

**BEFORE THE
GOVERNING BOARD OF THE
ARVIN UNION SCHOOL DISTRICT
COUNTY OF KERN, STATE OF CALIFORNIA**

**In The Matter of the Accusations
Against:**

**ROSEMARIE BORQUEZ; NORMA J.
BEIBER; GUADALUPE CALDERON;
CHRISTIE MARIE CALDWELL;
MARIA M. DURAN; ARCELI
HERRERA; ADAM TROXEL; and
VANESSA VALTIERRA,**

OAH No. 2010040174

Respondents.

PROPOSED DECISION

H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 3, 2010, at the Kern High School District, Bakersfield, California.

Peter C. Carton, Attorney at Law, represented the Arvin Union School District (District).

Ernest H. Tuttle III, Attorney at Law, represented the respondents.

At the outset of the hearing, the District announced that the preliminary notice of Recommendation Not to Reemploy served on Respondent Adam Troxel had been withdrawn, and that Adam Troxel would be retained for the upcoming school year.

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The record was held open until 5:00 p.m. on May 4, 2010 for the District to submit the case citation for *Peoples v. San Diego Unified School District*. On May 4, 2010, the District's attorney faxed a three-page "letter brief" to the Administrative Law Judge containing additional argument. The letter brief began: "As agreed yesterday, the Administration submits this letter brief with the case citation regarding whether Respondent Valtierra became permanent upon commencement of the 2009-10 school year."

No such agreement was made. The record was held open at the request of the District's attorney solely to provide a single case citation. Counsel's three-page brief violated the order and is completely improper. The document was neither marked for identification nor considered.

SUMMARY OF PROPOSED DECISION

The Governing Board of the Arvin Union 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. However, the application of the tie-breaker criteria was arbitrary and capricious as to certain certificated employees, resulting in a dismissal of the Accusations against those employees. In addition, the seniority date of one certificated employee was found to be erroneous.

FACTUAL FINDINGS

1. Jerelle Kavanagh is the Superintendent of the District.
2. On or before March 15, 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 eight full-time equivalent (FTE) positions would be reduced and/or discontinued. Of that sum, six full-time equivalent positions were in self-contained, multiple-subject classrooms. Eight preliminary notices of layoff were sent to teachers working in such classrooms.

3. Notice was served on all respondents by either personal service or certified mail. Certificated employees timely requested, in writing, a hearing to determine if there is cause for not reemploying them for the ensuing school year.

4. The Superintendent of the District made and filed Accusations against each of the certificated employees who requested a hearing. The Accusations, with required accompanying documents and blank Notices of Defense, were timely served on those certificated employees.

5. A timely Notice of Defense was filed on behalf of those respondents who desired a hearing.

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

7. On February 16, 2010, in Resolution No. 10:2009/2010, 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>
District Level Administrator Student Support Services	1.0
Self-Contained Multiple Subject Classrooms	6.0
Departmentalized Social Studies Single Subject	1.0
Total	8.0

8. Subsequent to adoption of the Board's Resolution, the District identified vacancies in School Year 2010-2011 due to retirements, release of temporary teachers, and resignations. Three teachers with multiple subject credentials submitted retirement notices after March 15, 2010. No resignation or retirement notices were received before that date. The three retiring teachers will complete the current school year.

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9. Board Resolution No. 9:2009/2010 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. The seven criteria established by the resolution were credentialing, experience, training, special education needs, evaluations, NCLB highly-qualified status, and BCLAD/CLAD credential needs. Those criteria were preceded by the following statement: “The specific criteria used in determining this need [the needs of the District] shall be as follows, but not necessarily listed in order of importance:”

10. 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.

11. 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. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the vacancies known as of March 15, 2010, 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 less senior employees.

Application of Tie-Breaker Criteria

12. The District used information from its seniority list to apply the tie-breaker criteria of the Board Resolution. No objective means of applying the tie-breaker criteria were identified in the tie-breaker resolution. Superintendent Kavanagh testified that she had discretion to apply the criteria in any way she saw fit. She admitted that, under that tie-breaking method, a teacher could not objectively determine where he/she would be placed on the seniority list with respect to others sharing the same first date of paid service. Superintendent Kavanagh considered the primary tie-breaker criterion to be “credentialing.” She therefore gave more importance to a clear credential than to a preliminary credential.

13. According to the seniority list, 13 permanent teachers holding multiple subject credentials share the same first date of paid service of August 2, 2007. Of those 13 teachers, two hold preliminary credentials (Rosemarie Borquez and Vanessa Valtierra). The remainder hold clear credentials. Except for Respondents Christie Caldwell, Guadalupe Calderon and Arceli Herrera, those teachers holding clear, multiple subject credentials, whose first date of paid service was August 2, 2007, were not given preliminary layoff notices.

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14. Respondents Caldwell, Calderon and Herrera did receive preliminary layoff notices. Superintendent Kavanagh reasoned that those three teachers had undergone less AB 472 training than the others and therefore did not rank as high with respect to the “training” criterion in the tie-breaker resolution. She considered a master’s degree held by Respondent Caldwell to be “education” rather than “training.”

15. The District is overseen by the District Assistance and Intervention Team (DAIT) as part of the No Child Left Behind Act of 2001, and is therefore subject to specific accountability requirements. As explained in a letter from Assistant Superintendent Marilyn Thompson:

On December 15, 2009, the Arvin Union School District was required to submit a Corrective Action Plan to the State Board of Education (SBE). In developing this plan, it was highly recommended by the California Department of Education (CDE), to ensure all our staff was highly trained in the most current instructional strategies for our English Learner population, and in Reading Language Arts and math. On February 12, 2010, the President of the State Board of Education, Mr. Ted Mitchell, and Ms. Lura Wagner, from CDE, visited our district as part of the DAIT process. The purpose of the visit was to determine if Arvin was on the right track for program improvement and improvement of state test scores, or if the state needed to intervene. At that time, Mr. Mitchell recommended that the district continue to complete training in SB 472 math and Reading Language Arts, as well as in English Language Professional Development (ELPD) for 100% of our staff. The recommendation was further emphasized by Mr. Mitchell at the State Board of Education meeting in Sacramento on March 10, 2010. In compliance with this recommendation, the district is working towards fulfilling our accountability for DAIT. . . . Based on the information mentioned above, it is imperative that all our teachers participate in these trainings, not only as a benefit to our students, but as part of the expectation of the State Board of Education.

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16. It was for that reason that Superintendent Kavanagh chose to emphasize the tie-breaker criteria of “credentialing” and “training,” respectively, in breaking the ties in the August 2, 2007 group. However, the training for DAIT compliance was not always scheduled during teachers’ contracted hours, and the scheduling of the training raised issues with the teachers’ union regarding whether the District could make after-hours training “mandatory.” Because of the differences between the District and the union in that regard, it was never clear to some of the teachers whether the training was mandatory or voluntary. In addition, certain teachers, such as Respondents Maria Duran and Vanessa Valtierra, were not given the same opportunity to participate in the DAIT compliance training as were others. Both teachers signed up for the training but were removed from the training list upon their receipt of preliminary layoff notices. When they were rehired for the following school year, they had missed the training and were unable to make it up. At least one other teacher, Respondent Arceli Herrera, was not permitted to take the training because she lacked certain prerequisites. She was unable to satisfy the prerequisites because they had last been offered in 2003 and 2004, well before Respondent Herrera’s hire in 2007.

Arceli Herrera

17. In addition to the issues raised in Paragraph 16, above, Respondent Herrera argued that the fact that she holds a BCLAD certificate in Spanish, which required course work, examinations, and skills beyond that required for a CLAD, should have placed her ahead of another teacher with the same first date of paid service who possesses only a CLAD certificate but who was retained. Superintendent Kavanagh testified that 75-80 percent of the student population consists of English language learners, and that the majority of those students are Spanish-speaking. However, she also testified that she did not consider possession of a BCLAD certificate high on the tie-breaker criteria list because, although parents are permitted to request bi-lingual instruction, they have not done so for many years.

Rosemarie Borquez

18. Respondent Rosemarie Borquez is listed on the seniority list as having a preliminary multiple subject credential. She completed all of the requirements for a clear credential before March 15, 2010, and the District was so notified. However, Ms. Borquez was precluded by state regulation from applying for the clear credential before May. Although she applied for the credential when she was permitted to do so, according to the Commission on Teacher Credentialing’s website, the credential had not been issued as of May 2, 2010.

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Seniority Date Disputes

Vanessa Valtierra

19. Respondent Vanessa Valtierra disputes her seniority date of August 2, 2007. However, the issue of her seniority date was litigated and established in a “summer layoff” proceeding on July 16, 2009. The ruling on that issue was not appealed.

Maria Duran

20. The District assigned Respondent Maria Duran a seniority date of July 31, 2008. Ms. Duran began teaching in the District at the beginning of school year 2007-2008 with a Provisional Internship Permit and, in January 2008, she received a district internship credential of which the District was notified on March 4, 2008. On May 22, 2008, Ms. Duran received a preliminary multiple subject credential. Ms. Duran taught a third grade class for the entire 2007-2008 school year. In so doing, she was not substituting for any other teacher. Ms. Duran was hired again for the 2008-2009 school year and taught that entire year except during her maternity leave.

21. The issue of Ms. Duran’s seniority date was litigated and established in the July 16, 2009 “summer layoff” proceeding. The Administrative Law Judge ruled that her seniority date had been miscalculated, and that it should be August 2, 2007. He then dismissed the Accusation as to Ms. Duran.

LEGAL CONCLUSIONS

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

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

3. A District may reduce services within the meaning of Education Code 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.)

4. 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.

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

6. 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.)

Tie-Breaker Criteria

7. Although a school district is granted broad discretion in determining how to apply its tie-breaker criteria, it may not do so in an arbitrary or capricious manner. Tie-breaker criteria should be accompanied by some weighing mechanism and ultimate tie-breaking device that will ensure objectivity and provide for review of the criteria’s application for fairness and accuracy.

8. In this case, the District’s superintendent was given complete discretion to apply the tie-breaker criteria in any manner she chose, so as to reach a result reflecting her preferences, rather than a result based on an objective determination. In emphasizing the criteria of “credentialing” first and “training” second, Superintendent Kavanagh was attempting to ensure compliance with the DAIT requirements. However, the District was well-aware of that priority no later than December 2009, well before the Governing Board passed the tie-breaker resolution. The Governing Board could easily have formulated its priorities to maximize the chances of DAIT compliance without rendering it impossible for a teacher to determine where he/she might be placed among his/her peers with the same first date of paid service. The failure to do so, coupled with Superintendent Kavanagh’s reliance on training that certain teachers were precluded from taking, renders the application of the tie-breaker criteria arbitrary and capricious as to those teachers with a seniority date of August 2, 2007, who hold multiple subject credentials. Because some of those teachers were retained while others received notices of lay-off, the Accusation will be dismissed as to all respondents with an August 2, 2007 seniority date who hold multiple subject credentials.

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Arceli Herrera

9. Ms. Herrera challenges the manner in which the tie-breaker criteria were applied, claiming that her possession of a BCLAD certificate should have placed her over another teacher with the same first date of paid service who possesses only a CLAD certificate. Although the District may or may not have agreed with Ms. Herrera had it prioritized the tie-breaker criteria, Ms. Herrera's argument provides another example of the arbitrary and capricious manner in which the tie-breaker criteria were applied.

Rosemarie Borquez

10. Ms. Borquez timely completed the requirements for a clear credential but, through no fault of her own, was unable to file the credential with the District before March 15, 2010 deadline for serving preliminary layoff notices. Her predicament is most unfortunate, but no relief can be granted to her on that basis. The District was not required to request a waiver from the Commission on Teacher Credentialing on Ms. Borquez's behalf pursuant to Education Code section 44225, subdivision (m) and/or section 44225.7, subdivision (a). Further, the District was entitled to rely on the information it had as of March 15, 2010, concerning teachers' credentials, in order to take that information into account in determining the identities of the certificated employees who would receive preliminary layoff notices, and it could not add to those notices after that date. (*Campbell Elementary Teachers Association, Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 814-815; *Degener v. Governing Board* (1977) 67 Cal.App.3d 689, 698.) However, Ms. Borquez's seniority date is August 2, 2007, and she holds a multiple subject credential. Therefore, as indicated in Legal Conclusion No. 8, the Accusation shall be dismissed as to her because of the improper manner in which the tie-breaker criteria were applied.

Vanessa Valtierra

11. Ms. Valtierra is collaterally estopped from again raising the issue of her seniority date. 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.) Even in the absence of collateral estoppel, the reasoning of the Administrative Law Judge in last year's hearing is applicable this year.

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12. 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.)

13. 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.

14. The elements of collateral estoppel are met in this case, and Respondent Valtierra is precluded from raising the issue again.

Maria Duran

15. Collateral estoppel also applies to the issue of Respondent Duran's seniority date but, in this case, it is the District that is estopped from re-litigating the issue. The administrative law judge who heard the "summer layoff" case in July 2009, found that her seniority date should be August 2, 2007, but the District assigned her a seniority date of July 31, 2008 this year. The following is additional analysis on the issue.

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16. The District miscalculated Ms. Duran's seniority date. Provisional internship permits and internship credentials are similar to emergency teaching permits for purposes of determining seniority. In *California Teachers Association v. Governing Board of Golden Valley Unified School District* (2002) 98 Cal.App.4th 369, the Court held that a teacher with an emergency permit could be classified as a probationary employee. In *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, the Court stated:

We could not have held in *Golden Valley* that emergency-permitted teachers *must* be classified as probationary employees because, as we have said, their classification, and the classification of all other certificated employees (with the single exception of district interns), is not determined by what type of credential or certification they have. If a certificated employee occupies a position the Education Code defines as temporary, he or she is a temporary employee; if it is not a position that requires temporary classification (or permanent or substitute), he or she is a probationary employee. [Citation.] The [Education] Code grants school districts no discretion to deviate from this statutory classification scheme. [Citation.] (*Id.* at 1299.) (Emphasis in text.)

17. Ms. Duran taught the entire 2007-2008 school year, beginning with a provisional internship permit, then with a district internship credential, and finally with a preliminary multiple subject credential. Nothing in the Education Code established that her position was that of a temporary employee, but it is undisputed that she had not attained tenure. Because she was neither a temporary nor a permanent employee, she is deemed to have been a probationary employee. Further, as a district intern, she was statutorily defined as a probationary employee. (Ed. Code, § 44885.5.) Accordingly, her seniority date must be revised to August 2, 2007, the first day of the 2007-2008 school year.

18. The result would be the same even if Ms. Duran taught the 2007-2008 school year in a temporary capacity. Because the District recognized her first date of paid service as a probationary employee as the beginning of the 2008-2009 school year, and because Ms. Duran taught more than 75 percent of the 2007-2008 school year, the temporary status of the 2007-2008 school year would convert to probationary status pursuant to Education Code section 44918, subdivision (a).

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Positively Assured Attrition

18. Respondents argued that the six self-contained classroom, multiple subject FTE positions in the Board's resolution should be reduced to three because of the three retirements of teachers holding multiple subject credentials. The District received those teachers' retirement notifications after March 15, 2010, and all three teachers intend to finish the current school year. The District need not consider any attrition occurring after the March 15 deadline for serving preliminary notices of layoff. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627.)

Over-Noticing

19. Respondents argued that, by serving eight self-contained, multiple-subject classroom teachers with preliminary notices of layoff, when the Governing Board authorized the reduction or elimination of only six full time equivalent positions in that area, the District over-noticed those teachers.

20. It was not established that the District acted in an arbitrary or capricious manner in pursuing and implementing the layoff by issuing more preliminary notices of layoff than the number of FTE positions being reduced or eliminated. No statutory, regulatory, or case authority was offered for the proposition that the number of certificated employees who receive preliminary notices must equal the number of FTE positions being reduced or eliminated. Further, even if one were to accept Resolution 10:2009-2010 as an order to the Superintendent, the resolution does not require notices to only enough employees to cover the number of FTE positions being reduced or eliminated. It provides the Superintendent with discretion to notice additional employees. The resolution reads in part:

The Superintendent is directed to determine which employees' services *may* not be required for the 2010-2011 school year as a result of this reduction in services and to give those employees notice of the Superintendent's recommendation that they not be reemployed not later than March 15, 2010, as required by the Education Code. (Emphasis added.)

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ORDER

1. The Accusations against Respondents Guadalupe Calderon, Christie Marie Caldwell, Arceli Herrera, Rosemarie Borquez, and Vanessa Valtierra are dismissed.

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

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

DATED: May 5, 2010

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings