

**BEFORE THE GOVERNING BOARD
OF THE WILSONA SCHOOL DISTRICT**

In the Matter of the Accusation Against:

OAH Case No.: 2008030943

MARIA AGUILAR, and other Certificated
Employees of the Wilsona Unified School
District,

Respondents.

PROPOSED DECISION

The hearing in the above-captioned matter was held on April 29, 2008, at Palmdale, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by Peter C. Carton, Schools Legal Service. Richard J. Schwab, Trygstaad, Schwab & Trygstaad represented the respondents.

Oral and documentary evidence was received at the hearing, the case was argued, but the record was held open so that various documents could be submitted. The following documents were received, and are made part of the record as follows:

Letter from Mr. McNabb re: permanent or probationary status of teachers, dated April 30, 2008, received as Exhibit 13;

Transmittal memo and personnel file of Rachel Jay, received as Exhibit 14;

Letter brief by Mr. Carton, dated May 1, 2008, identified as Exhibit 15;¹

Letter brief by Mr. Schwab, dated May 1, 2008, identified as Exhibit L.

The case was deemed submitted on May 2, 2008. The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders, as follow.

¹ After Mr. Carton sent Exhibit 15, he asked that it be disregarded, as it appeared that Mr. Schwab had not then received Exhibit 14. However, no further briefing was received, and Mr. Carton's arguments reached various issues besides Ms. Jay's status. Therefore, Exhibit 15 was considered.

FACTUAL FINDINGS

1. Complainant Ned McNabb filed the accusations² in this proceeding in his official capacity as Superintendent of the Wilsona School District (District).

2. The following persons are Respondents in this proceeding (Respondents³) and are certificated employees of the District:

Maria Aguilar, Charae Anderson, Tracie Banner, Lorrie Bauder, Lori Bernfeld, Diana Bertram, Connie Bolton-Simpkins, Jacob Briggs, Rachelle Briggs, Kristin Fall, Keith Faulkner, Pam Lockwood, Chad Mantooth, Darcel Nilsson, Afiong Ntofon, Monica Perez, Danielle Portillo, Cecilia Rico, Marcia Saldana, Wendee Schoonover, Jacqueline Valadez, Cecilyn Zoubek.

3. (A) On February 21, 2008, the Governing Board (Board) of the District adopted resolution number 2007-08-05, hereafter the "reduction resolution." That resolution noted that the Superintendent of the District had recommended that certain programs or services be reduced or eliminated during the 2008-2009 school year, and referenced potential cuts to the state budget of more than 4.4 billion dollars, and the potential of a 1.1 million dollar reduction in the District's budget. The reduction resolution authorized the reduction or elimination of services and programs starting with the 2008-2009 school year, in light of budgetary projections. The reduction resolution requires the elimination or reduction of 28 "FTE"—Full Time Equivalents—by reducing services in both the elementary and middle school grades.

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

Self-contained Classroom instruction, K-5, 17 FTE
Literacy Coach, 2 FTE
Elementary Administrative Assistants, Teacher Positions, 2 FTE
Departmentalized Instruction, Middle School, grades 6-8:
 Language Arts, 1FTE
 Opportunity, 1 FTE
 Electives, 3 FTE (one each in Art, Industrial Technology,
 Wood Carving-Drafting-Intro to Life)

² The term "accusation" refers to a type of pleading utilized under the Administrative Procedure Act, Government Code sections 11500 and 11503. As noted by the District letters to its teachers, and by the ALJ during the hearing, it should be made clear that the Respondents are not "accused" in the every-day sense of that word; they have done nothing wrong. Instead, it might be said they are accused of not having enough seniority to retain their positions with the District in the face of a resolution to reduce positions.

District-Wide Programs, 2 FTE (one each in Long Term Independent Study, grades K-8 and Resource Specialist Program).

4. (A) In its Reduction Resolution the Board directed the Superintendent to give notice of termination to certificated employees informing them that their services would not be required for the following school year (2008-2009).

(B) When the Board adopted the Reduction Resolution, it also adopted a separate resolution that identified tie-breaking criteria to be used when employees shared the same first date of paid service. That resolution is number 2007-08-06, and it was also approved on February 21, 2008.

5. 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 44955.³

6. 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 uncertainty regarding the state budget and the District's financial resources.

7. 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.

8. Prior to March 15, 2008, Respondents were given a preliminary written notice, to the effect that that pursuant to sections 44949 and 44955, their services would not be required in the 2008-2009 school year. Respondents requested a hearing, or Complainant has waived objection to their participation in this proceeding.

9. Thereafter, on or about March 28, 2008, an Accusation was served upon Respondents. That Accusation was accompanied by a notice which stated that failure to deliver a Notice of Defense to the Board within five days of service of the Accusation would constitute a waiver of the right to a hearing, and that the Board might then proceed against the Respondents without a hearing. Respondents timely filed a Notice of Defense.

10. 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 various tie-breaking criteria that were developed by the District and adopted by it. The tie-breaking criteria were appropriately applied to the teachers listed on the final seniority list.

³ All further statutory citations are to the Education Code unless otherwise noted.

11. (A) The District has withdrawn or rescinded the layoff notices to the following Respondents, prior to the commencement of the hearing: Michael Aktutay, Ruth Guess, Pat McGuire, Deborah Poor, Anne Stanley, Glenda Steele, and Raymond Strasser-King.

(B) During the hearing, the District dismissed the Accusation as to Respondent Charae Anderson, as it was established that her credential had a broader scope than initially understood, and because she was capable of teaching special education courses for which junior teachers had been retained.

12. The District determined that certain junior teachers possessed superior skills, training, or capabilities which more senior teachers did not possess, which would allow the more junior teachers to be exempted from lay off or "skipped." Such teachers were needed by the District to teach particular courses or to provide particular services, and could do so in light of their credentials and qualifications. Those teachers did not receive lay-off notices, and are identified as Romayn Jones, Kathryn Kendrick-White, Kelly Shuey, and Irene Brown.

13. Respondent Rachelle Briggs was listed as the tenth most junior teacher on the seniority list, with a first date of paid service as a probationary teacher on August 25, 2006. However, on September 29, 2005 she was hired as a substitute teacher, pursuant to a contract that contained the following pertinent language:

"1. You will serve as a day-to-day substitute teacher for the Wilsona School District.

2. The District will commit to employing you every school day for the remainder of the 2005-2006 school year, beginning Monday, October 3, 2005.

3. You have agreed to commit to substituting exclusively for the Wilsona School District. This means you will be available every school day beginning October 3, 2005. . . .

4. By making a commitment to serving our District exclusively, *your assignment shall be that of a long term substitute teacher. . .*

5. You will continue to be assigned on a daily basis by Anne Misicka through the substitute teacher assignment process. However, if for some reason, Anne were unable to contact you with an assignment, you would automatically report to Wilsona by 7:15 am and Anne would provide you with your assignment for that day."

(Exhibit C, emphasis added.)

14. (A) Respondent Connie Bolton-Simpkin is listed as the most junior employee, with a seniority date of December 18, 2007. She was classified as a probationary teacher on that date because that was the date she received her clear credential, and she was acknowledged as probationary by the District at that time.

(B) Prior to December 2007, Respondent Bolton-Simpkin was employed as a substitute teacher. She worked as a substitute teacher in 2005-2006 and the 2006-2007 school years. In March 2006 she was employed as a long-term substitute under a written contract that used the same language as that used in Respondent Briggs' contract, and specifically parts 1 and 4, quoted in Factual Finding 13, above.

(C) Respondent attested that she was paid whether she taught or not, but estimated that she taught 75 per cent of the time while she was contracted to the District as a substitute teacher. She was paid the long-term substitute teacher's pay rate.

15. The Superintendent, Mr. McNabb, testified that the contracts used to retain Respondents Briggs and Bolton-Simpkin are designed to exclusively employ the teachers as a long term substitute, and that they were paid the long-term rates.

16. In the seniority list prepared by the District, some probationary teachers have a seniority date prior to the seniority date of permanent teachers, and those probationary teachers are shown as senior to permanent teachers. Specifically, probationary teachers Tracy Banner, number 19 on the seniority list, Cecilyn Zoubek, listed as number 20, and Cecilia Rico, listed as number 21, are shown as senior to Respondents Bertram, Perez, and Schoonover, who are all permanent teachers. The list did not, as originally drawn, differentiate between the three probationary teachers and the permanent teachers.⁴

17. Ms. Teri Jay was not a respondent in this case, but an issue was raised as to her status, with Respondents asserting she may be a probationary teacher. That teacher's personnel file was received in evidence (Exhibit 14), and it establishes she is a day-to-day substitute teacher under her contract, and paid at that pay rate. She has been employed since approximately November 2007, filling in for her mother, who is on leave.

18. No certificated employee junior to any Respondent was retained by the District to render a service for which a Respondent was certificated and qualified to render.

⁴ The matter was clarified by the District after the close of testimony, in Exhibit 13.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to Code sections 44949 and 44955, based on Factual Findings 1 through 9.

2. (A) A District may reduce a particular kind of service (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 Trustees* (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, 853-854. 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 by the District in this case are particular kinds of services within the meaning of section 44955. (Factual Finding 3(B).) 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. (See *Campbell Elementary Teachers Association, Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 808.) This Conclusion is based on Factual Findings 3 through 7 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 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 "skip" 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) The District properly skipped a number of employees based on their qualifications. No Respondent established the right to displace a senior employee. This Conclusion is based on Factual Findings 12 and 18.

(C) No Respondent established at the hearing that they had the right to bump a junior employee.

4. It was not established that Ms. Jay is actually a probationary employee. Her contract clearly describes her as a substitute teacher, and she is paid the day-to-day rate, to fill a position of a regularly employed person absent from service. (See § 44917.) That contract, less than a year old, controls her classification at this time. (See § 44916.) While she might, in the future, become a probationary employee under operation of law or by dint of another contract (see, e.g., § 44918, subd. (a)), she has not yet attained that status. This Conclusion is based on Factual Finding 17.

5. (A) Respondent Rachelle Brigs is entitled to a seniority date of September 29, 2005, as she was hired as a substitute teacher on that date, paid by the District to the exclusion of any other district, and has served the district for more than 75 percent of the 2005-2006 school year.⁵ Under section 44918, subdivision (a), that year-long employment as a long term substitute shall be deemed a year of probationary service, and her first paid date of service should be September 29, 2005.

(B) It is not clear from the record as to what type of credential this Respondent held in 2005-2006; if it was not a provisional credential, the further year of probationary status may in fact qualify her as a permanent teacher. In either event, she is junior to some other teachers not being retained, in the sense that she if she is indeed a probationary teacher, she is junior to some of the teachers in that classification who are subject to lay off, or, she is the most junior of the permanent teachers subject to lay off. The District shall adjust the seniority list consistent with this Conclusion in its final order.

6. Respondent Bolton Simpkin is entitled to a seniority date of December 18, 2006, pursuant to section 44918, subdivision (a), and based on Factual Findings 14 (A) through 15. The record indicates she served as a substitute employee for at least 75 per cent of the year prior to her hire as a probationary employee in December of 2007. As such, she is junior to Respondent Aguilar and senior to Respondent Bernfeld.

7. The seniority list must be revised to separate the probationary teachers into one group, and the permanent teachers into another, so that a separate seniority list is established for each class. This is because section 44955, subdivision (c), requires that no permanent teacher be laid off if a probationary teacher is retained. Within each class, lay off must be in regards to seniority; the most senior probationary

⁵ Not only does the contract imply, at paragraph 5, that she would work every day, Respondent Bolton-Simpkins, who operated for at least one period under a similar contract, recalled working a substantial part of the year, and attested to being paid for every day of the school year, whether she was taught or not.

employee must be the last one laid off before the most junior permanent teacher may be laid off. Respondent Rachelle Briggs status must be ascertained by the District based on her credentials in 2005-2006; she shall either be the fourth most senior probationary teacher or the most junior permanent teacher. Thus, the seniority list must be revised, as follows:

Probationary Teachers: Jacqueline Valadez (the most junior probationary teacher), Chad Mantooh, Afiong Ntofon, Lori Bernfeld, Rachelle Briggs (if probationary); Maria Aguilar, Jacob Briggs, Kristin Fall, Pam Lockwood, Danielle Portillo, Cecilyn Zoubek, and Cecilia Rico (the most senior probationary teacher).

Permanent Teachers: Rachelle Briggs (the most junior permanent teacher if she is permanent), Diana Bertram, Monica Perez, Wendee Schoonover, Tracie Banner, Lorrie Bauder, Keith Faulkner, Darcel Nilsson, Marcia Saldana (the most senior permanent teacher).

8. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render, based on Factual Finding 18.

ORDER

1. The Accusations are sustained, except as to Respondent Charae Anderson; the Accusation against her is dismissed and she shall retain her employment.

2. Notice shall be given to the Respondents listed in Legal Conclusion number 7 that their services will not be required for the 2008-2009 school year because of the reduction and discontinuance of particular kinds of services. Notice shall be given to Respondents in inverse order of seniority, first to the probationary class of teachers, and then to the permanent teachers, after Respondent Rachelle Briggs' classification is determined.

May ___, 2008

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings