

**BEFORE THE
GOVERNING BOARD OF THE
OAK PARK UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA**

**In The Matter of the Reduction-in-Force
of Certificated Staff of:**

**OAK PARK UNIFIED SCHOOL
DISTRICT,**

Respondents.

OAH No. 2010030314

PROPOSED DECISION

H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 15, 2010, at the Oak Park High School, Oak Park, California.

Warren S. Kinsler, Attorney at Law, represented the Oak Park Unified School District (District).

Richard J. Schwab, Attorney at Law, represented the respondents¹.

At the outset of the hearing, the District rescinded the Accusations against Respondents, Tawnya Watson, Cindy Stephens, and Becky Koch.

The matter was submitted on April 15, 2010.

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¹ The respondents did not personally appear at the hearing.

SUMMARY OF PROPOSED DECISION

The Governing Board of the Oak Park Unified School District (Board) determined to reduce or discontinue particular kinds of services provided by teachers and other certificated employees for budgetary reasons. The decision was not related to the competency and dedication of the individuals whose services are proposed to be reduced or eliminated.

District staff carried out the Board's decision by using a selection process involving review of credentials and seniority, "bumping," and breaking ties between employees with the same first dates of paid service. The selection process was in accordance with the requirements of the Education Code.

FACTUAL FINDINGS

1. Anthony Knight, Ed.D., is the Superintendent of the District.
2. Between March 10, and March 12, 2010, the District served on each respondent a written notice that it had been recommended that notice be given to respondents pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year. Each written notice set forth the reasons for the recommendation and noted that 11.5 full time equivalent (FTE) positions would be reduced and/or discontinued.
3. Notice was served by personal service on all respondents except for Heather Powers, who was served by certified mail because she was on maternity leave and was not on campus.
4. As it did last year, the District served the respondents with a single packet containing the notices and all other documents mandated in Education Code² sections 44949 and 44955, and Government Code section 11500 et seq. The packet included the Accusation and a combined Request for Hearing and Notice of Defense form. The respondents were given through and including March 26, 2010, to request a hearing, a time commensurate with or in excess of the statutory deadlines for requesting a hearing and filing a Notice of Defense. District personnel chose this "one-step" process over the "two-step" process set forth in the Code because they reasoned that any respondent who filed a Request for Hearing would, in all probability, file a Notice of Defense to the Accusation. Therefore, the "one-step" would streamline the process and make it easier on the respondents requesting a hearing.

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² All statutory references are to the Education Code unless otherwise indicated.

5. The District considered teachers Erik Amerikaner, Ken Paulson, and Brenda Pasqua to be temporary employees with respect to their positions in the ROP program. However, it served “precautionary” notices on those individuals in the event that any or all of them chose to challenge that designation. Neither Mr. Amerikaner, Mr. Paulson, nor Ms. Pasqua filed a Request for Hearing/Notice of Defense³.

6. Timely Requests for Hearing/Notices of Defense were filed by or on behalf of those respondents who desired a hearing.

7. Respondents in this proceeding are probationary or permanent certificated employees of the District.

8. On March 1, 2010, in Resolution No. 10-07, the Board took action to reduce or discontinue the following particular kinds of services for the 2010-2011 school year:

<u>SERVICES</u>	<u>NUMBER OF FULL TIME EQUIVALENT POSITIONS</u>
Elementary Music Instruction	2.6
Elementary Classroom Instruction	2.0
Elementary Counseling Services	1.0
Middle School Instrumental Music Instruction	0.1
High School Video Production	0.6
Middle School Technology	0.8
Secondary Special Education Instruction	1.0
Secondary Counseling Services	2.0
ROP Computer Instruction	0.5
ROP Athletic Training	0.4
ROP Cabinet-Making & Architecture	0.5
Total	11.5

9. Subsequent to adoption of the Board’s Resolution, the District identified vacancies in School Year 2009-2010 due to retirements, release of temporary teachers, and resignations.

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³ Mr. Amerikaner and Mr. Paulson also teach in the regular program. They are retained in those positions for the upcoming school year and received layoff notices only in connection with the ROP program. Ms. Pasqua teaches only in the ROP program.

10. Board Resolution 10-09 established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. It provided that the order of termination shall be based on the needs of the District.

11. The District maintains a seniority list which contains employees' seniority dates (first date of paid service as a probationary employee), current assignments and locations, advanced degrees, credentials, and authorizations. Credential and authorization data are obtained from the records of the County Office of Education, at which certificated employees must register such documents.

12. The District used the seniority list to develop a proposed layoff and "bumping" list of the least senior employees currently assigned in the various services being reduced. The District then determined whether the least senior employees held credentials in another area and were entitled to "bump" other employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and whether they could "bump" other employees.

13. The District used information from its seniority list to apply the tie-breaker criteria of Board Resolution No. 10-09.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in sections 44949 and 44955 were met.

2. Respondents argued that the "one-step" notice packet the District used is fatally flawed because it does not comply with the requirements in the Education and Government Codes. Therefore, they asserted, jurisdiction does not exist to reduce the particular kinds of services authorized by the Board. The District argued that the issue was raised in last year's hearing, that the Administrative Law Judge decided the issue in the District's favor at that time, that the District adopted the Administrative Law Judge's Proposed Decision, and that the respondents did not contest the decision in a higher court. Therefore, the District argued, the respondents are collaterally estopped from raising the issue again this year. Secondly, the District asserted that, even if collateral estoppel does not preclude the issue, the rationale of the Administrative Law Judge last year was sound and is applicable to this year's proceeding. Lastly, the District argued that, even if the "one-step" process does not comply with applicable law, it is a non-substantive, non-prejudicial, procedural error that does not justify dismissing the charges. (§ 44949, subd. (c)(3).) The District is correct.

3. In order to establish collateral estoppel, several threshold requirements must be met. First, the issue sought to be precluded from litigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the earlier action. Third, it must have been necessarily decided in the earlier action. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. (See, *Zapata v. Department of Motor Vehicles* (1991) 2 Cal.App.4th 108, 112.)

4. Collateral estoppel may be applied to prior decisions made by administrative agencies when the agency acts in a judicial capacity and resolves disputed issues of fact properly before it. The prior proceeding should possess a judicial character, be conducted in an impartial manner, provide the parties with the opportunity to examine and cross-examine witnesses under oath and offer other evidence and argument. A record of the proceedings should be maintained. The resulting decision should be adjudicatory in nature. (*People v. Sims* (1982) 32 Cal.3d 468.)

5. The privity requirement for collateral estoppel is satisfied when the relationship between the party against whom collateral estoppel is asserted and the unsuccessful party in the earlier action are sufficiently close to justify the imposition of collateral estoppel. In this case, the respondents are either the same in both actions or are sufficiently close by virtue of their being probationary or permanent certificated employees of the same school district who have been served notices that their services will not be required for the following school year because of reductions or eliminations of particular kinds of services, and who received the District's one-step packet.

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6. The elements of collateral estoppel are met in this case, and Respondents are precluded from raising the issue again. Even in the absence of collateral estoppel, in finding that all jurisdictional requirements had been met, the reasoning of the Administrative Law Judge in last year's hearing is applicable to this year's hearing. That reasoning is repeated verbatim below, and is incorporated as legal conclusions herein:

Respondents argue that the process utilized by the District in providing all required documents in a single step is not authorized by section 44949 and, therefore, jurisdiction does not exist. They correctly point out that the statute provides for a two-step process. Thus, section 44949, subdivision (a), provides for a notice of non-reemployment; section 44949, subdivision (b), requires the employee to request a hearing within seven days of service of the notice; and section 44949, subdivision (c)(1), requires that, "In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with [the Administrative Procedure Act] . . . except that . . . [t]he respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation."

Section 44949 does not contain a specific penalty for deviation from the two-step process. It does state, in subdivision (c)(3), that "[n]onsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial."

7. Jurisdiction would exist in this case even if the District's one-step process was found to be improper. It was designed for the convenience of the employees involved and would be a non-prejudicial, non-substantive procedural error pursuant to section 44949, subdivision (c)(3).

8. Respondents next argued that "precautionary" notices are not provided for in the Education Code and therefore, the District improperly sent precautionary notices to the three teachers it deemed temporary. The issue is moot in that none of the three teachers who received precautionary notices requested a hearing, and accordingly, those notices had no procedural or substantive impact.

9. All of the identified services are particular kinds of services that could be reduced or discontinued under Education Code 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 Education Code section 44949.

10. 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.)

11. 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 directed be reduced or discontinued.

12. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

13. 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.)

14. Teachers Jan Willis, Caitlin Fowler, and Frances Hermosillo all have a first date of paid service as a probationary employee of August 27, 2007. Applying the tie-breaker criteria, the District determined that the order of seniority for those teachers, from senior to junior, is Willis, Fowler, and Hermosillo. Of the three teachers, only Fowler received a preliminary notice. Hermosillo has a clear, single subject credential in physical education and is presently teaching physical education at Medea Creek Middle School. Fowler has a clear, single subject credential in English and is presently teaching English at Oak Park High School. Willis holds a clear, single subject physical education credential with supplemental authorizations in introductory social science and introductory English. She presently teaches English at Oak Park High School.

15. Fowler argues that, because Willis is senior to Hermosillo, and because Willis is certificated and competent to teach physical education, Willis should “bump” Hermosillo and teach physical education instead of English. This would allow Fowler to move into the vacancy left by Willis. This is a process known as “inverse bumping.”

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16. Teachers are not entitled to inverse bumping. The second paragraph of section 44955, subdivision (c), speaks of the duty of a school board to make assignments in such a manner that employees will be retained to render any service “their seniority . . . [entitles] them to render.” A teacher’s entitlement to bump a junior teacher out of his or her assignment derives from the senior teacher’s seniority. A teacher’s seniority does not entitle him or her to bump a more senior teacher out of his or her assignment just because the more senior teacher could move into some other position.

17. *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, concerned the seniority rights of teachers in community colleges. The bumping rights for community college teachers are similar to those provided by the second paragraph of section 44955, subdivision (c). Duax was a community college teacher who was subject to layoff. In a manner similar to the instant case, he contended that he was entitled to inverse bumping, and that the District was required to bump a more senior teacher out of his position because Duax was qualified to fill that position, and the more senior teacher had a right to move into a different position. In rejecting Duax’s contention, the court ruled that the District’s “obligation to make assignments and reassignments . . . is limited to attempting to place an employee who would otherwise be terminated in a position being held by another employee with less seniority.” (*Id.* at 568.) In other words, a senior employee may bump a junior employee from a course or course of study the senior employee is certificated and competent to teach, but may not bump an even more senior employee requiring the more senior employee to bump someone in a different area. The District correctly determined the seniority and bumping rights of teachers Hermosillo, Willis, and Fowler.

ORDER

1. The Accusations against the respondents are sustained. Notice may be given to the respondents that their services will not be required for the 2010-2011 school year because of reduction or discontinuance of particular kinds of services.

2. Notice shall be given in inverse order of seniority.

DATED: April 19, 2010

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings