

BEFORE THE
BOARD OF EDUCATION
OF THE
ALVORD UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2011030963

Respondents listed in Appendix A.

PROPOSED DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Riverside, California, on April 27, 2011.

Mark W. Thompson, Atkinson, Andelson, Loya, Ruud & Romo, Attorneys at Law, represented the Alvord Unified School District.

Dan Bartlett, California Teachers Association, represented the respondents listed in Appendix A, except for respondent Craig Wells.

Respondent Craig Wells represented himself and was present throughout the hearing.

The matter was submitted on April 27, 2011.

FACTUAL FINDINGS

1. Craig Wells, Assistant Superintendent, Human Resources Development of the Alvord Unified School District, made and filed the accusation dated March 10, 2011, in his official capacity as the designee of Dr. Wendel W. Tucker, Ph.D., District Superintendent.

2. Respondents¹ are certificated district employees.

3. On February 10, 2011, in accordance with Education Code sections 44949 and 44955, the superintendent notified the Board of Education of the Alvord Unified School District in writing of his recommendation to reduce or discontinue particular kinds of services for the upcoming school year. The superintendent stated the reasons for the recommendation.

4. On February 11, 2011, the board adopted Resolution No. 31, determining that it would be necessary to reduce or discontinue particular kinds of services at the end of the current school year. The board determined that the particular kinds of services that must be reduced for the 2011-2012 school year were the following full time equivalent (FTE) positions:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Elementary Teacher	27
Secondary Physical Education Teacher	1
Secondary Wood Shop Teacher	1
Secondary READ 180 Teacher	2
Secondary English Teacher	1
Secondary Social Science Teacher	3
Secondary Math Teacher	1
Secondary Health Teacher	1
Secondary Freshman Focus/Seminary Teacher	1
Librarians	6

The proposed reductions totaled 44 FTE positions.

5. The board further determined in Resolution No. 31 that “competency,” as described in Education Code section 44955, subdivision (b), for the purposes of bumping, “shall necessarily include: (1) possession of a valid credential or authorization in the relevant subject matter area; (2) Highly Qualified status as authorized by the No Child Left Behind Act; (3) an appropriate authorization or possession of a BCLAD, CLAD or other equivalent English Language Learner Authorization (but not emergency authorizations) to the extent

¹ The District initially identified 39 certificated employees as respondents in this layoff proceeding. Three of the 39 individuals (Santos Campos, Kristin Rush, and Anahita Salahshour) did not request a hearing. Another individual, Joelle McCoy, was inadvertently sent a preliminary layoff notice and related documents, even though she had been issued a notice of non-reelection. For the reasons explained below, that notice of non-reelection precludes her participation in the present proceeding. By the end of the hearing the number of respondents identified for layoff had thus been reduced to the 35 individuals identified in Appendix A. The term “respondents” as hereafter used in this Proposed Decision refers collectively to these 35 remaining individuals.

required by the position; and (4) unique training and experience possessed by the employee to be bumped that are necessary and relevant to the position to be filled.”

An issue was raised with regard to the alleged vagueness of the fourth competency criterion. The district’s representative testified that the district applied this criterion to two and only two groups of employees, teachers on special assignment (TOSA) and project specialists. In response to a question as to why the district did not apply the criterion to other groups as well (e.g., employees of a school which had received a school improvement grant), he explained that the district chose to apply the criterion conservatively, and felt that the two groups selected were clearly defined and easily defended as necessary for the good of the district and its students. The district’s determination to apply the fourth competency criterion in the manner it did was neither arbitrary nor capricious, and constituted a reasonable exercise of its discretion.

6. In cases where an employee slated for layoff was competent under the district’s bumping criteria to serve in a vacant position, the district generally assigned the employee to “bump” into the vacant position in lieu of bumping into a position held by another, more junior employee, thus necessitating the layoff of the latter. The district deviated from this practice in one respect, however, by not permitting employees to bump into vacant counselor positions. As a result, at least one employee, Han Tran, was displaced by a more senior employee, Julie Shroads, who was competent to bump into a vacant counseling position, which would have saved Tran from layoff.

The district’s representative explained that the district’s decision not to permit bumping into vacant counseling positions was based on the district’s desire to reduce the number of district counselors through attrition. No evidence of any other motivation for the district’s practice in this regard was presented at the hearing. The district’s determination not to permit employees to bump into vacant counseling positions was neither arbitrary nor capricious, and constituted a reasonable exercise of its discretion.

7. The district, through the bumping process, proposes to lay off one employee, Alejandrina Vasquez, to the extent of a partial, 0.3 FTE amount. When asked to explain how an individual could hold a 0.7 FTE teaching position, the district’s representative conceded that it would be very difficult to assign someone to such a position.² He added in explanation that the layoff process is intended to determine which employees will retain their jobs next year, but that the actual assignment the retained individuals will be given next year has yet to be determined.

The district’s position is reasonable. The basic thrust of section 44955 is to provide for the layoff of certificated staff based fundamentally on principles of seniority. The “bumping” process is one means a district may employ to implement that principle. The

² Based on the evidence presented, it is inferred that district teachers typically teach five classes per day. Accordingly, even-numbered fractional FTE positions (such as 0.2, 0.4 and so on) would correspond to one or more classes per day. Odd-numbered fractional FTE positions would not, however, appear to correspond to a natural break in the school day.

layoff statute nowhere explicitly links the bumping process with actual assignments to be made for the upcoming school year. Indeed, a school district cannot realistically be expected to make assignment decisions for the upcoming school year as early as May 15 of the prior year, when so many matters that affect assignment are either unknown or subject to change. These matters may involve, for example, personnel (such as further attrition, changes in status, and professional qualifications), the composition of the student body, federal and state laws, and federal and state funding.

For the foregoing reasons, and based on the record as a whole, the district's partial layoff certain of its employees, including Vasquez, was neither arbitrary nor capricious and constituted a proper exercise of its discretion.

8. The board further determined in Resolution No. 31 that a specific and compelling need exists to retain certificated employees who possess special training and competency that other certificated employees with more seniority might not possess, to wit: Bilingual Crosscultural Language and Academic Development (BCLAD), Crosscultural Language and Academic Development (CLAD) or other equivalent English Language Learner Authorization (but not emergency authorizations) and the special training and experience that comes therewith.

Based on the evidence presented at the hearing, the board's determinations in this regard were neither arbitrary nor capricious, and constituted a reasonable exercise of the board's discretion.

9. The board directed the superintendent or his designee to determine which employees' services would not be required for the 2011-2012 school year as a result of the reduction of the foregoing particular kinds of services. The board further directed the superintendent or his designee to send appropriate notices to all certificated employees of the district who would be laid off as a result of the reduction of these particular kinds of services.

10. On or before March 15, 2011, the district timely served on respondents a written notice that the superintendent had recommended that their services would not be required for the upcoming school year, along with the related accusation. The notice set forth the reasons for the recommendation. The notice advised respondents of their right to a hearing, that each respondent had to deliver a request for a hearing in writing to the person sending the notice by the date specified in the notice, a date which in each case was more than seven days after the notice was served, and that the failure to request a hearing would constitute a waiver of the right to a hearing.

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

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

13. The services the board addressed in Resolution No. 31 were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The board’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious and constituted a proper exercise of discretion. No particular kinds of services were lowered to levels less than those levels mandated by state or federal law.

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

15. The district issued a notice of non-reelection to Joelle McCoy. The district also served McCoy with the full preliminary layoff packet that it served on respondents. The evidence established that service of these materials on Ms. McCoy was done through inadvertence, i.e., at the time the district issued the preliminary layoff notices, it overlooked that McCoy’s status as a non-reelected employee.

McCoy, who is a probationary employee, did not testify at the hearing. It was not argued on McCoy’s behalf that the district did not have the authority to issue her a notice of non-reelection. The argument was instead in effect that the issuance to her of a preliminary layoff notice, even inadvertently, conferred on her the right to be included in the present proceeding, regardless of a non-reelection notice. The only legal basis that could conceivably support such an argument would be one of estoppel. However, no facts were adduced (e.g., reasonable and detrimental reliance) upon which the application of estoppel could be based.

Further, and even if McCoy had challenged her classification by the district, an administrative law judge lacks jurisdiction under sections 44949 and 44955 to reclassify employees in a layoff proceeding. If a school district has misclassified an employee, the power to compel the school district to reclassify and reinstate that employee rests with the Superior Court, as occurred, for example, in *California Teachers Assn. v. Vallejo City Unified School District* (2007) 149 Cal.App.4th 135.

Accordingly, the district properly excluded McCoy from the present layoff proceeding.

16. The board considered all positively assured attrition that existed as of the date the preliminary layoff notices were served on respondents, in determining the actual number of necessary layoff notices to be delivered to its employees.

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

LEGAL CONCLUSIONS

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

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

3. Pursuant to section 44995, a senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or “bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) In fact, the district has an obligation under section 44955 to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. (*Bledsoe v. Biggs Unified School Dist.*, *supra*. at 136-137.)

4. The decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. It is within the governing authority’s discretion to determine the amount by which a particular kind of service will be reduced or discontinued as long as the district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.) A school district has wide discretion in setting its budget and a layoff decision will be upheld unless it was fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. (*California Sch. Employees Assn. v. Pasadena Unified Sch. Dist.* (1977) 71 Cal.App.3d 318, 322.)

School districts have broad discretion in defining positions within the district and establishing requirements for employment. This discretion encompasses determining the training and experience necessary for particular positions. Similarly, 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 Districts also retain discretion to determine standards of competency for purposes of teacher layoffs, and those standards will be upheld as long as they are reasonable. (*Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 565.)³

³ *Duax* involved the layoff of community college teachers pursuant to Education Code section 97743, but is applicable here by analogy.

5. With regard to the well-established doctrine of equitable estoppel, “The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.” (*Seymour v. Oelrichs* (1909) 156 Cal. 782, 795, quoted in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488.)

“Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury” (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305-306.)

6. A preponderance of the evidence sustained the charges set forth in the accusation. Cause exists under Education Code sections 44949 and 44955 for the district to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. Cause exists to reduce the number of certificated employees of the district due to the reduction and discontinuation of particular kinds of services. The district identified the certificated employees providing the particular kinds of services that the Board be directed be reduced or discontinued. It is recommended that the board give respondents notice before May 15, 2011, that their services are no longer required by the district.

ADVISORY DETERMINATION

The following advisory determination is made:

1. The accusations served on respondents are sustained. Notice may be given to respondents before May 15, 2011, that their services will not be required because of the reduction or discontinuation of particular services as indicated.

DATED: April 29, 2011

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings

Appendix A⁴

1. Michelle Bodily
2. Michelle Brazeal
3. Sofia Bustamante (0.6)
4. Jennifer Cieslik (0.8)
5. Sheila Cuevas
6. Barbara Damron
7. Ian Enriquez (0.6)
8. Monica Eppinger
9. Adrienne Fraire
10. Jeff Frieden
11. Diane Frymire
12. Lisa Funke
13. Monica Gutierrez
14. Mark Henley
15. Meredith Horton
16. Arianne Hovde
17. Linda Kieding
18. Ernie Ledesma
19. Wendy Lopez
20. Beatriz Mejia
21. Madalina Monreal
22. Elaine Rodriguez
23. M. Victoria Salgado
24. Christina Salomon
25. Karla Stanley
26. Wayne Stumpf
27. Mary Thrasher
28. Han Tran
29. Nancy Valdez
30. Alejandrina Vasquez (0.3)
31. Elizabeth Velarde
32. Loi Vuong
33. Tawni Webster
34. Craig Wells
35. Jeri Wilson

⁴ Where the lay off of a respondent is less than a full-time-equivalent position, the applicable fraction of a full-time equivalent position is indicated in parentheses opposite the individual's name.