BEFORE THE
GOVERNING BOARD
ROCKLIN UNIFIED SCHOOL DISTRICT

In The Matter Of The Accusations Against: KATELYN ALSTOT, APRIL FETCH (TAYLOR), MARY GOMES, LARA KIKOSICKI, ROBERT KLINGENSMITH, DAVID LACOSTE, REGINA MANIBUSAN, CHAUNTE MARTIN, MARYANN YOUNGER, Respondent.	OAH NO.2011020353

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 5, 2011, in Rocklin, California.

Michelle L. Cannon, Attorney at Law, Kronick, Moskovitz, Tiedemann & Girard, represented the Rocklin Unified School District.

Andrea Price, Attorney at Law, Langenkamp, Curtis & Price, represented all of the respondents except April Fetch, who did not appear at the administrative hearing.[1]

The matter was submitted on April 5, 2011.

FACTUAL FINDINGS

1. Kevin Brown is the Superintendent for the Rocklin Unified School, State of California, and made and filed the Accusation in his official capacity.

2. Each of the respondents was at all times mentioned herein, and now is, a certificated employee of the District.

[1] The notice issued to respondent Maryann Younger had been rescinded by District by the time the administrative hearing commenced.

3. On March 7, 2011, the Governing Board of the Rocklin Unified School District was given written recommendation that notice be given to respondents pursuant to Education Code sections 44949 and 44955, that their services will not be required for the ensuing school year and stating the reasons therefor.

4. On March 10, 2011, respondents were given notice of the recommendation pursuant to Education Code sections 44949 and 44955, that their services will not be required for the ensuing school year and stating the reasons therefor.

5. Pursuant to Education Code section 44949, respondents requested, in writing, a hearing to determine if there is cause for not employing them for the ensuing school year.

6. The Governing Board resolved to reduce or eliminate a total of 25.5 full time equivalent (FTE) positions and specified the particular kinds of services to be reduced or eliminated in Board Resolution 10-11-15. The resolution included a definition of "competency" for purposes of displacement (bumping) discussed in more detail below.

Tie-Breaker Issue

7. The Governing Board, in Resolution 10-11-12, adopted tie-breaking criteria to determine the relative seniority of affected certificated employees with the same date of first paid probationary service. The criteria and application of one portion are discussed below.

8 On the eve of the administrative hearing, a lottery was held to break a tie between respondent Regina Manibusan and Michael Pappas. Ms. Manibusan had already received notice that she would not be reemployed next school year when District administrators discovered that she was entitled to additional credit under the tie-breaking criteria for extracurricular work for which she was paid a stipend. The additional point she received tied her with Mr. Pappas as each then had 12 points. Ms. Manibusan lost the lottery. At the administrative hearing, Ms. Manibusan asserted that District had improperly calculated another category of the tie-breaking criteria, that relating to experience. The District criteria for tie-breaking awarded two points for 5-10 years of "[f]ull time equivalent of credentialed public school experience," and three points for 11 years plus of such experience. Respondent Manibusan claimed that she was entitled to three points, whereas she only received two.

9. Respondent Manibusan began teaching in southern California in September of 2000. She was hired by the District at the beginning of the 2008-2009 school year and was employed at Step 9, accurately reflecting her previous eight years of teaching experience. School year 2009-2010 was her tenth year of teaching and she is currently in her eleventh year. District interprets the tie-breaking criteria to require the completion of at least eleven years of teaching to earn three points and applied this interpretation to all tie breaking situations. While unnecessary to the calculation, respondent Manibusan also would not have received three points because she did not teach a "full time equivalent" year last year as her teaching assignment was reduced from 1.0 FTE to .67 FTE by a previous reduction in force.

In summary, the application of the District's tie breaking criteria to respondent Manibusan, and specifically the manner in which it calculated her experience points, was appropriate.

Bumping Issues

10. The District's Governing Board Resolution 10-11-15 included a statement that for purposes of potential displacement rights, "competency" shall mean "at a minimum, possession of a preliminary, clear, professional clear, lifetime, or other full credential, and at least one semester actual teaching experience in the subject area in a comparable setting (K-6 self-contained; 7-12 departmentalized; 7-12 alternative education; specialized elementary music, PE, ELD or VAPA programs) within the last five years." The statement included that competency shall also mean that, where required, the teacher is qualified to teach the subject area under the federal No Child Left Behind Act (NCLB).

11. Superintendent Brown and Marjorie Crawford, another District administrator, testified about the rationale for the bumping criteria requiring recent experience in what they described as a "like setting." Very similar criteria were in effect last year and in previous years, although the Governing Board's lay off decision in the spring of 2009 discussed below included findings that the like setting criteria parenthetical examples simply listed elementary, secondary, and alternative education. In other words, there was no reference to "self-contained" or "departmentalized" and elementary and secondary education were not defined by grade levels. Superintendent Brown explained that the reason for the like setting criteria was to avoid having a senior teacher displace a teacher with experience in the setting, which he regarded as detrimental to the educational system. Superintendent Brown acknowledged that the bumping criteria are used exclusively for layoffs and that they are not applied to new hires, reassignments and rehiring of teachers previously laid off.

12. Ms. Crawford's testimony did not focus on the rationale for the like setting criteria generally, but rather on the differences among elementary, middle school and high school physical education programs. Ms. Crawford had experience as a high school physical education teacher, high school coach, athletic director, and athletic conference representative. She has also taught physical education at the middle school level and was a middle school principal for 16 years. Ms. Crawford has not taught elementary physical education and has not been an elementary school teacher or principal. She based her opinions about elementary school physical education on the training that she received for her single subject physical education credential authorizing her to teach physical education in grades K-12. Ms. Crawford described the skills typically taught in the various settings, beginning with basic movement skills and athletic endeavors in elementary school to establish a foundation of movement leading up to games. Itinerant teachers provide "pull out" classes for large groups of students. Elementary school students do not receive formal grades for physical education as they do in middle and high schools. Ms. Crawford contrasted the "secondary" physical education program with its emphasis on lifelong sports and physical fitness. Most of her testimony in this area emphasized the unique aspects of a high school physical education program with access to special facilities including pools for aquatics, weight rooms for weight training, and gymnastics equipment. These activities necessarily involve special

safety considerations such as water safety and proper weight lifting and "spotting" techniques. Team sports are a big part of the secondary physical education curricula, and students are graded on knowledge of rules and performance. Secondary students dress for physical education in locker rooms supervised by teachers. The District's middle school physical education classes are 49 minutes long whereas high school physical education courses are 90 minutes on alternate school days. The District has incorporated state standards for physical education in its elementary, middle school and high school programs.

13. Respondent David Lacoste first rendered paid probationary service for the District on August 22, 2006. He holds a single subject K-12 physical education credential. Respondent Lacoste has taught physical education exclusively in the District's elementary schools since he was employed. He currently teaches first to sixth graders physical education at two elementary schools. The students attend two classes each week. Each class is approximately 40 minutes long. Respondent Lacoste teaches a total of approximately 1,000 students, 600 at one elementary school and 400 at the other. Although respondent Lacoste is senior to Pappas who teaches three periods of physical education at Rocklin High School, District maintains that respondent Lacoste may not bump Pappas because respondent Lacoste does not meet the District competency criteria requiring at least one semester of actual teaching experience in the same area "in a comparable setting" within the last five years. As noted above, District distinguishes between the K-6 self-contained setting in which respondent Lacoste teaches and the 7-12 departmentalized setting in which Mr. Pappas teaches. Respondent Lacoste is also senior to respondent Manibusan who teaches 1.0 FTE seventh and eighth grade physical education, part of the "7-12 departmentalized" setting into which the competency criteria would not allow him to bump. However, respondent Manibusan is herself subject to layoff.

14. Respondent Lacoste contends that he is competent to teach physical education at the secondary level. Respondent Lacoste focuses on cardiovascular fitness for his elementary school students. He teaches activity units similar to those taught in the higher grades, and his units average three weeks. Respondent Lacoste recently completed a five-week square-dance and jazz unit followed by a two-night show for the students' parents. His students participate in team sports including volleyball, football, softball, and basketball. He teaches a version of badminton without a net called "speedminton." Respondent Lacoste does not give his students grades, but he is familiar with the District's grading software and does assess his students using written materials and tests. Respondent Lacoste tests his students in physical fitness in the fifth grade, using the same tests as those administered to students in the seventh and ninth grades.

15. Respondent Lacoste also has significant experience working with middle school and high school students in organized sports. He has coached students in grades 7-12 a total of 19 years, including coaching volleyball at Rocklin High School for nine years. He is not coaching the high school team this year because of family commitments, but he continues to coach club volleyball teams for middle school age children. Respondent Lacoste has experience supervising boys' locker rooms in his capacity as a coach. Respondent Lacoste has also completed a master's degree program in recreation and has

worked for two communities in recreation, including aquatics. He is familiar with proper swim stroke techniques, having learned them in his college courses. Respondent Lacoste holds a bachelor's degree from Boise State University in physical education with an emphasis on teaching secondary physical education.

16. As noted above, the District does not apply the same competency criteria when considering new hires, rehiring of teachers who have been laid off, or reassignments. The evidence in this matter included examples of this practice. Michael Pappas, the employee junior to respondent Lacoste, also holds a single subject physical education credential as well as authorization to teach foundational high school level mathematics (through geometry). He was assigned this year to teach three periods of physical education at Rocklin High School, even though he has never taught physical education for the District and his only experience teaching physical education is one quarter of student teaching at Yuba City High School in the spring of 2005. Mr. Pappas testified and established that he tried to bump a less senior physical education teacher last year and was unsuccessful because of the comparable setting competency criteria that are at issue in this proceeding. Another teacher who was unable to bump into an English Language Development (ELD) position last year based on the same competency criteria and was given a layoff notice, was rehired to teach ELD this year. A third teacher with only elementary school teaching experience for the District was reassigned to teach at the District's alternative high school.

LEGAL CONCLUSIONS

Bumping Issue

Bumping Disallowed Among "Settings"

17. Education Code section 44955, subdivision (b) and (c) reads:

> (b) Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school

year. 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 retained to render a service which said permanent employee is certificated and competent to render.

In computing a decline in average daily attendance for purposes of this section for a newly formed or reorganized school district, each school of the district shall be deemed to have been a school of the newly formed or reorganized district for both of the two previous school years.

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. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject. (Emphasis added.)

District's Criteria for Defining "Competent"

18. As noted above, District adopted criteria by which to determine if a certificated employee is competent to bump a junior certificated employee. These criteria are summarized in Factual Finding 10. Respondent Lacoste challenged the competency criteria as arbitrary and unreasonable (an abuse of discretion). The most recent published appellate decision in this area involved a community college layoff and the interpretation of the same statutory language "certificated and competent" in the community college context. In *Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, the community college governing board directed the Chancellor to apply as a standard of competence that "an employee have had experience rendering a service or teaching in a specific subject area equal to a total of one year's full-time assignment in that service or subject area since January of 1971." The college was proposing the layoff of instructors for school year 1981-1982. The *Duax* court looked to previous decisions interpreting the same phrase in the context of reemployment rights of laid off certificated school employees and concluded that the determination of competency by a governing board involves the exercise of discretion based on the board's "special competence" to do so. (*Id.* at p. 564.) The court also cited another line of school layoff cases for the proposition that the term "competent" as used in Education Code section 44956 relates to specific skills or qualifications required of the applicant. The *Duax* court concluded: "Hence, from these authorities we conclude that a board's definition of competency is reasonable when it considers the skills and qualifications of the teacher threatened with layoff." (*Id.* at p.565.)

19. One of the cases relied upon by the *Duax* court was *Martin v. Kentfield School District* (1983) 35 Cal.3d 294. The case involved the rehire rights of laid-off teachers and the statutory prohibition against imposing requirements different from those for teaches who continued in service. However, in the body of the decision, the California Supreme Court quoted favorably from an earlier appellate case, *King v. Berkeley Unified School District* (1979) 89 Cal. App.3d 1016, in its discussion of a school district's role in determining whether a teacher is certificated and competent to render a required service. The court, citing *King*, observed that such determinations involve discretionary decisions which are within the special competence of school districts. (*Martin v. Kentfield School District, supra,* 35 Cal.3d 294, 299.) The *King* case also involved rehiring of laid-off certificated employees. The *King* court observed, "The application of [predecessor statute to Education Code section 44956] requires that someone make informed determinations whether a laid-off employee reached by the statute is both 'certificated and competent' to hold a position to which he claims reemployment rights." (*King v. Berkeley Unified School District, supra,* 89 Cal.App.3d 1016, 1023.) The court agreed with the trial court that such decisions necessarily involve discretionary decisions by a school district's responsible officials because they have a special competence to make them. (*Ibid.*)

20. Relevant case law supports a school district's right to define the minimum requirements for competency for purposes of bumping, so long as the definition considers the skills and qualifications of the teacher. At first glance, District's criteria appear to meet this standard. The possession of an appropriate credential, reasonably recent experience in the

particular subject area and NCLB highly qualified status, where required, reflect a teacher's skills and qualifications. No particular expertise in the educational environment is necessary to appreciate that children learn and behave very differently in an elementary school setting compared to middle and high schools, and experience in one or the other setting is likely to enhance a teacher's skill in dealing with that particular group of students. The evidence presented in this case, however, established that the District's definition of competency had more to do with administrative convenience than a good faith application of expertise to require teaching experience in a subject in a comparable setting. The rationale for the comparable setting requirement provided by the Superintendent was to avoid having a senior teacher displace a teacher with experience in the setting, which he regarded as detrimental to the educational system. The Superintendent provided no explanation for the manner in which he believed such displacements are detrimental. Ms. Crawford explained the differences among physical education programs among elementary, middle school and high school programs, but even assuming her views were part of the "special competence" used by District to create the comparable setting criterion for competence, there was no clear nexus demonstrated between the programs and the development of teaching skills and qualifications.

21. Discretion is abused when a district's action exceeds the bounds of reason, all the circumstances before it being considered. (*Anderson Union High School District* (1976) 56 Cal. App.3d 453, 463.) The most telling evidence that the comparable setting element was not supported by a fair and substantial reason was the District's policy not to use the competency criteria for rehiring and reassignments. As the factual findings reflect, teachers who failed District's comparable setting experience criterion were suddenly competent simply because they were rehired after lay off proceedings or reassigned. This suggests that which the Superintendent implied in his testimony: that the primary reason for denying bumping among the various designated settings was apparently administrative convenience. When it became administratively convenient to place these teachers in positions by rehiring or reassignment, the fact that they had no experience in the new setting was no longer an obstacle. While one can understand that new hires would not normally be required to demonstrate teaching experience to establish "minimum" competency, the distinction between teachers seeking to bump and those being rehired or reassigned based on perceived "competency" makes little sense. Moreover, the California Supreme Court noted in the *Martin* case that the Education Code prohibits the imposition of requirements on teachers seeking reemployment which do not pertain to "continuing teachers,"[2] but District seeks to do the same thing to respondents, impose requirements on them for bumping that do not pertain to rehires. To summarize, a school district may properly establish across-the-board minimum competency criteria rather than assess the competency of senior teachers to bump on an individual basis. When such discretionary decisions are based on the application of a district's special expertise, they should be honored unless they reflect an abuse of discretion. Where the facts demonstrate that a criteria were not based on such good faith application of expertise, and teaching competence was defined differently for senior teachers seeking to exercise their statutory right to bump and those being reassigned or rehired, the challenged

[2] This is now part of Education Code section 44957, subdivision (a).

criteria are an abuse of discretion. Respondent Lacoste met the other minimal requirements for competency and his considerable experience coaching middle and high school students provided him the skills and qualifications to deal with the unique learning and behavior characteristics of both age groups. He is therefore certificated and competent to bump into physical education positions held by less senior certificated employees in the middle or high schools.

22. There is another, perhaps more compelling, reason to rule against District and in favor of respondent Lacoste on the bumping criteria issue. This very issue was litigated by the same parties in the spring of 2009 in "In the Matter of the Reduction in Force of: CERTAIN CERTIFICATED PERSONNEL EMPLOYED BY THE ROCKLIN UNIFIED SCHOOL DISTRICT, OAH Case Number. 2009030849. In that matter, District's Governing Board adopted the Administrative Law Judge's Proposed Decision, including that portion which determined the comparable setting requirement for physical education instructors to be an abuse of discretion. As a result, respondent Lacoste's layoff notice was rescinded. Collateral estoppel, or issue preclusion, prevents relitigation of legal or factual issues actually argued and decided in a prior proceeding. (*Castillo v. City of Los Angeles* (1982) 92 Cal. App.4th 477, 481.) Res Judicata and its subcategory collateral estoppel are viable affirmative defenses in an administrative proceeding. In *People v. Sims* (1982) 32 Cal.3d 468, (*Sims*), the Supreme Court established the conditions under which the results of an administrative proceeding would be given collateral estoppel effect. The Supreme Court held that "[c]ollateral estoppel may be applied to decisions made by administrative agencies when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. (*Sims*, at p. 479.)

23. As the Supreme Court stated in *Sims*, "collateral estoppel has been found to bar relitigation of an issue decided at a previous proceeding if (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]." (*Sims*, at p. 484.)

24. District argued that the issue is not the same because the criteria were different in the earlier matter. In the preceding matter, the District's comparable setting criteria required "at least one semester actual teaching experience in a comparable setting (elementary, secondary, alternative education) within the last five years." The comparable setting criteria now require: "at least one semester actual teaching experience in the subject area in a comparable setting (K-6 self-contained; 7-12 departmentalized; 7-12 alternative education; specialized elementary music, PE, ELD, or VAPA programs) within the last five years."

25. The earlier decision, in Factual Finding 24 concluded, based on preliminary factual findings very similar to those in this matter, that:

> In a unified school district, the imposition of a 'comparable setting' requirement as a condition of competency for an elementary PE teacher to bump into a secondary PE teaching position is not reasonable, and impermissibly undercuts seniority rights. Under these circumstances, the competency requirement becomes an insurmountable barrier to the senior employee and shifts the burden from the District to make an individualized showing of its need to skip a junior employee under section 44955, subdivision (d). As applied to respondent PE teachers, this requirement is an abuse of discretion.

26. The relabeling of elementary and secondary conventional teaching environments within the parenthetical definitions of settings does not change the nature of the issue to be decided in this matter. It remains identical, insofar as respondent Lacoste is concerned, i.e., whether the District's competency criteria requiring at least a semester of teaching the subject in a comparable setting within the last five years constitutes an abuse of discretion as applied to an elementary PE teacher otherwise credentialed and competent to teach middle school and high school PE? All elements having been satisfied, collateral estoppel bars the District from relitigating whether the application of the comparable setting requirement to respondent Lacoste was an abuse of discretion. Having lost the issue in the earlier proceeding, District is barred from seeking a different outcome in this matter.

ORDER

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. The anticipation of receiving less money from the state for the next school year is an appropriate basis for a reduction in services under Education Code section 44955. As stated in *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 638-639, the reduction of particular kinds of services on the basis of financial considerations is authorized under that section, and, "in fact, when adverse financial circumstances dictate a reduction in certificated staff, section 44955 is the only statutory authority available to school districts to effectuate that reduction." The District must be solvent to provide educational services, and cost savings are necessary to resolve its financial crisis. The Board's decisions were a proper exercise of its discretion.

3. The services eliminated or reduced are particular kinds of services that could be reduced or discontinued under section Education Code section 44955. Cause exists to reduce the number of certificated employees of the District due to the reduction or discontinuance of particular kinds of services. Cause for the reduction or discontinuance of

services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

4. Except as noted below, final notice shall be given to respondents that their services will not be required for the 2011-2012 School Year because of the reduction and discontinuance of particular kinds of services

5. Because a less senior employee is being retained to teach a course which respondent Lacoste is certificated and competent to teach, respondent Lacoste's lay-off of .50 FTE is rescinded.

Dated: May 3, 2011

KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings