

BEFORE THE
GOVERNING BOARD
OF THE
ETIWANDA SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Respondents listed in Appendix A.

OAH No. 2010030638

PROPOSED DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Etiwanda, California on April 30 and May 18, 2010.

Margaret A. Chidester and Alexandria M. Davidson, Law Offices of Margaret A. Chidester & Associates, represented the Etiwanda School District.

Michael R. Feinberg and Amy M. Cu, Schwartz, Steinsapir, Dohrmann & Summers, LLP, represented the respondents listed in Appendix A.

The matter was submitted on May 18, 2010.

FACTUAL FINDINGS

1. Terry Embleton, Assistant Superintendent, Personnel Services of the Etiwanda School District, made and filed the accusation dated March 26, 2010, in his official capacity as the designee of Dr. Shawn Judson, Ed.D., District Superintendent.

2. Respondents¹ are certificated district employees.

3. On or before March 3, 2010, in accordance with Education Code sections 44949 and 44955, the superintendent notified the Governing Board of the Etiwanda School

¹ The district initially identified and served preliminary notices on 120 certificated employees. The district subsequently rescinded the notices as to a number of these employees, so that by the conclusion of the hearing, there remained 36 named respondents. These 36 individuals are listed in Appendix A.

District of his recommendation to reduce or discontinue particular kinds of services for the upcoming school year.

4. On March 3, 2010, the board adopted Resolution No. 0910-41, determining that it would be necessary to reduce or discontinue particular kinds of services at the end of the current school year. The board determined that the particular kinds of services that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
K-8 classroom teaching positions	57
Professional Development teaching on assignment	4
Adapted Physical Education Teacher	1
Physical Education Teacher	1
Academic Administrators	2
Instructional Technology Coordinator	1
Director of Professional Development	1
Intermediate Assistant Principals	4
Elementary Assistant Principals	3
Teaching Vice Principal	1
Teacher Librarian	0.25
Intervention teachers	12.6

The proposed reductions totaled 87.85 FTE positions.

5. The board directed the superintendent or his designee to determine which employees' services would not be required for the 2010-2011 school year as a result of the reduction of the foregoing particular kinds of services. The board further directed the superintendent or her designee to send appropriate notices to all certificated employees of the district who would be laid off as a result of the reduction of these particular kinds of services.

6. On or before March 15, 2010, the district timely served on respondents a written notice that the superintendent had recommended that their services would not be required for the upcoming school year. The notice set forth the reasons for the recommendation. The notice advised respondents of their right to a hearing, that each respondent had to deliver a request for a hearing in writing to the person sending the notice by the date specified in the notice, a date which in each case was more than seven days after the notice was served, and that the failure to request a hearing would constitute a waiver of the right to a hearing.

The recommendation that respondents be terminated from employment was not related to their competency as teachers.

7. The district thereafter timely served on respondents the accusation described in Finding 1.

8. Respondents timely filed written requests for hearing and notices of defense. All pre-hearing jurisdictional requirements were met.

9. Subsequent to the action the board took on March 3, 2010, to reduce particular kinds of services by 87.85 FTE positions, the district continued to evaluate its personnel needs. After taking into consideration upcoming positively assured attrition and other matters, the district has now determined that it can meet its fiscal needs by reducing services by a total of 70.05 FTE positions for the 2010-2011 school year.²

10. Respondents are probationary or permanent certificated employees of the district.

11. The services the board addressed in Resolution No. R-15/2009-2010 were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The board’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious and constituted a proper exercise of discretion.

12. The reduction or discontinuation of particular kinds of services related to the welfare of the district and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the district as determined by the board.

13. The board considered all positively assured attrition, including resignations, retirements and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees.

14. The district has a policy of hiring temporary employees in certain teaching positions. The district determines the number of temporary employees it can hire based on the number of leaves of absence, job share, or categorically funded positions it must fill. It does not make a determination based on the type of credential the individual has or does not have.

15. When the district appoints an individual as a substitute teacher, whether day-to-day or long term, the district sends the individual a letter, which explicitly refers to the employment as substitute in nature.

² Specifically, the district rescinded the intermediate and elementary assistant principal position reductions, and amended the K-8 classroom teaching position reduction from 57 to 50 positions, the professional development teacher and assignment reduction from four to two positions, and the intervention teacher reduction from 12.6 to 10.8 positions.

16. Holly Connor is a professional development teacher on special assignment. She has multiple subject and learning handicapped (LH) credentials. The district has designated Connor to bump into two teaching positions held by more junior employees: a 0.05 FTE elementary teaching position held by Emily Kennedy, and a 0.95 FTE eighth grade math and science teaching position held by Willie Townsend.

By virtue of Connor's LH credential, she is competent and credentialed to serve in a special education teaching position currently held by the more junior Trina Lange, a temporary employee who was given a notice of non-reelection by the district. The district thus had the option to assign Connor to displace Lange, instead of Townsend. If the district had done so, it would have avoided the 0.95 FTE layoff of Townsend. However, the district chose to assign Connor to Townsend's position rather than that of Lange because the district felt that a middle school position was a better fit for Connor. The district's decision was neither arbitrary nor capricious, but instead constituted a proper exercise of its discretion.

17. Mary Arellano is a fourth grade teacher, and holds a multiple subject credential. The district has assigned her a seniority date of August 21, 2008. During the 2006-07 school year, Arellano served as a substitute teacher at Etiwanda Intermediate School. Until October 2006, she served as a day-to-day substitute. She then became a "roving" substitute teacher and continued in that capacity until March or April of 2007, when she became a long-term substitute for a regular teacher who went on maternity leave. Arellano served about 62 school days as a long-term substitute during the 2006-07 school year. During the 2007-08 school year, Arellano served first as a day-to-day substitute, and then, from October 2007 until the end of the school year, as a half-time (50%) long-term substitute at Day Creek Intermediate School, in a job share position with another teacher. Arellano and her co-worker each alternated working two or three days in a given week. In other words, Arellano worked five full seven-and-a-half hour teaching days every two weeks from October 2007 to the end of the school year. This amounted to a total of about 84 days as a long-term substitute that year. The 2007-08 school year had 180 instructional days.

Day-to-day substitutes do not issue grades, prepare lesson plans, conduct parent conferences, attend open houses or do a number of other tasks that regular or long-term substitute teachers are required to do. A roving substitute is an individual who provides day-to-day service at a particular intermediate school site, to fill in when a regular teacher is ill or otherwise cannot report for work. Unlike a day-to-day substitute, a roving substitute need not call in (or be called in) each day. Instead, by prior arrangement with the district, the roving substitute will report to a particular school site each day within a pre-determined period,³ and will be assigned to whichever classroom needs a substitute. If there is no need for a roving substitute to serve in a classroom on a particular day, the individual will be assigned to work at the school site in some other capacity, e.g., in the office. Like other substitutes, a roving substitute does not sign an employment contract, but instead receives a letter from the district confirming his or her service in a substitute capacity.

³ The period could be a substantial period such as a number of weeks or months, or a very short period of as little as one day.

The district properly assigned Arellano a seniority date of August 21, 2008.

18. Lindsay Hansen teaches intermediate school language arts and social studies, and has a multiple subject credential. Her current position is a 0.4 FTE position, and the district proposes to lay her off as to that entire position. Hansen worked for the district at some time in the past, then took a leave of absence followed by a resignation while she was still a probationary employee. She was reemployed on August 6, 2009, which the district asserts is her correct seniority date. Pursuant to Education Code section 44848, the district's determination of Hansen's seniority date was correct.

19. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.⁴

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. A district may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. Pursuant to section 44995, 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.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393 v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843; *Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 134-135.)

4. The district has an obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. (*Bledsoe v. Biggs Unified School Dist., supra.*, at p. 136-137.)

⁴ Evidence was presented with regard to the status and circumstances of respondents Laurie Sanchez, Jennifer Melancon, Kathryn Nelson, and Teresa Rivas. However, since these employees were not designated by the district for layoff, and since their layoff will not be necessitated pursuant to this decision, it is unnecessary to consider the merits of the parties' positions with regard to these individuals.

However, the Education Code does not accord to a junior employee the right to dictate how a district is to exercise its discretion in this regard. (*Duax v. Kern Community College District* (1987) 196 Cal.App.3d 565.) More specifically, in the context of the present proceeding, a district is not required to reassign a senior employee (e.g., Connor) to a vacant position (e.g., that formerly held by Lange), as opposed to a position that would result in the bumping of a more junior employee (e.g., Townsend). So long as the district's action does not result in the retention of a junior employee to perform services a more senior employee designated for layoff is competent and credentialed to perform, the district may exercise its discretion to deploy its staff however it deems best.⁵ Respondents seek to distinguish *Duax* on the basis that the board's resolution in that case contained competency criteria for purposes of bumping, and on the basis that *Duax* involved an interpretation of Education Code section 87743 pertaining to community college districts, and not 44955 pertaining to pre-postsecondary districts. Regardless of these distinctions, the basic thrust of *Duax* is that school districts retain the discretion to administer bumping in any reasonable way that they choose, as long as it does not run afoul of specific provisions of the statute.

5. Pursuant to Education Code section 44845, certificated employees are deemed "to have been employed on the date upon which he first rendered paid service in a probationary position."

6. Pursuant to Education Code section 44918, subdivision (a), "Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year." Subdivision (d) provides, "Those employees classified as substitutes, and who are employed to serve in an on-call status to replace absent regular employees on a day-to-day basis shall not be entitled to the benefits of this section."

7. Respondents contend that Mary Arellano's seniority date should be adjusted pursuant to Education Code section 44918 to take into account: (i) her service as a roving substitute in the 2006-07 school year; and (ii) her service as a long term substitute in the 2007-08 school year.

With regard to the first issue, it does not appear that a roving substitute engages in the kinds of tasks required of a regular teacher or long-term substitute. Roving substitutes seem to fall somewhere in between long-term substitutes for a particular teacher, to which section 44918 is clearly applicable, and day-to-day substitutes, to which the section is clearly inapplicable. However, roving substitutes are not assigned for any set length of time to a particular classroom, but instead, like day-to-day substitutes, teach in whatever class (if any) a substitute may be needed on a given day. It is thus inferred that, like day-to-day

⁵ Respondents argued that the district was *permitted* to reassign Connor so as to bump Lange instead of Townsend, but they provided no authority that the district was *required* to do so.

substitutes, they do not engage in many important tasks of regular teachers or long term substitutes, e.g., the issuance of grades, the preparation of lesson plans, and the conducting of parent conferences. Otherwise stated, roving substitutes seem a functional equivalent of day-to-day substitute *in terms of their actual classroom duties*. As such, it is not appropriate to accord them probationary status pursuant to section 44918.

With regard to the second issue, Arellano only worked 84 of 180 instructional days during the year in question, far short of the 75% specified in section 44918. However, she contended that if she had covered her 50% assignment by working half-days, instead of alternating whole days, she would have worked about 630 hours. That total would, it is claimed, have exceeded the total hours she would have accumulated (506) had she worked half days on 75% of the instructional days in that school year. Since she would have been qualified for probationary status under section 44918 had she worked half days on 75% of the instructional days of the school year, she argued that she should be deemed to qualify for such status on the basis of the equivalent number of hours. This argument, while creative, is not persuasive. The statute does not suggest a basis for substituting hours for days along the lines argued by respondents.⁶

8. Education Code section 44916 provides:

“The classification shall be made at the time of employment and thereafter in the month of July of each school year. At the time of initial employment during each academic year, each new certificated employee of the school district shall receive a written statement indicating his employment status and the salary that he is to be paid. If a school district hires a certificated person as a temporary employee, the written

⁶ Respondents cite to a 2009 teacher layoff decision issued in Chino Valley Unified School District, OAH No. 2009031048. In that decision, it was found, “Those job-share respondents who served 75 percent of the number of hours of the school year for three consecutive years were entitled to permanent classification upon their contracting to teach a fourth year.” In support of her decision, the administrative law judge cited to *Vittal v. Long Beach Unified School District* (1970) 8 Cal.App.3d 112, which supported the quoted finding. However, the facts in the Chino Valley case differed in some important respects from those here, e.g., the teachers in question had “many years of experience who had job-shared,” some were “reassured [during an earlier layoff year] that they were ‘safe’ from future layoff proceedings because of the number of years they had been employed by the district,” and they testified that they “would have re-structured their work schedules so as to work every day if they had known that not working every day would affect their tenure.” Most importantly, *Vittal* and Chino Hills only stand for the proposition that if a teacher served for 75% of the *hours* in a school year, this is sufficient to meet the requirements of section 44918, even if the teacher did not serve 75% of the instructional *days* in a school year. Here, however, Arellano did not serve 75% of the (approximately 1380) hours in the school year in question. For these reasons, neither *Vittal* nor Chino Hills supports respondent’s position in this case.

Respondents contended during closing argument that pursuant to *Kavanaugh v. West Sonoma Valley County High School District* (2003) 29 Cal.4th 911, individuals who served as substitute employees are to be deemed probationary if they are not provided the notice of their temporary status prescribed in Education Code section 44916. It was not clear whether this argument was intended to pertain to Arellano. Assuming *arguendo* that it was, and also assuming *arguendo* that *Kavanaugh* and section 44916 apply to substitute teachers, the evidence failed to establish that Arellano did not receive appropriate notice that her employment during the 2006-07 and 2007-08 academic years was substitute in nature, that she was misled by any representations of the district, or that she believed she was employed in any capacity other than as a substitute during those two academic years.

statement shall clearly indicate the temporary nature of the employment and the length of time for which the person is being employed. If a written statement does not indicate the temporary nature of the employment, the certificated employee shall be deemed to be a probationary employee of the school district, unless employed with permanent status.”

9. If a certificated employee resigns and is thereafter reemployed, her date of employment is normally—and with exceptions inapplicable here—deemed by Education Code section 44848 to be the date of reemployment. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 641.)

10. A preponderance of the evidence sustained the charges set forth in the accusation. Cause exists under Education Code sections 44949 and 44955 for the district to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. Cause exists to reduce the number of certificated employees of the district due to the reduction and discontinuation of particular kinds of services. The district identified the certificated employees providing the particular kinds of services that the Board be directed be reduced or discontinued. Notice may be given to respondents within the time prescribed by law that their services will not be required because of the reduction or discontinuation of particular services as indicated.

ADVISORY DETERMINATION

The following advisory determination is made:

1. The accusations served on respondents Willie Townsend, Jennifer Phillips, Tamara Oberhauser, Donna Kronenfeld, Casey Giacomazzi-Ault, Kimberly Cataldo, Joshua Estes, Callie Thumm, Renee Taylor, Mary Arellano, Gwen Doyle, Lindsay Hansen, Gina Davis, and Andrea Postajian are sustained. Notice may be given to respondents within the time prescribed by law that their services will not be required because of the reduction or discontinuation of particular services as indicated.

2. The accusations served on the remaining respondents are dismissed.⁷ Notice may not be given to such respondents that their services will not be required because of the reduction or discontinuation of particular kinds of services.

DATED: _____

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings

⁷ These respondents were all issued precautionary layoff notices; the district does not seek to lay them off.

Appendix A

1. Virginia Adams
2. Mary Arellano
3. Amanda Brady
4. Dorlene Bruorton
5. Kristen Cassidy
6. Kimberly Cataldo
7. Benjamin Cooper
8. Gina Davis
9. Gwen Doyle
10. Joshua Estes
11. Matthew Garner
12. Casey Giacomazzi-Ault
13. Brandy Hammond
14. Lindsay Hansen
15. Alisa Harris
16. Donna Kronenfeld
17. Megan McElroy
18. Jennifer Melancon
19. Kristin Moz
20. Laurie Muratalla
21. Kathryn Nelson
22. Katherine Nguyen
23. Tamara Oberhauser
24. Jamie O'Hara
25. Jennifer Phillips
26. Andrea Postajian (0.45 FTE)
27. Richard Ramirez
28. Teresa Rivas
29. Laurie Sanchez
30. Ashley Svoboda
31. Renee Taylor
32. Callie Thumm
33. Willie Townsend
34. Brooklin Trover-Pesetski
35. Christine Vo
36. Mary Anne Wagner