

**BEFORE THE
GOVERNING BOARD OF THE
SAN BERNARDINO COMMUNITY COLLEGE DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

Patricia Menchaca, Respondent

OAH No. 2020040264

PROPOSED DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 7, 2020.¹

David E. Robinett, Attorney at Law, Atkinson, Andelson, Loya, Ruud & Romo, represented the San Bernardino Community College District (district).

¹ In light of the Governor's proclamation of a State of Emergency and Executive Orders N-25-20 and N-33-20 arising out of the COVID-19 pandemic; the declarations of county and city public health emergencies throughout the State; the President's declaration of a national emergency over the outbreak; the directives from state and local officials to ensure and facilitate physical distancing and to shelter in place; and in order to protect the health and safety of all public and OAH personnel, this matter was conducted telephonically.

Davide Velasquez, Attorney at Law, of the Law Offices of David Velasquez, A.P.C., represented respondent, Patricia Menchaca.

The matter was submitted on May 7, 2020. This matter was originally set for hearing on April 27, 2020, and was continued for ten days to May 7, 2020, pursuant to a joint request of the parties.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent was hired in August 2012 as a STEM Pathway Coordinator for the district, a position that does not require any classroom teaching duties. The STEM Pathway Coordinator is an academic faculty position at the district. Respondent possesses a master's degree in soil and water science.

2. On May 14, 2019, the district provided written notification to respondent that the position of STEM Pathway Coordinator was being discontinued. The written notice further provided:

Once your workdays shift to 177 days the following will be your assignment: Full-time tenured faculty member within the discipline of Environmental Science, in accordance with your identified FSA.

3. On March 12, 2020, the Governing Board of the district adopted Resolution Number 2020-03-12-HR02, discontinuing particular kinds of certificated services and directing the Superintendent/Chancellor to give appropriate notices to academic employees whose positions would be affected by the discontinuation "in

accordance with the provisions of Section 87740 and 87743 of the Education Code.” The resolution called for the discontinuation or elimination of 1 full-time equivalent (FTE) position of STEM Pathway Coordinator. The resolution identified the particular kinds of service (PKS) and Full Time Equivalencies (FTEs) that were to be discontinued and reduced as “Elimination of Stem Pathway Coordinator – 1 FTE position.”

4. The decision to reduce or discontinue a particular kind of service is a matter reserved to the district’s discretion and is not subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.) School districts have the discretion to determine particular kinds of services that will be eliminated, even though a service continues to be performed or provided in a different manner by the district. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.) A school district’s decision to reduce a particular kind of service must not be fraudulent, arbitrary or capricious. (*San Jose Teachers Association v. Allen* (1983) 144 Cal. App. 3d 627, 637.)

5. On March 13, 2020,² respondent was served with a letter notice advising her that her services would not be required for the 2020-21 academic year. The letter notice informed respondent of her right to request a hearing, and enclosed a copy of Resolution Number 2020-03-12-HR02, sections 87740 and 87743, a blank request for hearing form, and a memorandum regarding contract/statutory rights of reemployment and reinstatement. In response to the letter notice, on March 19, 2020, respondent through her attorney, sent a letter requesting a hearing regarding the

² The letter notice sent to respondent was dated March 13, 2019, which is presumed to be a typographical error in light of the fact that the letter attached the resolution which was dated March 12, 2020.

layoff with an attached signed request for hearing form dated March 19, 2020. On April 14, 2020, the district served the Notice of Accusation, Accusation, Notice of Hearing, Resolution No. 2020-03-12-HR02, copies of relevant sections of the Government Code, and blank Notice of Defense form on respondent. Respondent failed to complete the Notice of Defense form. However, the district admitted at hearing there was no prejudice to the district for her failure to do so, and did not oppose her participation at the hearing, particularly in light of the fact that she had already requested a hearing in writing on March 19, 2020.

Faculty Service Area Designation

6. Education Code section 87743.1 defines “faculty service area” (FSA) as follows:

[A] service or instructional subject area or group of related services or instructional subject areas performed by faculty and established by a community college district.

Education Code section 87743.2 further requires that each community college district must by July 1, 1990, establish FSAs in accordance with the Government Code and in consultation with the academic senate. Education Code section 87743.5 requires each community college district to establish competency criteria to determine competency to serve in a faculty service area for faculty members employed by the district.

Education Code section 87743.3 provides in part:

Each faculty member shall qualify for one or more faculty service areas at the time of initial employment. A faculty member shall be eligible for qualification in any faculty service area in which the faculty member has met both

minimum qualifications pursuant to Section 87356 and district competency standards. After initial employment, a faculty member may apply to the district to add faculty service areas for which the faculty member qualifies. . . .

Education Code section 87743.4 provides as follows:

Each district shall maintain a permanent record for each faculty member employed by the district of each faculty service area for which the faculty member possesses the minimum qualifications for service and in which he or she has established competency pursuant to district competency standards. The record shall be contained in the faculty member's personnel file.

7. The procedure for effectuating a reduction in the number of permanent employees is dictated by the terms of Education Code section 87743. Education Code section 87743 provides in relevant part:

However, the services of no tenured employee may be terminated under this section while any probationary employee, or any other employee with less seniority, is retained to render *a service in a faculty service area in which the records of the district maintained pursuant to Section 87743.4* reflect that the tenured employee possesses the minimum qualifications prescribed by the board of governors and is competent to serve under district competency criteria.

(Italics and underlining added for emphasis).

8. The district stipulated at the hearing that it has no written record or any documentation of respondent's FSA or FSAs in her personnel file or any other administrative file at the district.

Witness Testimony for the District

9. Joe Opris, the district's Director of Human Resources, testified in this proceeding. Mr. Opris's duties include oversight of all recruitment, employer/employee relations, labor relations, benefits, and processes with the Governing Board and executive teams. Mr. Opris reports to his supervisor Kristina Hannon, Vice Chancellor of Human Resources and Police Services. Mr. Opris was the primary person in the Human Resources department of the district overseeing this layoff process. He explained that he worked with the Interim Chancellor, Jose Torres, to prepare documents related to the elimination of respondent's position. On March 12, 2020, the Governing Board adopted Resolution No. 2020-03-12-HR02 in response to the Chancellor's recommendation.

Mr. Opris oversees the creation and maintenance of the "Academic Seniority List" which is a list of all full-time academic faculty members of the district. Mr. Opris explained that the list is updated annually to ensure that new hires are added, and people who have retired or left the district are removed. The document provides a "seniority number" that Mr. Opris testified reflects the ranking of that faculty member based on their "full-time, tenure track, academic, contract hire date." Respondent is ranked with a seniority number of 137 out of 250 listed faculty members on the Academic Seniority List as of Fall 2019.

Mr. Opris also testified that he understands that the FSA assignment to a faculty member is important in the context of a lay-off because the district looks to the assigned FSA for a faculty member to determine whether or not the faculty member has “bumping³” rights, meaning the rights to displace a junior employee. Mr. Opris admitted that the district did not have any record of which FSA or FSAs respondent possesses and that the district was obligated under the Education Code to assign respondent the appropriate FSA at the initiation of her employment. Mr. Opris also stated that when respondent was initially hired by the district there was “no FSA assigned to her” because the STEM Pathway Coordinator is grant-funded. Mr. Opris acknowledged that the district’s failure to assign an FSA to respondent at the initiation of her employment and its failure to maintain records of her FSA was something that predated his employment and that the district “is working to correct.” Mr. Opris stated that he and Keith Wurtz, Vice President of Instruction at Crafton Hills College⁴, considered other FSAs to assign to respondent, specifically Earth Sciences, Geology, and the Tutoring Coordinator FSA⁵. Mr. Opris stated that he relied exclusively on Mr.

³ A senior employee whose position is discontinued has the right to transfer to a continuing position in which he or she possesses the required FSA and is competent to fill. In doing so, the senior employee is entitled to displace or “bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469, 473-474.)

⁴ Crafton Hills College is one of the colleges within the district.

⁵ The “Tutoring Coordinator FSA” is used in herein to mean the “Learning Assistance or Learning Skills Coordinators or Instructors, and Tutoring Coordinators FSA” as defined in the Minimum Qualifications Handbook as defined below.

Wurtz's opinion as to whether respondent would be properly classified into the Tutoring Coordinator FSA. Mr. Opris stated that respondent could not be classified in the Tutoring Coordinator FSA because the district was not offering any tutoring in the field of environmental sciences. Mr. Opris also admitted that he relied solely on Mr. Wurtz's opinion that respondent was not qualified for the Earth Sciences FSA, and as a result did not assign that FSA to her.

Accordingly, in order to determine if respondent had bumping rights to any junior employee, Mr. Opris and Mr. Wurtz "analyzed together" respondent's transcript and compared it to the Minimum Qualifications Handbook⁶ to assign her an FSA. Mr. Opris admitted that respondent was never consulted during that analysis, and that he and Mr. Wurtz "agreed" that respondent possessed only the Ecology FSA based only on their analysis and not based on any record maintained by the district. Based exclusively on the Ecology FSA Mr. Opris and Mr. Wurtz assigned to respondent, Mr. Opris determined that the district did not retain any other employee with less seniority than respondent in the FSA of Ecology.

The Academic Seniority List for Fall 2019 shows that respondent is more senior to at least two employees presumably possessing the Tutoring Coordinator FSA (listed at positions #235 and #238), and at least one employee presumably possessing an Earth Science FSA (listed at position #200). Accordingly, if respondent possesses either

⁶ The "Minimum Qualifications Handbook" as used herein is the 2018 Handbook for Minimum Qualifications for Faculty and Administrators in California Community Colleges, which was received into evidence. The handbook provides the minimum qualifications as developed by the California Community College Chancellor's Office that a person must meet to be placed in a particular FSA.

the Earth Science FSA or the Tutoring Coordinator FSA, she would be able to bump those employees.⁷

On cross-examination, Mr. Opris acknowledged that he and Mr. Wurtz made the determination that the Ecology FSA was an appropriate one to be assigned to respondent prior to the drafting of Resolution No. 2020-03-12-HR02 in 2019. Mr. Opris also admitted that he had no factual basis to conclude that respondent had ever been informed of the assignment of the Ecology FSA to her at any time, but he believed that respondent “must have known” that her FSA was Ecology because at some point respondent taught environmental science courses at Crafton College and she would not have been able to do so without possessing an Ecology FSA.

10. Kurt Wurtz testified at the hearing. Mr. Wurtz’s responsibilities as the Vice President of Instruction at Crafton Hills College include ensuring that the students in the district are able to obtain the proper curriculum needed to obtain their desired degree, including scheduling the courses and programs. Mr. Wurtz stated that he worked with Mr. Opris to ensure the district followed the appropriate process to effectuate the layoff at issue in this hearing and to “identify if there were any positions that respondent could back-fill into.” Mr. Wurtz stated that the STEM Pathway Coordinator position was the result of a grant that expired in 2012 to develop STEM pathways, which are a “series of courses a student can take to move from one segment to another” such as from a community college to a four-year university or

⁷ Respondent only argued that her possession of the Tutoring Coordinator FSA allowed her to bump the two junior employees with the Tutoring Coordinator FSA. Respondent made no argument regarding any junior employee possessing an Earth Science FSA.

employment. Mr. Wurtz stated he was involved in the decision to eliminate the STEM Pathway Coordinator position because the grant had ended, the STEM pathways were already in place, and there was "not much to do" in the position as a result.

Mr. Wurtz explained that Crafton Hills College is not planning on offering the courses of environmental science or ecology in the 2020-21 academic year because in August 2019 the Human Resources department determined that the instructors who were teaching those courses were not qualified and did not meet the minimum qualifications under the Minimum Qualifications Handbook to do so. Mr. Wurtz acknowledged that respondent is qualified to teach those courses, but she "already had a full-time position as the STEM Pathway Coordinator."

With regard to the assignment of the Ecology FSA to respondent, Mr. Wurtz admitted that he alone concluded that respondent's appropriate FSA is in Ecology. He stated he made that conclusion based upon her transcript and master's degree in soil and water science and compared it to the requirements in the Minimum Qualifications Handbook. Mr. Wurtz also stated that respondent has taught an environmental science course at Crafton College in the past, and she would not be able to do so without an Ecology FSA. Accordingly, he concluded that the Ecology FSA was the appropriate FSA to assign to respondent. On cross-examination Mr. Wurtz admitted that he simply assigned the Ecology FSA to respondent because she had taught the environmental science course in the past, and he was not aware if she had ever been informed of that decision. Mr. Wurtz also admitted that while he considered the Tutoring Coordinator FSA as a possibility for respondent, he determined that she did not qualify for that FSA because there was no tutoring in environmental science offered by the district. Mr. Wurtz admitted that if environmental science courses and tutoring for those courses

were being offered in the 2020-21 academic year, then respondent would qualify for the Tutoring Coordinator FSA in addition to the Ecology FSA based on his analysis.

Mr. Wurtz also admitted that the Minimum Qualifications Handbook requires that a person have a "Master's in ecology or environmental studies or the equivalent" in order to qualify for the Ecology FSA. Notably, respondent does not have a master's degree in ecology or environmental studies, but instead as noted has a master's degree in soil and water science. Mr. Wurtz opined that respondent did not qualify for an Earth Sciences FSA because the Minimum Qualifications Handbook requires that a person have a "Master's in geology, geophysics, earth sciences, meteorology, oceanography or paleontology or the equivalent" or a "Bachelor's in geology" for that FSA and in his opinion respondent's degree is not one of those.⁸ However, Mr. Wurtz admitted that respondent "may very well meet" the requirements for an Earth Science FSA if she were to "go through the equivalency process" to determine if her degree is an equivalent. He stated "if she does not have one of the specifically listed degrees, she would have to go through the equivalency process" which involves submission of transcripts, course descriptions and faculty review and the academic committee will then vote to determine if she meets that FSA. Notably, none of those procedures were followed when Mr. Wurtz unilaterally assigned respondent to the Ecology FSA even though her degree is not listed in the Minimum Qualifications Handbook for that FSA.

Mr. Wurtz testified that he "was under the assumption" that respondent "had gone through the equivalency process" for the Ecology FSA because respondent had

⁸ Respondent testified she had a bachelor's degree in geology, which is a specifically listed degree in the Minimum Qualifications Handbook to qualify for the Earth Science FSA.

taught the environmental science course in the past. He admitted it was possible that she had not gone through that process. Mr. Wurtz also admitted that he had never formally informed respondent that she was assigned to the Ecology FSA, and he was not aware of anyone else from the district doing so. He also testified that when respondent was initially hired by the district as a STEM Pathway Coordinator, it was not necessary to assign her an FSA because she was “non-instructional faculty.” Mr. Wurtz believes that respondent did not have an FSA assigned to her until she taught the environmental sciences course.

11. Kristina Hannon testified at the hearing. Ms. Hannon’s responsibilities as the Vice Chancellor of Human Resources and Police Services include oversight of all Human Resource services for the district including employee relations, benefits, and worker’s compensation, as well as oversight of campus safety and risk management. Ms. Hannon testified that the job duties and formal job description for the STEM Pathway Coordinator are different than that of other coordinators such as tutoring coordinators. She stated that the formal job descriptions contain the minimum qualifications for the job.⁹

⁹ There was a significant amount of testimony regarding the formal requirements for the job of a tutoring coordinator based on respondent’s assertion that she possessed the Tutoring Coordinator FSA. However, the determination of whether respondent qualifies for the Tutoring Coordinator FSA based on her degree are beyond the scope of this hearing, which is limited to a determination of whether the district followed the proper procedural requirements and laws to effectuate Resolution No. 2020-03-12-HR02.

Respondent's Testimony

12. Respondent testified that she has a master's degree in soil and water science, as well as a bachelor's degree in geology and anthropology. Prior to working at the district, she worked as the STEM Coordinator for one year and as an instructor for the courses of environmental science and biological science at Mount San Jacinto Community College. Thereafter, in 2012 she accepted her current position as STEM Pathway Coordinator at Crafton Hills College. When she was initially employed by the district, respondent specifically asked individuals in the Human Resources department of the college what would happen to her position if the grant funding for it was pulled and the position discontinued. In response to the question, she was informed that if this happened she would be placed in a position as an earth sciences instructor or alternatively as a learning coordinator, such as a tutor. Respondent understood from this response that she possessed an Earth Science FSA and a Tutoring Coordinator FSA at the initiation of her employment with the district. Respondent admitted that the district did not explicitly discuss with her or inform her of any specific FSA to which she was assigned at any point during her employment with the district, but based on the discussions regarding the courses she would teach she understood that she held the Earth Science FSA and Tutoring Coordinator FSA. She also stated that no person ever told her that she was not assigned to an FSA at the time she was initially hired.

13. Respondent stated that during her first two years working at Crafton Hills College she taught courses in Ecology, and has always been qualified to teach earth sciences courses. In 2014 she requested to teach the environmental science course from the Human Resources department and received a response from the Human Resources department that she was approved to do so. Respondent believes that she may also qualify for the Biology FSA, but has not requested to add that FSA to those

she believes she already possesses, namely Ecology FSA, Earth Sciences FSA, and Tutoring Coordinator FSA. Respondent stated that she believes she was assigned the Earth Science FSA and Tutoring Coordinator FSA when she was initially hired, and in 2014 when she began teaching the environmental science course she would have been given the Ecology FSA. Respondent also explained that tutoring coordinators do not actually tutor students, but their job duties include collaboration between departments to ensure the course catalog is current, facilitation of planning documents to guide the direction of the department, recommendation of preliminary budgets, coordination of the use of facilities, recommendation of candidates for employment, and coordination with the district administration. Respondent understood that at the time she was hired at the district she was qualified and assigned the Tutoring Coordinator FSA.

14. Respondent has also been a member of the academic senate at Crafton Hills College from 2016 to 2019. She stated that the academic senate functions to oversee the academic and professional matters at the college to ensure district policies are followed. Respondent stated that she is familiar with the process that a faculty member must undertake to add an FSA to those already possessed. Specifically, the faculty member must make a request for the additional FSA, a committee is formed for consideration of the faculty member's qualifications and to make a decision on whether the faculty member is qualified. She stated that there is also an appeals process if the faculty member disagrees with the decision.

Education Code section 87743.3 provides that a faculty member may apply to the district to add FSAs for which the faculty member is qualified and if "a dispute arises from an allegation that a faculty member has improperly denied" an FSA the dispute "shall be classified and procedurally addressed as a grievance. Education Code section 87743.3 further provides:

If the district has no grievance procedure, fair and equitable procedures for the resolution of the disputes shall be developed by the academic senate and representatives of the governing board.

15. Respondent testified that if she had known or ever been informed that she was only assigned to the Ecology FSA she would have made a formal request to add the FSAs for Earth Science and Tutoring Coordinator. However, respondent reiterated that she believed she already possessed those FSAs.

Parties' Arguments

16. The district argued that the district's failure to document and maintain a record of each FSA respondent possesses as the minimum qualifications for service in her personnel file was a minor error on the part of the district. However, the district's failure to maintain that record does not allow respondent to "have whatever FSA she wants" because she must still meet the minimum qualifications for the FSA. The district argued that its decision to assign respondent the Ecology FSA was not arbitrary and capricious, and the services being reduced were the kinds the board may reduce. The district is not offering environmental science courses in the 2020-21 academic year and as a result respondent does not qualify for the Tutoring Coordinator FSA. The district asserts that because respondent only possesses the Ecology FSA, there is no employee with less seniority being retained to render a service that she is qualified to render, and the district correctly implemented the layoff.

17. Respondent argued that the district admitted to its failure to abide by the terms of Education Code section 87743.4 to maintain a permanent record of the FSAs possessed by respondent and its failure to do so resulted in a serious

deprivation of respondent's due process rights. Respondent relied on the representations of the district when she was hired that she was qualified for the Earth Science FSA and the Tutoring Coordinator FSA. Respondent further argued that the district's bad faith in its assignment of the Ecology FSA only to respondent deprived her of her bumping rights with regard to the Tutoring Coordinator positions at the district. If respondent had known that the district did not consider her to be in possession of the Earth Science FSA and Tutoring Coordinator FSA she would have taken advantage of the process to add those FSAs as stated in statute and district policy. Respondent acknowledges that she can't simply assign herself an FSA based on her belief that she is so qualified, but also argues that the district may not simply assign an FSA to her based on what the district wants her to possess.

Evaluation

18. The district admitted that it failed to maintain a permanent record of respondents' assigned FSAs based on her qualifications in violation of Education Code section 87743.4. Also, the testimony from Mr. Opris and Mr. Wurtz showed that the district believed that respondent was never assigned an FSA when she was initially hired in 2012, which would also be a violation of Education Code section 87743.3 that requires that each faculty member "shall qualify for one or more faculty service areas at the time of initial employment." This statute does not make any exception for a "non-instructional faculty member" as Mr. Wurtz asserted. The district's violations of these sections of the Education Code were not minor errors as argued by the district. To the contrary, the entire statutory scheme reflected in the Education Code for the procedure of layoffs depends on the proper assignment of FSAs. The Education Code lays out the requirements for how an FSA may be added as well as a grievance

procedure if a faculty member disputes the district's conclusion regarding whether that faculty member is so qualified.

The unilateral assignment of the Ecology FSA to respondent in 2019 based solely on Mr. Wurtz's opinion was wholly inappropriate and in violation of the requirements of the Education Code. Notably, Mr. Wurtz's testimony regarding how he made that conclusion that respondent only possessed an Ecology FSA was internally inconsistent. Specifically, Mr. Wurtz testified that he compared respondent's master's degree in soil and water science to the requirements in the Minimum Qualification Handbook to arrive at the Ecology FSA. Mr. Wurtz also stated that if her degree was not actually listed in the qualifications, then she would have to go through the equivalency evaluation process to determine if she possessed the necessary qualifications for that FSA. However, the master's degree in soil and water science is not specifically listed as a degree for the qualifications of an Ecology FSA. Instead, Mr. Wurtz admitted on cross-examination that he simply saw that she had taught environmental science at some point and that course requires an Ecology FSA to teach. Mr. Wurtz even admitted that respondent could possess the qualifications necessary for other FSAs but she would have to go through the equivalency assessment process for that determination. This conclusion is in direct contradiction to the requirements of Education Code section 87743.3 that respondent be assigned at least one, but possibly more, FSAs at her initial employment. Respondent cannot be expected to undergo an equivalency assessment process for an FSA she believed she already possessed. The district utterly failed at ever notifying respondent what her assigned FSA actually was. The district also failed to provide any grievance procedure for respondent to dispute the district's decision made in 2019 that she only possessed an Ecology FSA, particularly given she has been employed since 2012 and by law is required to have an FSA assigned to her at her initial employment.

Education Code section 87743 sets forth the procedural requirements for a reduction in the number of permanent employees at the district. That section dictates that no tenured employee may be terminated while a junior employee, or employee with less seniority, is retained to render a service **"in a faculty service area in which the records of the district maintained pursuant to Section 87743.4 reflect that the tenured employee possesses . . ."** (emphasis added) The fundamental first step in the layoff process depends on the proper identification of that FSA or FSAs in respondent's personnel records showing her qualifications for which she is entitled to bump a junior employee with the same FSA. It is noted that there is at least one junior employee listed on the Academic Seniority List for Fall 2019 listed as an instructor for earth sciences, and there are at least two junior employees listed in the position as tutoring coordinators. If respondent possesses an Earth Science FSA or a Tutoring Coordinator FSA as she asserts, she would be entitled to bump those employees. The district's violation of the applicable Education Code sections 87743, 87743.3, and 87743.4 as discussed above prevents the appropriate application of the layoff procedure as set forth in Education Code section 87743. Without proper identification of all of the FSAs possessed by respondent at the time of her initial employment and thereafter, it is not possible to determine what if any bumping rights she may have with regard to junior employees.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 87740 and 87743, and all notices and other requirements of those sections were provided as required.

2. A district may reduce services within the meaning of Education Code section 87743, which provides, in part:

Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, or 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 by reason of either of these conditions to decrease the number of tenured employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the employees of the district, tenured as well as probationary, at the close of the school year. However, the services of no tenured employee may be terminated under this section while any probationary employee, or any other employee with less seniority, is retained to render a service in a faculty service area in which the records of the district maintained pursuant to Section 87743.4 reflect that the tenured employee possesses the minimum qualifications prescribed by the board of governors and is competent to serve under district competency criteria. . . .

3. A preponderance of the evidence sustained the statements set forth in the district's Resolution No. 2020-03-12-HR02 served on respondent that the particular kind of service, namely the STEM Pathway Coordinator, be discontinued for the 2020-21 academic year. The district identified the employee, respondent, who is providing the particular kind of service that the board directed be reduced or discontinued.

5. However, because of the district's violations of Education Code sections 87743, 87743.3, and 87743.4, for failing to assign at least one FSA upon initial employment of respondent and failing to maintain a permanent record of all FSAs possessed by respondent it is not possible to determine if any employee with less seniority than respondent is being retained to perform a service in a faculty service area in which the records of the district maintained pursuant to Section 87743.4 reflect that respondent possesses the minimum qualifications.

6. Cause does not exist pursuant to Education Code section 87743 to give notice to respondent that her services will not be required for the 2020-2021 academic year based on the reduction or discontinuance of the particular kind of service because a determination cannot be made regarding whether respondent possesses an FSA for a service that is being rendered by a junior employee.

RECOMMENDATION

It is recommended that the Governing Board of the District rescind the Notice of Recommendation that Service Will Not Be Required served upon respondent and dismiss the Accusation.

Consistent with the above findings, the district shall properly evaluate respondent's qualifications for all appropriate faculty service areas pursuant to the requirements of Education Code section 87743.3, including providing any required grievance procedure for fair and equitable resolution of any disputes related thereto.

DATE: May 15, 2020

DocuSigned by:

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DEBRA D. NYE-PERKINS

Administrative Law Judge

Office of Administrative Hearings