificated Employees of the Bonita Unified School District, Respondents.	OAH Case No. 2010030319

PROPOSED DECISION

The hearing in the above-captioned matter was held on April 23, 2010, at San Dimas, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by Mark W. Thompson, Atkinson, Andelson, Loya, Ruud & Romo. Respondents were represented by Michael Four, Schwartz, Steinsapir, Dohrman & Sommers, excepting Julie Christensen, who appeared and represented herself.

Oral and documentary evidence was received, and argument was heard, and the matter was submitted for decision on the hearing date. The Administrative Law Judge hereby makes his factual findings, legal conclusions, and order, as follows.

FACTUAL FINDINGS

1. Complainant Curtis Frick filed and maintained the Accusation[1] in the above-captioned matter while acting in his official capacity as Assistant Superintendent, Human Resources, of the Bonita Unified School District (District), and as the delegee of the Superintendent of the District.

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[1] The term "accusation" refers to a type of pleading utilized under the Administrative Procedure Act, Government Code sections 11500 and 11503; that statutory scheme governs the hearing procedures in this case. The Respondents are not "accused" in the every-day sense of that word; they have done nothing wrong, and all appear to be dedicated professionals. It might be said that they are only accused of not having enough seniority or other qualifications to retain their positions with the District in the face of a resolution to reduce positions.

2. The following persons are certificated employees of the District and are the Respondents in this case:

Jennifer R. Brazeau, Charles R. Chastain, Julie A. Christensin, Kathleen Eagleton, Dana L. Frontino, Samya Knott, Joshua Koeper, Lauren Konrad, Danny Lopez, Angela Parra, Elizabeth P. Quezada, Mandy Ray, Alejandra Rivas, Pamela A. Wittkop, Adrian Wong, Christina Cortez, Jason Coss, Raymond D. Delgadillo, Natalie Ramirez, Gary L. Riley, Michael Sornborger.

3. (A) On March 10, 2010, the Board of Education of the District adopted Resolution number 2010-17, entitled "Reduction Particular Kinds of Services" (Reduction Resolution). The purpose of the Reduction Resolution was to reduce and discontinue particular kinds of certificated services commencing with the 2010-2011 school year. Specifically, the resolution requires the reductions of 24.5 "FTE"—Full Time Equivalents—by reducing various types of services. This decision was based on financial concerns as the District faces a budget shortfall.

(B) The FTE's that the Board determined to reduce are described in the Reduction Resolution, as follows:

Physical Education Teachers	1.8
High School Math Teachers	2.2
High School English Teachers	2.4
High School Social Science Teachers	0.6
High School Science Teachers	1.8
Elementary Teachers	13.0
Art Teachers	0.4
Elective Teachers	0.6
Teachers on Special Assignment (TOSA Math)	0.6
Home Teacher	0.6
Independent Study Teacher	0.5
TOTAL FTE OR CERTIFICATED POSITIONS	24.5

(C) In adopting the Reduction Resolution, the Board also established competency criteria for the purpose of "bumping" and rehiring rights. Such requires a valid credential in the relevant subject area and at least one complete year of prior service in the District in the same assignment.

4. The services which the District seeks to discontinue or reduce are particular kinds of services that may be reduced or discontinued under Education Code section 44955.[2]

[2] All further statutory references are to the Education Code.

5. The decision by the Board to reduce or discontinue services was neither arbitrary nor capricious, but rather was a proper exercise of the District's discretion given the uncertainty regarding the state budget and the District's financial resources. In this case, the District faces a budget shortfall of approximately 3.6 million dollars.

6. The reduction and discontinuation of services 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 Board. Although class sizes may increase in some schools or in specific courses, such is outweighed by the detriment which the District will suffer if it can not balance its budget. It was not established, as asserted, that science labs would become unsafe by operation contrary to the California Department of Education's Science Safety Handbook for California Public Schools. At this time, and on this record, it can not be found that the District's science labs will become overcrowded, as enrollment has not been established for the next school year, and the size and other characteristics of the District's science labs was not established.

7. (A) On or about March 11, 2010, each Respondent was given written notice that pursuant to sections 44949 and 44955, their services would not be required in the 2010-2011 school year (hereafter the preliminary notices). Some of the Respondents were listed as receiving "precautionary" notices, so that the District could be assured of reducing particular kinds of services by the target amount of 24.5 FTE.[3] It should be noted that as to some of the Respondents, the District only sought to lay them off for part of their position, i.e., Respondent Lopez would be laid off as to .3 FTE, but would retain .7 FTE of physical education position.

(B) On or about March 11, Respondents were also served with the Accusation in this matter.[4] Excepting Respondents Eagleton, Koepfer, Ray, Riley, and Sornborger, each Respondent filed a combined request for hearing and notice of defense. Furthermore, Mr. Four filed a notice of defense on behalf of all Respondents. All jurisdictional requirements have been met.

8. On March 10, 2010, the Board adopted Resolution 2010-16, entitled "Resolution to Adopt Criteria for Resolving Ties in Seniority Related to Certificated Layoffs." (Hereafter tie-break criteria.) This resolution set out criteria to be used in the event that two or more employees who rendered paid service to the District on the same date faced the possibility of lay off. The tie-break criteria were based solely on the needs of the District and its students.

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[3] Such precautionary notices were given to Respondents Cortez, Coss, Delgadillo, Ramirez, Riley, and Sornborger.

[4] Ms. Eagleton and Ms. Wittkop were served on March 12, all other Respondents having been served March 11.

9. In the course of the reduction in force process, the District created a seniority list. That seniority list took into account a number of factors, including first date of paid service and the tie-breaking criteria. The seniority list is accurate, with the exception of the fact that Respondent Wittkop is shown as a permanent employee when she should be ranked as a probationary employee.

10. The District, in meeting its requirement to reduce positions by 24.5 FTE, took into account attrition through resignations and retirements.[5] It also took steps in some cases to reduce the assignment of teachers assigned to one District school, who were carrying "overloads," that is, were assigned a work load equivalent to 1.2 FTE. In each case, a reduction of .2 FTE from those teachers contributed to the total reduction of 24.5 FTE. Further, two teachers holding temporary status, Respondents Riley and Sornborger, were given notice they would be released, along with the precautionary notices referenced in Factual Finding 7(A).

11. After the preliminary notices and accusations were served, the District learned that Respondent Brazeau held a masters degree, and that it was dated July 5, 2007. As a result, under the tie-breaking criteria, she became senior to Respondent Coss, who has the same first paid date of service, but whose masters degree was received in October 2007. Mr. Coss, who had received a precautionary notice, must be laid off before Ms. Brazeau.

12. Charles Chastain, who had been served with a preliminary notice and accusation, was able to bump into a social studies position, and the notice to him has been rescinded.

13. (A) Respondent Wittkop is employed as the District's only home teacher, that is, one who might teach children in their homes outside of the context of special education. She is employed on a 60 per cent basis, and hence her position constitutes .6 FTE. She holds two masters degrees, and holds two credentials, a clear multiple subject and a reading specialist. She has been assigned as the home teacher during her entire tenure with the District. In the main, she worked with families that were home schooling their children. In recent years, the number of such children has declined to approximately 4 children, from a peak of approximately 24. Ms. Wittkop has therefore undertaken other assignments at her principal's request, including teaching reading intervention to "opportunity" students in the eighth and ninth grades.

(B) Just prior to the hearing, District staff, in reviewing Ms. Wittkop's personnel file, noted that she has only worked 60 per cent of the time since she was first hired by the District in a probationary status. In November 2001, she entered into a contract with the District as a permanent teacher, and she had been carried as a permanent teacher based on that contract. That contract provided, at that time, that she would work 60 per cent of the time, and receive 60 per cent of the typical salary.

[5] For example, the 2.2 FTE reduction in math teachers was accomplished by resignations or retirement.

(C) Ms. Wittkop has been unaware that her part-time teaching during what should have been her two-year probationary period might not qualify for permanent status. In reliance on the contract she executed in 2001, she has believed she was a permanent employee, and took no steps to rectify the situation by seeking sufficient assignments to meet the criteria in question.

(D) Although Ms. Wittkop is credentialed to perform other assignments held by teachers junior to her, such as teaching in the continuation school, she does not meet the District's competency criteria described in Factual Finding 3(C), in that she has not taught for a year in such assignments within the District.

14. No junior teacher is being retained in a position that a senior teacher is credentialed and qualified to fill.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to sections 44949 and 44955, based on Factual Findings 1 through 7.

2. (A) A District may reduce a particular kind of services (PKS) 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 Trustee*s (1976) 64 Cal.App.3d 167, 178-179.) The Court of Appeal has made clear that a PKS reduction does not have to lead to less classrooms or classes; laying off some teachers amounts to a proper reduction. (*Zalec v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 853-85; see also *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 631, 637 [reduction of classroom teaching can be a reduction of a PKS; as long as there is a change in the method of teaching or in a particular kind of service in teaching a particular subject any amount in excess of the statutory minimum may be reduced]; *California Teachers Assn. v. Board of Trustees* (1982) 132 Cal.App.3d 32.)

(B) The services to be discontinued are particular kinds of services within the meaning of section 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949. The mere potential for some problem of overcrowded facilities, or the less-than-optimal increase in class size deos not establish that the Board has acted arbitrarily, capriciously, or in violation of the law. This Legal Conclusion is based on Factual Findings 5 and 6 and the foregoing authorities.

3. (A) A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the

senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) At the same time, junior teachers may be given retention priority over senior teachers—may be "skipped" in favor of that senior employee—if the junior teacher possesses superior skills or capabilities not possessed by their more senior colleagues. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Governing Bd. of Santa Clara Unified School Dist.* (1981) 116 Cal.App.3d 831.)

(B) No Respondent established that they had the right to bump a junior employee or that they should have been skipped, based on the foregoing rules, and Factual Findings 9 through 14.

4. Respondent Wittkop is not a permanent employee, despite the contract she signed stating that she was, and despite the fact that the District has, for a period of years, classified her as a permanent teacher. Section 44908 clearly calls for a probationary teacher to work at least 75 per cent of a school year to gain credit toward permanent status, and Ms. Wittkop did not do so. Furthermore, as noted by Complainant's counsel, the case of *Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 866 stands for the proposition that the statute is mandatory; it can not be varied by agreement or mistake, or even by estoppel present, even if there are elements of an estoppel (detrimental reliance by one party on the statements or actions of another). As noted by the court, an estoppel will not lie in situations of this type, in that important public policies will be contravened by an estoppel, and an estoppel can not expand a government agency's powers. Therefore, Ms. Wittkop must be deemed the most senior probationary teacher, and subject to lay off.

5. The District may lay off the respondents, in reverse order of seniority, in order to reduce services, based on all the foregoing.

ORDER

1. The following Respondents may receive final layoff notices: Julie Christensen, Jason Coss, Kathleen Eagleton as to .3 FTE, Dana Frontino, Samya Kott as to .4 FTE, Joshua Koepfer as to .8 FTE, Lauren Konrad, Danny Lopez as to .3 FTE, Angela Parra, Elizabeth Quezada, Mandy Ray as to .4 FTE, Alejandra Rivas, Pamela Wittkop as to .6 FTE, and Adrian Wong.

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2. Respondents Jennifer R. Brazeau, Christina Cortez, Raymond D. Delgadillo, and Natalie Ramirez are dismissed as Respondents and they shall not received a final layoff notice.

April ___, 2010

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Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings