

BEFORE THE GOVERNING BOARD OF THE
ALHAMBRA UNIFIED SCHOOL DISTRICT

In The Matter Of The Accusations Against:

OAH No. L2008030580

Janice Abbey Parker, Jennifer Rivera and
Jose Vara,

Respondents.

PROPOSED DECISION

Julie Cabos-Owen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 23, 2008, at the Alhambra Unified School District Offices in Alhambra, California.

James B. Fernow of Fagen Friedman & Fulfroost, L.L.P., represented the Alhambra Unified School District (District). Emma Leheny of Rothner, Segall & Greenstone represented all Respondents.

Oral and documentary evidence was received and argument was heard. The record was left open to allow the parties to respond in writing to evidence which was not exchanged prior to the hearing (Complainant's Exhibits 23 and 24, and Respondents' Exhibit A). On April 25, 2008, Respondents' counsel timely filed the Declaration of Janice Abbey Parker, which was marked as Respondents' Exhibit B. Respondents did not file any written objection to Complainant's Exhibits 23 and 24. Therefore, Complainant's Exhibits 23 and 24 were admitted into evidence. On April 29, 2008, the District timely filed its Response to Respondents' Submission of Authorities, which was marked as Complainant's Exhibit 26 and lodged. Complainant's Exhibit 26 contained no objection to Respondent's Exhibit B. Therefore, Respondent's Exhibit B was admitted into evidence. The record was closed and the matter was submitted for decision on April 30, 2008.

FACTUAL FINDINGS

1. At the administrative hearing, the parties stipulated to a Statement of Facts (Complainant's Exhibit 22), which is set forth verbatim below:

1. Janice Abbey Parker, Jennifer Rivera and Jose Vara (Respondents) are certificated employees of the District.

2. On February 19, 2008, the Governing Board of the District adopted Board Resolution No. 07-08-22 recommending a reduction in

particular kinds of services provided by the District for the 2008-2009 school year. A true and correct copy of said Resolution is attached as "Exhibit 1."

3. On March 11, 2008, the Governing Board of the District adopted Board Resolution No. 07-08-27 recommending a reduction in particular kinds of services provided by the District for the 2008-2009 school year. A true and correct copy of said Resolution is attached as "Exhibit 2."

4. The District's Board Resolutions recommended a reduction in particular kinds of service provided by the District for the 2008-2009 school year, including the reduction of physical education (PE) teachers by 5 full time equivalents.

5. On or before March 15, 2008, the District's Governing Board was informed of the names of the employees who would be noticed that the Superintendent had recommended not to re-employ them in the upcoming 2008-2009 school year. A true and correct copy of a memorandum from Superintendent Donna Perez to the Governing Board of the District is attached as "Exhibit 3."

6. On or about February 20 and March 12, 2008, the District timely served Respondents with Notice that the Superintendent of the District had recommended not to re-employ them in the upcoming 2008-2009 school year. True and correct copies of the Notices and Proofs of Service are attached as "Exhibit 4."

7. All of the District PE teachers who did not have Cross Cultural Language and Academic Development (CLAD) certification as of March 15, 2008 were served with a Notice that the Superintendent of the District had recommended not to re-employ them in the upcoming 2008-2009 school year. True and correct copies of the Notices and Proofs of Service are attached as "Exhibit 4." As of this date, Respondent Janice Abbey Parker is the only remaining PE teacher without CLAD certification who received a lay-off Notice that has demanded a hearing and remains in the lay-off termination hearing.

8. The Respondents timely filed a Request for Hearing concerning the recommendation not to re-employ them in the upcoming 2008-2009 school year. True and correct copies of the Respondents' Request for Hearing are attached as "Exhibit 5."

9. The District timely served each Respondent with an Accusation for Lay-Off of Certificated Employees, Notice to Respondent, and

blank Notice of Defense form, accompanied by relevant sections of the Education Code and Government Code. These Accusations and related documents were served and filed by the District's Superintendent in her official capacity. A true and correct copy of said Accusations and related documents are attached as "Exhibit 6."

10. The District timely served a Notice of Hearing on the Respondents setting the hearing date for April 23, 2008. A true and correct copy of said Notice is attached as "Exhibit 7."

11. Respondents Jose Vara, Jennifer Rivera and Janice Abbey Parker, timely filed Notices of Defense. True and correct copies of said Notices are attached as "Exhibit 8." District agrees that all three (3) Respondents have timely requested an opportunity to be heard.

12. Respondent Jose Vara's first date of paid probationary service with the District was September 5, 2006. A true and correct copy of the District's seniority list is attached as "Exhibit 9."

13. Respondent Jose Vara does contest his hire date, arguing that he was first hired as an athletic director during the summer of 2006. Even if this is accurate, a fact that the District disputes, Mr. Vara's seniority date would be no sooner than July 1, 2006. Thus, he would remain the most junior of all of the District's PE teachers.

14. Respondent Jennifer Rivera's first date of paid probationary service with the District was September 6, 2005. (See "Exhibit 9.")

15. Respondent Jennifer Rivera does contest her hire date, arguing that she was first hired as a long-term substitute teacher during the 2004-2005 school year. Even if this is accurate, a fact that the District disputes, Ms. Rivera's seniority date would be no sooner than September 7, 2004. Thus, she would remain the second-most junior of the District's PE teachers.

16. Respondent Janice Abbey Parker's first date of paid probationary service with the District was September 10, 1990. (See "Exhibit 9.")

17. Respondent Jose Vara currently holds a Preliminary Single Subject Teaching Credential in PE, which is valid from March 18, 2006 through April 1, 2011. A true and correct copy of Respondent Jose Vara's Preliminary Single Subject Teaching Credential is attached as "Exhibit 10."

18. Respondent Jennifer Rivera currently holds a Professional Clear Single Subject Teaching Credential in PE, which is valid from June 21, 2004 through July 1, 2009. A true and correct copy of Respondent Jennifer Rivera's Professional Clear Single Subject Teaching Credential is attached as "Exhibit 11."

19. Respondent Janice Abbey Parker currently holds a Professional Clear Single Subject Teaching Credential in PE, which is valid from September 1, 2004 through September 1, 2009. A true and correct copy of Respondent Janice Abbey Parker's Professional Clear Single Subject Teaching Credential is attached as "Exhibit 12."

20. In or about May, 2006, and May 2007, the District provided certain certificated teachers in the District with notice that "it is mandatory that all teachers obtain EL [English Learners] certification to work in the Alhambra Unified School District." These notices were not sent to Respondent Janice Abbey Parker. True and correct copies of the District's May 2006 and May 2007 notices are attached as "Exhibit 13."

21. In or about September 2006, District Human Resources Technician, Anne M. Gonzales, met with Respondent Janice Abbey Parker. At Ms. Parker's request, Ms. Gonzales submitted to [C]CTC [California Commission on Teacher Credentialing] the Application for Credential Authorizing Public School Service, for CLAD authorization. A true and correct copy of the [sic] Ms. Parker's Application for Credential Authorizing Public School Service is attached as "Exhibit 14."

22. On, [sic] January 3, 2007, the CTC did not issue Respondent Janice Abbey Parker a CLAD Certification and instead returned [sic] her Application for Credential Authorizing Public School Service since only courses in which Ms. Parker received a grade of "C" or higher, "Pass," or "credit" may be used to qualify for CLAD Certificate. A true and correct copy of the [C]CTC's return letter and Ms. Parker's transcript are attached as "Exhibit 15."

23. On March 22, 2007, and as a result of the [C]CTC's return of Respondent Janice Abbey Parker's Application for Credential Authorizing Public School Service, the District assisted Ms. Parker with submitting an Application for Temporary County Certificate. Ms. Parker sought a Temporary County Certificate, effective September 1, 2006. A true and correct copy of Ms. Parker's Application or Temporary County Certificate is attached as "Exhibit 16."

24. Respondent Janice Abbey Parker received an Emergency Crosscultural, Language, and Academic Development Permit from September 1, 2006 to October 1, 2007. A true and correct copy of Ms. Parker's emergency CLAD expiration is attached as "Exhibit 17."

25. In or about September 2007, the Alhambra Teacher's Association (ATA) issued its September 2007 newsbrief. A paragraph on the first page notes the impending CLAD authorization deadline, stating, "[f]or those teachers who still have not completed their certification for CLAD, they need to do so by the end of January, 2008. If you are not sure of your status contact Anne Gonzales, Human Resources, at 308-2232 to find out. Time is of the essence and classes are quickly filling up. Don't wait or it will be too late! Without the CLAD, you are not certified to teach students who are ELD. In our district that translates to loss of seniority and possibly your job. Good luck and hurry!" A true and correct copy of the ATA's September 2007 newsbrief is attached at "Exhibit 18."

26. Respondent Janice Abbey Parker does not recall seeing ATA's September 2007 newsbrief.

27. The District student body consists of approximately 34% EL [English Language Learner] students. Specifically, the schools where Respondent Janice Abbey Parker works, Fremont Elementary and William Northrup Elementary, have 29% and 50% EL students respectively. True and correct copies of the District's Enrollment Summary and Language Census 2008, are attached as "Exhibit 19."

28. In or about January 2008, the District posted the certificated teacher seniority list in the teacher's lounge at each school site within the District. The District instructed certificated teachers to review the seniority list for possible errors, and report these possible errors to the District for further review. Respondents did not notify the District of potential errors in the District certificated teacher seniority list. (See "Exhibit 9.")

2. The May 2006 and May 2007 notices (see Factual Finding 1, paragraph 20) were sent to teachers who had taken no action to obtain CLAD certification. At that time, the District had evidence that Respondent Janice Abbey Parker (Respondent Parker) was working on obtaining CLAD certification, so she did not receive these notices.

3. Every summer since the summer of 2000, the District's English Language Development Office has offered District teachers several training courses to prepare for Bilingual, Crosscultural, Language and Academic Development (BCLAD) and CLAD certification examinations. Each summer, several of the courses were offered at no cost to

the teachers. Written notification regarding these training courses was distributed to the mailboxes of all teachers in the District. Respondent Parker does not recall seeing the written notification in 2000, or any similar notification in subsequent years.

4. On June 16, 2006, a memorandum was issued by the District, and distributed to the mailboxes of all teachers in the District, even those who had already obtained their California Teacher of English Learners (CTEL) or CLAD certifications. The memorandum reminded the recipients that teachers serving EL students in California were required to hold certificates issued by the CCTC authorizing them to provide such specialized instruction. The memorandum announced the opportunity to register for a July 2006 CTET Examination Preparation Program. Respondent Parker did not see this document.

5. In the Fall of 2006, the President of the Alhambra Teachers' Association and the District's Assistant Superintendent of Human Resources visited every District site, including Respondent Parker's two school sites, to meet with teachers who did not have CLAD certification and to answer questions regarding the importance of obtaining CLAD certification. Respondent Parker does not recall these visits.

6. The services set forth in Factual Finding 1, specifically PE instruction, are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. The Board's decision to reduce or discontinue the identified particular kinds of services was neither arbitrary nor capricious, and constituted a proper exercise of discretion.

7. The reduction or discontinuation of particular kinds of services was related solely to the needs and welfare of the District and its pupils.

8. The Board considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

9. The District used the Seniority List with seniority dates to develop a proposed layoff list of the least senior employees currently assigned in the various services being reduced. The District also considered each teacher's credentials and certifications. The District determined that nobody less senior than Respondents was being retained to render services Respondents are certificated and competent to render.

10. In formulating the layoff list, the District decided to skip junior teachers with CLAD certification and lay off more senior teachers without CLAD certification.

11. The credible testimony of Laura Tellez, Assistant Superintendent of the District established the following:

(a) A CLAD certificate is required for teachers who work with EL students. Teachers without CLAD certification are not trained in the strategies utilized in working with

EL students. Moreover, there is no specific number of EL students required in order for the teacher to need a CLAD certificate. If a class contains even one EL student, the teacher must have a CLAD certificate or he/she is not fully certified to teach the class and would be considered "misassigned." The District has gotten documentation from the CCTC informing the District that it must inform parents when their child is being taught by teacher who is not fully certified.

(b) EL students are represented in every classroom in the district. Therefore, it is impossible to place a teacher in a class without at least one EL student.

12. Respondent Janice Abbey Parker (Respondent Parker) is not currently CLAD certified. District demographics make it impossible to assign Respondent Parker to a PE class that does not have at least one EL student. She is therefore not fully certificated to teach any PE class in the District.

13. At the administrative hearing, the District asserted that the sole issue remaining was whether Respondent Parker or Respondent Jennifer Rivera (Respondent Rivera) should be laid off, since Respondent Jose Vara was the most junior of the three. The District maintains that Respondent Parker is the appropriate person to be laid off, due to her lack of CLAD certification.¹

LEGAL CONCLUSIONS

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

2. The PE services listed in Factual Finding 1 are determined to be particular kinds of services within the meaning of Education Code section 44955. (Factual Findings 1 and 6.)

3. Cause exists to reduce the number of certificated employees in the District due to the reduction and discontinuation of particular kinds of services. 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 sections 44955. (Factual Finding 7.)

4. Education Code section 44955, subdivision (b), provides, in pertinent part:

[t]he services of no permanent employee may be terminated . . . while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

¹ Based on District counsel's statements at the administrative hearing, only two of the Respondents would be laid off, and one would be retained.

[¶] ... [¶]

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof.

5. Education Code section 44955, subdivision (d)(1), allows the District to deviate from terminating a certificated employee in order of seniority, if the District demonstrates that there is a specific need for personnel to teach a specific course or course of study, and that the certificated employee has special training and experience necessary to teach that course or course of study which others with more seniority do not possess.

6(a). Respondent Parker submitted a copy of the *Alexander v. Board of Trustees of the Delano Joint Union High School District* (1983) 139 Cal.App.3d 567 to support her assertion that she should bump Respondent Rivera. The *Delano* case is not applicable to the case at hand. In this case, unlike *Delano*, the District based its decision on Education Code section 44955, subdivision (d)(1). Additionally, the facts of *Delano* are distinguishable from those in this case.

6(b)(1). *Delano* involved the layoff of several certificated employees of the Delano Joint Union High School District (Delano District). More than half of the student population in the Delano District was of either Hispanic or Philippine descent. Although the Delano District had established a bilingual education program, no accurate statistics were presented at the hearing regarding the degree to which students were deficient in English, and there was no evidence that students with limited English abilities were assigned to bilingual teachers.

6(b)(2). In order to assist in determining the order of termination of certificated employees with the same first date of paid service, the governing board for the Delano District adopted tie-breaking criteria which included "language needs" and "competency." (*Id.* at 569.) Regarding teachers with different seniority dates, the Delano District also applied the tie-breaking criteria of "language needs," contrary to its resolution to apply such criteria only to employees with the same seniority dates. The Delano District first looked at whether an employee had a certificate of competency in Spanish. Then, for employees without such certificates, the Delano District determined bilingual ability through assessments of each employee made by other bilingual personnel. "At the hearing, several employees who had received notices presented evidence that they were bilingual; as a result they were retained, even though not assigned to teach courses in the bilingual program." (*Id.* at 570.) A mathematics teacher with an emergency credential, at the bottom of the seniority list, was skipped because he was bilingual, and more senior teachers were discharged because they were not bilingual. The Court of Appeal found that this was an abuse of discretion, holding that the Delano District did not use proper criteria in terminating the senior teachers.

6(b)(3). Citing Education Code section 44955, subdivision (b), the Court of Appeal noted, "Teachers having the same seniority date might properly be retained or discharged depending upon their ability to communicate in Spanish, a generally applicable 'need of the district and students.'" (*Id.* at 573.) The Court further noted that the "specific statutory language applicable to teachers with *different* seniority dates . . . [referred] to retention of senior permanent employees to render 'service which said permanent employee is certificated and competent to render.'" (*Id.*) The *Delano* Court pointed out, "To maintain the separate treatment of teachers with different seniority dates, we perceive the problem to be one of identifying 'competency' in a traditional manner, which is concerned with course and programs generally listed in job descriptions or course outlines. For example, within physical education may be found particular teaching requirements and competency which could vary from general sports to special classes for handicapped or retarded students. [Citation.]" (*Id.* at 574.) In focusing on program requirements in this manner, the Court noted, "Those most often skipped in elementary schools are special education teachers, teachers with bilingual certificates or credentials, counselors, speech therapists, art and music teachers, and administrators. . . . [However,] a bilingual machine-shop instructor was not entitled to preference over more senior instructors lacking bilingual competency because bilingualism was not a requirement for the position." (*Id.*, fn. 2.)

6(c). The case at hand, unlike *Delano*, involves the presence of EL students in every class in the District, the resulting District-wide requirement of a CLAD (or similar) certificate for all teachers, and the numerous opportunities afforded District teachers to achieve the appropriate certification and competency to teach EL students. Unlike *Delano*, where teachers without EL certification were laid off even if they did not need EL certification to teach their particular class, in this case, a CLAD certificate is required to teach every class in the District, based on the presence of an EL student in every class. Given this distribution of EL students, the District demonstrated the need for every teacher to have CLAD (or similar) certification, in order to avoid being deemed "misassigned." Unlike *Delano*, in this case, the CLAD requirement is used to determine if a senior teacher is "certified and competent" to teach his/her class. Given the foregoing, PE teachers need to have CLAD (or similar) certification to teach PE classes in the District. Therefore, in determining which PE teachers to retain, the District may properly retain a junior teacher with CLAD certification, while terminating the services of a senior teacher without CLAD certification.

7. Respondent Rivera was hired after Respondent Parker. The District demonstrated that there was a specific need for personnel to teach EL students in every class in the District and that Respondent Rivera had the special training and certification necessary to teach EL students which Respondent Parker, with more seniority, did not possess. More specifically, Respondent Rivera had special training and CLAD certification to teaching EL students in any PE class in the District. Given Respondent Parker's lack of CLAD certification, the evidence failed to establish that Respondent Parker was competent to fill Respondent Rivera's position. Therefore, Respondent Parker cannot "bump" Respondent Rivera.

8. No certificated employee junior to any Respondent is being retained to perform any services which any Respondent is certificated and competent to render.

9. Cause exists within the meaning of Education Code section 44955 for terminating or reducing Respondent Vara's and Respondent Parker's employment for the 2005-2006 school year, as set forth in Factual Findings 1 through 13 and Legal Conclusions 1 through 8.

ORDERS

1. The Accusations served on Respondents Janice Abbey Parker and Jose Vara are sustained. Notice may be given to Respondents Janice Abbey Parker and Jose Vara before May 15, 2008, that their services will be reduced or terminated for the 2008-2009 school year because of the reduction or discontinuation of particular services as indicated.

2. The Accusation served on Respondent Jennifer Rivera is not sustained, and the Accusation related to Respondent Jennifer Rivera is dismissed.

Dated: May 7, 2008

JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings