

BEFORE THE GOVERNING BOARD OF THE
LA CANADA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

OAH No. L2004030306

Teachers of the La Cañada Unified School
District

Respondents.

PROPOSED DECISION

Ralph B. Dash, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on April 12, 2004, at La Canada, California.

James C. Romo, Attorney at Law, represented La Cañada Unified School District (hereinafter "District").

Glenn Rothner, Attorney at Law, represented Respondents Karen Rose, Katharine Budde, Kimberlee Kimes, Mandy Emory, Kathy Kaze, Laurie Hopkins, Shannon Burke, Brittany Barker, James Padilla, Monique Saenz-Willshire, Daniel Yoder, Joseph Lee, Linda Matchie

Francis X. Flynn, Attorney at Law, represented Respondent Tonya Johnson.

Respondents Jennifer Harrison-Lee and Karen Stattler elected to represent themselves, but did not appear at the hearing.

The record remained open until April 26, 2004 to permit counsel to file closing briefs. The same were timely filed and the matter was deemed submitted on that date.

Oral and documentary evidence having been received and the matter submitted, the Administrative Law Judge makes the following Finding of Facts.

* * * * *

1. Sue Leabo, Superintendent of the District, acting in her official capacity, caused all pleadings, notices and other papers to be filed and served upon Respondents pursuant to the

provisions of Education Code Sections 44949 and 44955. At the hearing of this matter, the parties stipulated, in writing, that the facts contained in Findings 2 through 6 below are true and are deemed established without the necessity of providing further evidence thereon.

2. On March 4, 2004, the Governing Board of the La Cañada Unified School District adopted a resolution to reduce and discontinue the following particular kinds of certificated services no later than the beginning of the 2004-2005 school year:

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|--------------------------------------------------------------------------------------|---------|
| 1. Kindergarten through 6 th Grade Classroom Teaching Services | 7.0 FTE |
| 2. Kindergarten through 6 th Grade Elementary Teacher Specialist Services | 2.2 FTE |
| 3. K-6 th Learning Resource Specialist Services | .6 FTE |
| 4. 9 th Grade English/Language Arts Teaching Services | 3.0 FTE |
| 5. 9 th Grade Math Teaching Services | 1.0 FTE |
| 6. 7 th - 12 th Grade Social Science Teaching Services | 1.0 FTE |
| 7. 7 th - 12 th Grade Science Teaching Services | 1.0 FTE |
| 8. 7 th - 12 th Grade Spanish Teaching Services | 1.0 FTE |
| 9. 7 th - 12 th Art Teaching Services | 1.0 FTE |
| 10. 7 th - 12 th Grade Counseling Services | 1.0 FTE |
| 11. 7 th - 12 th Grade Physical Education Teaching Services | 1.0 FTE |
| 12. Itinerant Elementary Music Teaching Services | .5 FTE |
| 13. ROP - Culinary Art Teaching Services | .8 FTE |

3. The Governing Board further determined that it shall be necessary by reason of said reductions or discontinuances to decrease the number of certificated employees at the close of the present school year by a corresponding number of full-time equivalent positions, and directed the Superintendent to proceed accordingly by notifying the appropriate employees to implement the Governing Board's determination. The number of full-time equivalent positions to be reduced is 21.1.

4. On or before March 15, 2004, and prior to notification to employees who are the above-named Respondents, that their services will not be required for the ensuing school year, the Governing Board was given the names of those employees by the Superintendent.

5. On or before March 15, 2004, and after notification to the Governing Board, the Superintendent caused to be served on said named Respondents a written notice that their services would not be required for the ensuing school year.

6. Those employees who returned a Request for Hearing form (all Respondents named herein) were then served with a Notice of Accusation, Accusation, appropriate copies

of Government and Education Code Sections, and a Notice of Defense with instructions to return that form.

7. These services are "particular kinds of services" that may 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, but constituted a proper exercise of discretion.

8. The reduction or discontinuation of these 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.

9. The Board properly considered all known attrition, resignations, retirements, deaths and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees as of March 15, 2003. San Jose Teachers Association v. Allen, 144 Cal.App. 3d 627 at 636 (1983).¹

10. Respondents contend that the Notice referred to in Finding 5 was deficient and, under the holding in *Karbach v. Board of Education*, (1974) 39 Cal. App. 3d 355, the Accusation should be dismissed. The deficiency complained of is as follows: The Notices, dated March 10, 2004, contained the following language:

You are hereby notified that it has been recommended to the Governing Board of the La Cañada Unified School District that you be given notice your services will not be required for the ensuing 2004-2005 school year.

This notice provided to you pursuant to the provisions of Sections 44949 and 44955 of the Education Code. The reason for this recommendation is that the Governing Board has decided to reduce particular kinds of certificated services of this District, **as described in the resolution accompanying this notice**, beginning not later than the commencement of the 2004-2005 school year.

As a result of this reduction of a particular kind of service, the Governing Board has determined that it will be necessary to reduce the certificated staff by a corresponding number of full-time equivalent positions. It has been determined that you are one of those employees whose services will therefore not be required for the ensuing 2004-2005 school year. (emphasis added)

The parties stipulated that the resolution referred to in the notice, which contains the information set forth in Findings 2 and 3 above, was not included with the notices sent to any Respondent. The reason for this failure to include a copy of the resolution with the notice

¹ All layoffs were for particular kinds of service and not "average daily attendance" which might require positively assured attrition to be considered through May 15.

was not established by the evidence. The parties presumed it was a clerical error. There was no evidence to indicate the omission of the resolution was intentional.

11. Respondents contend the notice was defective, because although it did notify Respondents that particular kinds of services were being reduced, by failure to include the resolution, the notice did not specify which services were being reduced and how many positions would be lost. Citing *Karbach*, supra, Respondents argue they were not given sufficient notice so as to be able to "reasonably assess the probability [they] will not be reemployed". *Karbach* at page 362. Respondents' reliance on *Karbach*, particularly under the facts of this case, is misplaced. In *Karbach*, the school board had given notice that reduction in force was required because of a drop in average daily attendance, one of the two statutory grounds for dismissal in these types of proceedings. See Education Code Section 44955(b). The court found prejudice to the teachers in that case when at trial, the district attempted to offer evidence that reduction in force was necessary because of a reduction in particular kinds of service, the other statutory ground for dismissal, a ground not contained in the notice.

12. In this case, the Notice actually stated that the reduction in force was due to a reduction in particular kinds of service, and that is sufficient.² See *Campbell Elementary Teachers Assn v. Abbott* (1978) 76 Cal. App. 3d 796. While the Notice did not specify which services were to be reduced, the logical inference is that it was, or might be, the type of service performed by the teacher who received the Notice. Before the Notices were sent out, the Superintendent met with each of the affected teachers during the first week of March, 2004, and told him or her specifically that he or she would be receiving a layoff notice because of a reduction of services in each one's particular field. Each teacher thus had **actual** notice of the pending layoff, and the reasons therefor, before March 15, 2004. Furthermore, there was no evidence that any teacher suffered prejudice as a result of the resolution not being included in the notice. The District did not attempt to introduce evidence that was not related to the statutory ground specified in its Notice.

13. Respondents next seek dismissal of the Accusation on the ground that the District improperly "skipped" (that is, retained a teacher with less seniority) certain teachers because he or she had a CLAD³ certification. This certificate, with certain exceptions, is needed before a teacher can teach students designated as "english language learners" (ELL). Students are determined to be ELL if english is not the primary language spoken in the home and testing shows the student's language abilities are such as to require teachers with special training to properly teach them. The students are tested each year, and as their english skills get better, they lose the ELL designation. Approximately 2.3 % of the District's students require ELL services, a very low rate compared with most other districts in this state. This percentage has remained "fairly consistent" over the years. The District has had no problem

² The teachers were aware, as early as December, 2003, that those who had CLAD certification, discussed infra, would be "skipped". This prompted many of the Respondents to immediately begin the process of obtaining this certification.

³ Cross-cultural Language and Academic Development.

in accommodating student needs. Over 60 per cent of the District's teachers are now certified to teach ELL students.⁴ Currently, there is only one ELL kindergartener in the District, and at least three CLAD certified teachers available for this student.⁵ All new hires for the past two years have been required to obtain CLAD certification as a condition of becoming a permanent employee of the District. In addition, most Respondents are currently in CLAD training and could teach ELL students with the District's permission (see footnote 4).

14. Education Code Section 44955(d)(1) provides in pertinent part as follows:

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons: (1) The district demonstrates a specific need for personnel to teach a specific course or course of study...

Respondents argue that the decision by ALJ Engeman in his 2003 Travis Unified School District decision gave a correct analysis of the meaning of this statute (statute requires a clear showing by a District of a specific need for CLAD certificated teachers before they are "skipped"), and that his analysis should be followed here.⁶ Complainant argues that virtually all other ALJs who issued decisions on this issue in 2003 allowed skipping of CLAD certificated teachers. Complainant is correct. However, review of the decisions referenced by Complainant in the closing letter brief shows that in their Proposed Decisions, the ALJs, while not doing a lengthy statutory analysis,⁷ made very specific findings of the needs of each district to skip the specially certificated teachers. A few examples, from the decisions actually cited by Complainant, are sufficiently demonstrative of this point:

A. From Judge Anderson's Proposed Decision in the Mt. Diablo School District matter:

Sufficient qualified teachers to teach pupils who are not proficient in English have been a continuing problem for the District. For example, 94% of the kindergartens through 5th grades currently have ELL. The District is out of

⁴ There are certifications other than CLAD which permit teachers to teach ELL. In addition, a teacher in training for CLAD can also teach ELL, provided certain very easy ministerial steps are taken by the District. All that need be done is for the District to add the names of these teachers in training to the "Proposed Resolution of Noncompliance Findings (Exhibit 5), noting that they are in training for the certification.

⁵ The Superintendent testified the District needed to have all teachers be CLAD certified so that ELL students "could have access to all teachers". However, the District's own policy with respect to its middle school shows this not to be true. In the middle school, students are divided into two "houses". Each has its own "teaching team". Students of one house are taught only by a member of their teaching team, and have no access to teachers from the other house.

⁶ After a long statutory analysis, Judge Engeman held there was no showing by the school district of a need, within the meaning of Education Code Section 44955(d), to skip the CLAD or BCLAD (Bi-lingual Cross Cultural...) certificated teachers.

⁷ Nothing contained in this Proposed Decision should be construed as either adopting or rejecting Judge Engeman's statutory analysis.

compliance with state requirements for instruction of these pupils. The law requires that teachers with ELL must have a CLAD certificate or equivalent. As the District has exceeded three years in non-compliance, it may soon be subject to financial sanctions. In addition, the need is growing as the numbers of non-English speaking pupils have been increasing exponentially. Accordingly, the District determined that it would be contrary to the interests of its pupils to reduce the number of teachers so qualified. It resolved to exempt those teachers from layoff.

B. From Judge Tompkin's Proposed Decision in the Sausalito-Marin City School District matter:

Previously, Marin City was almost 100 percent African-American. Now it is approximately 48 percent African-American with a growing population of Spanish, Eastern European and Vietnamese immigrants, many of whom are English language learners. Currently District has English language learners at every grade level and anticipates that these students will continue their education in District. During a self-study conducted by District during the 2001-2002 school year the need for teachers with SDAIE, CLAD and BCLAD certificates became very evident. A subsequent State Certification Compliance review during the 2002-2003 school year underscored this need. District was advised by the State that in order to be found in compliance with State requirements, District would have to agree to have all of its teachers obtain a CLAD within two years.

C. From Judge Adler's Proposed Decision in the El Centro Elementary School District matter:

The District has about 6,000 students, and there is only one classroom in the District with no ELL students. In addition, 324 ELL students were not receiving instruction from ELL certified teachers, and the District is required to make good faith efforts to ensure that all ELL students are being taught by teachers with ELL certifications. There was also evidence that in 2005, the law will require all ELL students be taught by those with ELL certifications. The District's need to retain certificated employees with ELL certification was clearly established.

15. The District did not make a sufficient showing that it needed to skip CLAD certificated teachers for the benefit of its students. While the District was noted to be "out of compliance" by the Department of Education in its 2000-2001 Compliance Review, it had prepared a plan of correction and followed it. There was no showing this plan of correction did not address the needs of the District or the Department of Education. In fact, the evidence was to the contrary. If there was any doubt, the District could have included the

names of Respondents who were in CLAD training before March 15, 2004 (virtually all of them) to its plan. This would have permitted Respondents to teach ELL, even though they had not yet been CLAD certified. Accordingly, it is found that the District improperly skipped Respondents who are senior employees without CLAD certification. Thus, with two exceptions discussed in Finding 17 below, the District's seniority list is incorrect. Respondents are certificated and competent to render the services provided by more junior teachers who were retained.

16. Respondents' last contention is that even if CLAD certification justified skipping certain teachers (which it does not), the District improperly skipped two teachers (Cartnal and Robinson) who had completed CLAD training but had not yet received their certification from the Commission on Teacher Credentialing. Respondents' contention is correct. The certification must actually be issued and on file with the District and with the Board of Education before these teachers may be considered CLAD certified. See, *Fine v. Los Angeles Unified School District*, 116 Cal. App. 4th 1070 (2004) where the court stated, at page 1079:

[Education Code] Section 44330 governs the '[e]ffect of registration' of a teaching credential, and strongly suggests the registration of a credential operates to authorize the teacher's service under that credential, rather than the validity date of the credential. Section 44330 authorizes a county board of education to provide for the registration of any certification or other document authorizing its holder to serve in a position requiring certification qualifications, such as Fine's [Multiple Subject (Exam)--Preliminary]. It also states,

'Such registration shall authorize the service of the holder as an employee...in the capacity in which and for the period of time for which the certification or other document is valid.'

Therefore, registration is, by statute, the sine qua non for a teacher's service under a credential. Without registration of the credential, service is not authorized.

While this matter is factually distinguishable from *Fine*, the holding in that case is quite clear. The two teachers in question here were not yet CLAD certified, but were nevertheless skipped based on their application for certification. This is not sufficient. The certification must first be issued and registered before it becomes effective. However, just as with Respondents, the District could have added the names of these two teachers to the plan of correction which would enable them to teach ELL.

17. Respondent Yoder holds a Preliminary Single Subject Social Sciences credential. The District hired him on August 27, 2003. He is not qualified to teach any of the subjects (music, math, Special Education) that his three more junior colleagues now teach. The reduction in force is proper as to him. Respondent Matchie is a high school counselor. Her hire date is August 20, 2003. She holds five different credentials. However, none of her

credentials permit her to teach the classes now taught by less senior retained teachers and the reduction in force is proper as to her.

Conclusions of Law

1. Jurisdiction for these proceedings exists pursuant to Education Code Sections 44949 and 44955.

2. The services set forth in Finding 2 are particular kinds of service which may be reduced or discontinued in accordance with applicable statutes and case law. 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.

3. Cause exists because of the reduction in particular kinds of services to reduce the District's teaching positions by 21.1 Full Time Equivalents. However, the District improperly determined the order of seniority of the teachers to be laid off, by reason of Findings 13 through 16, thereby violating the provisions of Education Code Section 44954(b) which provides in part:

Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority is certificated and competent to render.

Accordingly, except as set forth in Conclusion 4, the District must retain all Respondents. The District's decision to reduce or discontinue the services is neither arbitrary nor capricious, but rather a proper exercise of the District's discretion.

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4. The District need not retain the services of Respondents Yoder and Matchie, by reason of Finding 17.

ORDER

As a result of the reduction of services, the District may give notice to teachers Daniel Yoder and Linda Matchie that their services will not be required for the 2004-2005 school year. The District must retain all other Respondents.

Dated: May 3, 2004

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings