

BEFORE THE
GOVERNING BOARD
BUCKEYE UNION SCHOOL DISTRICT
COUNTY OF EL DORADO
STATE OF CALIFORNIA

In the Matter of the Non-Reemployment of:

ASHLEY BLACK, JENELLE CARVER,
AMY DeOLIVIERA, HEATHER McINTYRE,
KERRY McFARLAND, and MELODY
ROOT,

Respondents.

OAH No. 2010030052

PROPOSED DECISION

This matter was heard before Administrative Law Judge Dian M. Vorters, Office of Administrative Hearings, State of California, on April 15, 2010, in Shingle Springs, California.

Heather M. Edwards, Attorney at Law,¹ represented complainant, Teresa M. Wenig, Superintendent, Buckeye Union School District.

A. Eugene Huguenin, Jr., Attorney at Law,² represented respondents. (See Exhibit A)

The matter was submitted on April 15, 2010.

FACTUAL FINDINGS

General Findings Concerning Statutory Requirements

1. Respondents are certificated district employees.

¹ Heather M. Edwards, Attorney at Law, Girard Edwards & Hance, 1121 L Street, Suite 510, Sacramento, California 95814.

² A. Eugene Huguenin, Jr., Attorney at Law, Huguenin Law Office, 9297 Office Park Circle, Suite 110, Elk Grove, California 95758.

2. On March 3, 2010, the governing board of the district resolved to reduce or discontinue particular kinds of services. To that end, the board adopted Resolution 10-04 (Layoff Resolution). Within the meaning of Code section 44955, the services are “particular kinds of services” that can be reduced or discontinued. The decision to reduce or discontinue these services was not arbitrary or capricious but constituted a proper exercise of discretion.

3. Not later than March 15, 2009, the superintendent of the district caused the governing board of the district and respondents to be notified in writing of her recommendation that preliminary notice be given respondents, pursuant to Education Code sections 44949 and 44955,³ that the district would not require their services for the 2010-2011 school year. The notice stated the reasons for the recommendation. In recommending reductions in certificated staff, the superintendent considered the qualified condition of the district’s budget. The recommendation was not related to respondents’ performance as certificated employees.

4. Superintendent Teresa Wenig testified that her recommendation to the board was based on a \$1million budget shortfall for the 2010-2011 school year. The deficit was caused by a loss in state and federal funds. The shortfall would have been greater but for the board’s use of \$1.3 million in reserves.

5. A Preliminary Notice of Layoff was delivered to each respondent, by personal delivery. Superintendent Wenig or Colleen Johnson, Director of Human Resources, hand delivered the preliminary notice of layoff package to each teacher at her place of employment.

6. The notice advised each respondent of the following: She had a right to a hearing. In order to obtain a hearing, she had to deliver a request for a hearing in writing to the person sending the notice. The request had to be delivered by a specified date, which was a date that was not less than seven days after the notice of termination was served.⁴ And the failure to request a hearing would constitute a waiver of the right to a hearing.

7. Respondents timely filed written requests for a hearing to determine whether there was cause for not reemploying them for the ensuing year. An accusation was timely served on respondents. Respondents were given notice that, if they were going to request a hearing, they were required to file a Notice of Defense within five days after being served

³ All references to the Code are to the Education Code unless otherwise specified.

⁴ Employees must be given at least seven days in which to file a request for a hearing. Education Code section 44949, subdivision (b), provides that the final date for filing a request for a hearing “shall not be less than seven days after the date on which the notice is served upon the employee.”

with the accusation.⁵ Respondents filed timely notices of defense. All prehearing jurisdictional requirements were met.

Positively Assured Attrition

8. The Board must allow for positively assured attrition such as voluntary resignations and retirements which occur during the “computation period.” (*Santa Clara Federation of Teachers v. Governing Board of Santa Clara Unified School Dist.* (1981) 116 Cal.App.3d 831, 847.) The district must “consider evidence of positively assured attrition, involuntary retirements for the [upcoming] school year which were known to the board when it made its preliminary determination on 15 March ... and when it made its final determination on 15 May.” (*Lewin v. Bd. of Trustees of Pasadena Unified School Dist.* (1976) 62 Cal.App.3d 977, 983.)

9. As set forth in the Layoff Resolution, the governing board considered all positively assured attrition which has occurred to date, that is, all deaths, resignations, retirements, and additional attrition which may occur before the start of the 2010/2011 school year in reducing these services and but for the attrition already assured and the attrition anticipated would have found it necessary to reduce additional kinds of service.

Services the District Intends to Reduce or Discontinue

10. The governing board of the district determined, in the Layoff Resolution, that because particular kinds of services were to be reduced or eliminated, it was necessary to decrease the number of permanent employees in the district by 13.30 full-time equivalents (FTE). The particular kinds of services the governing board of the district resolved to reduce or discontinue are:

Administrative Positions

Director of Human Resources	1.0 FTE
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Certificated Positions

Elementary Music	1.0 FTE
Elementary Physical Education Program	4.0 FTE
K-8 Counseling Program	.8 FTE
K-5 Self-contained classrooms	3.0 FTE
7th/8th grade Math	1.0 FTE
7th grade Life Science	1.0 FTE
7th/8th grade Language Arts	1.0 FTE
Special Education	.5 FTE

⁵ Pursuant to Government Code section 11506, a party on whom an accusation is served must file a Notice of Defense in order to obtain a hearing. Education Code section 44949, subdivision (c)(1), provides that, in teacher reduction in force cases, the Notice of Defense must be filed within five days after service of the accusation.

Use of Tie-Breaking Criteria Based on the Current Needs of the District and Students

11. Pursuant to Education Code section 44955, subdivision (b), the governing board of the district established, in Resolution 10-02 (Tie-Breaker Resolution), criteria for determining the order of termination as among employees who first rendered paid service on the same date. The district employed tie-breaking to achieve a proper list of employees to receive layoff notices. Points were granted to each affected employee based upon all the following criteria. Employees with the fewest points were to be terminated before employees with more points.

- a. Multiple number of current credentials held K-8; *4 points (total)*
- b. Total years teaching in a California public school:

 Five (5) years or more; *2 points*
 One to four (1 to 4) years; *1 point*
- c. Professional Clear Credential; *1 point*
- d. If two or more certificated employees who first rendered paid service on the same date still have the same number of points after application of points provided above, the ranking of such employees shall be determined by a lottery conducted by the Superintendent or her designee.

The lottery was conducted by drawing names out of a bowl.

12. Seven teachers shared a seniority date of August 11, 2008. The district applied tie-breaking criteria and conducted a lottery to break continuing ties. The final order of seniority was deemed to be:

Name	Points	Seniority After Lottery
Kerry McFarland	7	1
Susanna Fong	7	2
Karinne Ziegler	6	3
Kristin Cheatham	6	4
Amy DeOliviera	5	5
Darcey Little	5	6
Melody Root	2	7

13. Seven teachers shared a seniority date of August 7, 2007. The district applied tie-breaking criteria and conducted a lottery to break continuing ties. The final order of seniority was deemed to be: ⁶

Name	Points	Seniority After Lottery
Nancy Savage	7	1
Melinda Spooner	3	--
Jinny Klein	3	--
Kori Carey	3	--
Kevin Cadden	3	--
Heather McIntyre	2	6
Jenelle Carver	2	7

Skipping/Bumping/Seniority

14. Skipping describes the process by which the district may deviate from the order of seniority when there is an identified need for a particular type of service, there is a junior employee who is uniquely qualified to provide that service or teach a subject, and there is no senior employee who is certificated and competent to provide the service. (Ed. Code, § 44955, subd. (d)(1).) The district employed skipping to achieve a proper list of employees to receive layoff notices.

15. Bumping describes the process by which the district identifies those employees who are more senior and who are competent to perform a particular kind of service or teach a particular subject. The district employed bumping to achieve a proper list of employees to receive layoff notices.

16. Seniority is the relationship between the teachers within a school district. Among the teachers credentialed to provide a given service, greater seniority in the district gives a greater legal entitlement to a position. Seniority is defined as the date upon which an employee first rendered paid services in a probationary position. (Ed. Code, § 44845.)

Education Code section 44955, subdivision (b), provides that no senior employee may be terminated while any less senior employee is retained to render a service which the more senior permanent employee is “certificated and competent” to render. “It [is] the district’s obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possess[es] the seniority and qualifications which would entitle him/her to be assigned to another position.” (*Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 137.)

⁶ There was no evidence that a lottery was held to rank the four employees receiving three points. A lottery was held to rank the two least senior employees, Heather McIntyre and Jenelle Carver.

17. Superintendent Wenig testified that the district maintains a seniority list of all certificated employees. The seniority list is posted at each school site and employees are advised to review and update the list. The seniority list is verified and maintained by Human Resources Director, Coleen Johnson. Ms. Johnson testified that information is gathered from personnel files and verified through the California Teaching Commission. Forms are mailed each year to all certificated employees for updates and identification of errors. The last verification was mailed to employees on January 21, 2010. No errors were reported, however, some teachers had earned a clear credential. All verified information was incorporated into the final seniority list.

Layoff/Skipping/Bumping at Administrative Level

18. The governing board determined to lay off the Director of Human Resources to effect a reduction of 1.0 FTE in Administration. No bumping, skipping, or tie-breaking was employed.

Layoff/Skipping/Bumping at the Elementary School Level

19. At the elementary school level, the governing board determined it was necessary to reduce 3.0 FTE K-5 Self-Contained Classroom Teaching positions, 4.0 FTE Elementary Physical Education (PE) positions, and 1.0 FTE Elementary Music position for a total of 8.0 FTE. (Factual Finding 10.) The district implemented the reduction by first looking at the seniority chart and identifying which employees held relevant credentials. Tie-breaking procedures were implemented as necessary between those employees who first rendered paid service on the same date. Bumping was employed to ensure that the more senior teachers, certificated and competent to render a particular kind of service, were retained over those with less seniority.

20. To reduce 3.0 FTE K-5 Classroom instruction, teachers in this assignment with the least seniority were identified as Karinne Ziegler, Melody Root, and Amy DeOliviera. All three share a seniority date of August 11, 2008. None possessed the seniority or qualifications to bump into another classroom assignment. These employees were the proper recipients of layoff notices.

- a. Karinne Ziegler has an August 11, 2008 seniority date. She teaches second grade at William Brooks Elementary School. She holds a clear multiple subject credential, a supplemental authorization in Music, and an EL (English Learner) authorization.
- b. Amy DeOliviera has an August 11, 2008 seniority date. She teaches fifth grade at Oak Meadow Elementary School. She holds a preliminary multiple subject credential and an EL authorization.

- c. Melody Root has an August 11, 2008 seniority date. She teaches language arts at Rolling Hills Middle School. She holds a clear single subject English credential and an EL authorization. She is qualified to teach English and English Learners at the K-12 level.

21. To reduce 4.0 FTE Elementary PE instruction, teachers in this assignment with the least seniority were identified as Amanda Burstiner, Ashley Black, Jennie Friedrichs (0.5 FTE), Shelley Bishop, and Matt Kimura (0.5 FTE). These employees were the proper recipients of layoff notices.

Anne Diers bumped Amanda Burstiner. Ms. Burstiner has a seniority date of August 12, 2009. She teaches special education at Rolling Hills Middle School. She holds a preliminary multiple subject credential, a preliminary Education Specialist Instruction credential, and an EL authorization. Ms. Diers has a seniority date of August 28, 1987. She teaches Elementary PE at Blue Oak Elementary. She has a clear single subject PE credential, a clear specialist instruction credential in special education (L.H.), and a clear certificate of completion in staff development. Ms. Diers is more senior and qualified to teach special education.

22. To reduce 1.0 FTE Elementary Music instruction, the teacher in this assignment with the least seniority was identified Tim Dirkes. Tim Dirkes bumped Jenelle Carver. Ms. Carver has a seniority date of August 7, 2007. She teaches second grade at Buckeye Elementary. Mr. Dirkes has a seniority date of August 7, 1998. He teaches music at William Brooks Elementary. He holds a clear multiple subject credential and a CLAD certificate. Mr. Dirkes was more senior and qualified to teach at the elementary level. Ms. Carver was the proper recipient of a layoff notice.

Layoff/Skipping/Bumping at the Middle School (7/8) Level

23. At the middle school level, the governing board determined it was necessary to reduce 1.0 FTE 7/8 Mathematics position, 1.0 FTE 7/8 Life Science position, and 1.0 FTE Language Arts/History Core position for a total of 3.0 FTE. (Factual Finding 10.) The district implemented the reduction by first looking at the seniority chart and identifying which employees held relevant credentials. Tie-breaking procedures were implemented as necessary between those employees who first rendered paid service on the same date. Bumping was employed to ensure that the more senior teachers, certificated and competent to render this particular kind of service, were retained over those with less seniority.

24. To reduce 1.0 FTE 7/8 Mathematics instruction, the teacher in this assignment with the least seniority was identified as Kerry McFarland. This employee was the proper recipient of a layoff notice.⁷

⁷ Even adjusting Ms. McFarland's seniority date to July 29, 2008 from August 11, 2008, she is the least senior employee qualified to teach K-8 mathematics.

25. To reduce 1.0 FTE 7/8 Life Science instruction, the district identified those employees with the least seniority who were qualified to teach Life Science. Darcey Little was identified to receive a layoff notice.

- a. Darcey Little has a seniority date of August 11, 2008. She teaches eighth grade American Studies/Language Arts/Exploration. She possesses a multiple subject credential, a supplemental mathematics authorization, and an EL authorization. She is qualified to teach Life Science and Language Arts. Ms. Little properly received a layoff notice for the 7th Grade Life Science as this was a particular kind of service being eliminated.
- b. Darcey Little was qualified to bump Melody Root to teach 7/8 Language Arts. Both share a seniority date of August 11, 2008. After tie-breaking criteria were applied, Ms. Root was found to be the least senior. Ms. Root is qualified to teach K-12 English. Hence, she was qualified to bump into K-5 Classroom instruction but was eliminated as this was also a particular kind of service being reduced. (Factual Finding 20.)
- c. Trisha Sanchez teaches seventh grade Life Science/Exploration. She has a seniority date of July 3, 2001. She holds a clear multiple subject credential with a CLAD emphasis, a supplemental science authorization, and a certificate of eligibility in administrative services, and NCLB (History, English, Science, and multiple subject). She is more senior and qualified to bump Ms. Cheatham in a secondary language arts/history core teaching position. As such, Ms. Sanchez was properly retained to teach 7/8 Language Arts/History (Core).

26. To reduce 1.0 FTE 7/8 Language Arts/History Core instruction, the district identified those employees with the least seniority who were qualified to teach Language Arts/History Core. Heather McIntyre was identified to receive a layoff notice.

- a. Heather McIntyre has a seniority date of August 7, 2007. She teaches second grade at Buckeye Elementary School. She holds a clear multiple subject credential and an EL authorization. Ms. McIntyre is qualified to teach a language arts/history core assignment. Ms. McIntyre bumped Darcey Little, with a seniority date of August 11, 2008) for the 7th/8th Language Arts/History (Core) assignment. However, this is a particular kind of service being eliminated. Hence, Ms. McIntyre properly received a layoff notice for 1.0 FTE 7/8 Language Arts/History (Core).
- b. Ms. Cheatham teaches seventh grade Language Arts and World Studies. She has a seniority date of August 11, 2008. She possesses a multiple subject credential, a single subject English credential, and an EL authorization. Ms. Cheatham bumped Darcey Little and Melody Root, after the district applied

tie-breaking criteria to teachers with an August 11, 2008 seniority date. Ms. Cheatham was properly retained to teach single subject English.

Layoff/Skipping/Bumping of K-8 Counseling Services

27. The governing board determined it was necessary to reduce 0.8 FTE K-8 Counseling Services. (Factual Finding 10.) The district implemented the reduction by first looking at the seniority chart and identifying which employees held relevant credentials. Tie-breaking procedures were implemented as necessary between those employees who first rendered paid service on the same date. Bumping was employed to ensure that the more senior teachers, certificated and competent to render this particular kind of service, were retained over those with less seniority.

28. To reduce 0.8 FTE K-8 Counseling Services, the counselor in this assignment with the least seniority was identified as Christine Falconer. This employee was the proper recipient of a layoff notice.

Layoff/Skipping/Bumping of Special Education Services

29. The governing board determined it was necessary to reduce 0.5 FTE Special Education Services. (Factual Finding 10.) The district implemented the reduction by first looking at the seniority chart and identifying which employees held relevant credentials.

30. To reduce 0.5 FTE K-8 Special Education Services, the teacher in this assignment with the least seniority was identified as Jennifer Smith. This employee resigned on February 19, 2010.

Issues Related to Seniority Dates

31. The district adjusted the seniority date of three teachers who began their service in August 2008. Amy DeOliviera, Kerry McFarland, and Melody Root, initially shared a seniority date of August 13, 2008. It was determined that all three had attended an earlier paid teacher orientation. As such, their seniority date was appropriately changed to August 11, 2008, the date they first rendered paid service to the district. (Ed. Code, § 44845.)

32. Kerry McFarland contested her reported seniority date of August 11, 2008. She asserted that her true seniority date is July 29, 2008. She provided evidence that this was the date that she first rendered paid service to the district.

33. Ms. McFarland began teaching in the district at the start of the 2008-2009 school year. She holds a clear multiple subject credential and a supplemental authorization in mathematics. During the summer of 2008, Ms. McFarland was contacted by Gigi Marchini's secretary and asked to attend an algebra teacher workshop. Ms. Marchini is the Assistant Superintendent in charge of curriculum, instruction, and professional development.

Ms. McFarland testified that she considered her attendance at the meeting to be mandatory. She was the only new mathematics teacher in attendance. Not all mathematics teachers were present due to summer break. As for her own attendance, Ms. McFarland did not recall if the word “mandatory” was used or if any consequence was conveyed for failure to attend. However, as a new employee of the district, she did not feel at liberty to ignore the superintendent’s request for her attendance.

34. There were two math workshops held before the start of classes. The first on July 29, 2008 and the second on August 11, 2008. A separate “teacher in-service” meeting also occurred on August 11, 2008. Ms. McFarland could not attend the teacher in-service since the second algebra workshop was held at the same time. The district compensated Ms. McFarland and the other mathematics teachers for their attendance at both algebra workshops at a rate of \$25 per hour. Ms. McFarland referred to the payment as “extra duty pay” whereas the district referred to it as a “stipend.”

35. Ms. Marchini testified that she convened the algebra meeting to discuss new State of California mandates affecting middle school mathematics instruction. All seventh and eighth grade teachers were contacted by phone and “invited” to attend. According to Ms. Marchini, the meeting was not mandatory because it was summertime and she knew that not all teachers would be available. After the July 29, 2008, meeting Ms. Marchini sent an electronic mail message to attendants. In it she thanked them for their presence and further stated, “I think that it was a much calmer setting than it would have been on August 13, 14, or 15th! You got a lot done and I know that it’s just the beginning. So I looked at the Benchmark Assessments tab in Edusoft and the Holt Assessments for math are all there!!!! You might want to look at these. There are forms A, B, and C...it looks to be very thorough. I look forward to seeing you all on the 13th!”

36. Ms. McFarland signed two subsequent Notices of Employment, in October and December 2008, that listed her hire dates as August 13 and 11, 2008, respectively. On January 11, 2010, the district sent Ms. McFarland a “Seniority Date and Credentials Verification” form which continued to list her seniority date as August 11, 2008. When she received her verification letter, she questioned Sharon B., in personnel. According to Ms. McFarland, she was told that the hire date “related to the school year.” Ms. McFarland made no corrections and signed the form on January 13, 2010. She testified that she believed that the August 11, 2008 date reflected her attendance at the second math meeting and she does not understand why the first algebra meeting was not credited.

37. The district adjusted Ms. McFarland’s hire date to reflect an August 11, 2008 teacher in-service that she did not attend. The district does not argue that Ms. McFarland’s hire date should be returned to August 13, 2008, to reflect this fact. However, the district opposes adjusting her seniority date to reflect the July 29, 2008 algebra meeting, because attendance was not mandated.

38. The content of the July 29th meeting was relevant to mathematics instruction. The district benefited from the presence of the algebra teachers and as such, paid them for their service. It is understandable that given the time of year, the July 2008 math meeting was not mandatory. However, it is just as reasonable that as a new teacher for the district, Ms. McFarland would not have treated her own attendance as optional. Seniority is determined solely by the date upon which a probationary or permanent employee first rendered paid service in a probationary position. (Ed. Code, § 44845; *California Teachers Assoc. v. Vallejo City Unified School District* (2007) 149 Cal.App.4th 135, 156.) Ms. McFarland first rendered paid service to the district on July 29, 2008. As such, her seniority date must be adjusted accordingly.

39. Any other assertions put forth by respondents at the hearing and not addressed above are found to be without merit and are rejected.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists pursuant to Education Code sections 44949 and 44955. All notices and jurisdictional prerequisites required by those sections were satisfied.

2. The services the district seeks to eliminate in this matter, as set forth in the Layoff Resolution, are the particular kinds of service 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 the board's discretion. Pursuant to Education Code sections 44949 and 44955, legal cause exists for the district to reduce or discontinue the particular kinds of services set forth in the Layoff Resolution. The reduction or discontinuance of these identified particular kinds of services relates solely to the welfare of the district and its pupils.

3. No certificated employee with less seniority than any respondent is being retained to render a service that any respondent is certificated and competent to render. Legal cause exists pursuant to Education Code sections 44949 and 44955 to give respondents final notice that their services will not be required for 2010-2011 school year.

RECOMMENDATION

1. The Buckeye Union School District's action to reduce or eliminate the particular kinds of services identified in Layoff Resolution 10-04, for the 2010-2011 school year is AFFIRMED.

2. The Accusation against respondents is SUSTAINED. The Buckeye Union School District may give final notices to respondents that their services will not be required for the 2010-2011 school year. Notices shall be given in inverse order of seniority.

3. The seniority date of Kerry McFarland is adjusted to July 29, 2008, to reflect the date upon which she first rendered paid service to the district.

DATED: April 30, 2010

DIAN M. VORTERS
Administrative Law Judge
Office of Administrative Hearings

APPENDIX A

2010 Buckeye Union School District – List of Respondents

	Last Name	First Name
1	Black	Ashley
2	Carver	Janelle
3	DeOliviera	Amy
4	McFarland	Kerry
5	McIntyre	Heather
6	Root	Melody