

BEFORE THE  
BOARD OF EDUCATION  
ADELANTO SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Respondents listed in Appendix A.

OAH No. 2010030308

**PROPOSED DECISION**

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Adelanto, California on April 23, 2010.

Todd M. Robbins, Atkinson, Andelson, Loya, Ruud & Romo, Attorneys at Law, represented the Adelanto School District.

Carlos R. Perez, Reich, Adell & Cvitan, APLC, Attorney at Law, represented all respondents listed in Appendix A, except for respondent Maria Rivera.

Respondent Maria Rivera represented herself.

The matter was submitted on April 23, 2010.

**FACTUAL FINDINGS**

1. Ross Swearingen, Assistant Superintendent, Human Resources of the Adelanto School District, made and filed the accusation dated March 9, 2010, in his official capacity as the designee of Darin Brawley, District Superintendent.

2. Respondents<sup>1</sup> are certificated district employees.

3. On March 9, 2010, in accordance with Education Code sections 44949 and 44955, the superintendent notified the Board of Education of the Adelanto School District in writing of his recommendation to reduce or discontinue particular kinds of services for the upcoming school year. The superintendent stated the reasons for the recommendation. The

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<sup>1</sup> Other individuals were initially named as respondents, but either did not request a hearing and thus are outside the scope of this proceeding or were dismissed as respondents prior to the conclusion of the hearing.

recommendation that respondents be terminated from employment was not related to their competency as teachers.

4. On March 9, 2010, the board adopted Resolution No. 09-10-24, determining that it would be necessary to reduce or discontinue particular kinds of services at the end of the current school year. The board determined that the particular kinds of services that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Elementary K-6 Teaching Services	31.5
Intervention Teaching Services	2
Special Education Teaching Services	2
Music Teaching Services	1.14

The proposed reductions totaled 36.34 FTE positions.

5. The board further determined in Resolution No. 09-10-24 that “competency,” as described in Education Code section 44955, subdivision (b), for the purposes of bumping, “shall necessarily include: (1) possession of a valid credential in the relevant subject matter area; (2) ‘highly qualified’ status under the No Child Left Behind Act in the area to be assigned; and (3) an appropriate EL authorization (if required by the position).”

6. The board directed the superintendent or his designee to determine which employees’ services would not be required for the 2010-2011 school year as a result of the reduction of the foregoing particular kinds of services. The board further directed the superintendent or his designee to send appropriate notices to all certificated employees of the district who would be laid off as a result of the reduction of these particular kinds of services.

7. On or before March 15, 2010, the district timely served on respondents a written notice that the superintendent had recommended that their services would not be required for the upcoming school year, along with the related accusation. The notice set forth the reasons for the recommendation. The notice advised respondents of their right to a hearing, that each respondent had to deliver a request for a hearing in writing to the person sending the notice by the date specified in the notice, a date which in each case was more than seven days after the notice was served, and that the failure to request a hearing would constitute a waiver of the right to a hearing.

The recommendation that respondents be terminated from employment was not related to their competency as teachers.

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

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

10. The services the board addressed in Resolution No. 09-10-24 were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The board’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious and constituted a proper exercise of discretion.

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

12. The board considered all positively assured attrition, including resignations, retirements and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees.

13. Amanda Anderson is an elementary school teacher. She was first employed by the district for or during the 2008-2009 school year. She reported to school on August 13, 2008, got her room key and spent the next three days preparing her classroom. She was not paid for these three days, and the district did not require her to work. The district also did not tell her *not* to work on these three days. Even though no one told her to work on those three days, she believed she was expected to do so because the district calendar identified August 13 as the first official work day. Her first date of paid service with the district was October 8, 2008. The delay occurred because the district was waiting for the receipt of Anderson’s live scan clearance.

Pursuant to Education Code section 44845, the district properly determined Anderson’s seniority date to be October 8, 2008.<sup>2</sup>

14. Marnee Durgin teaches middle school English Language Development (six periods) and choir (one period). She is slated for layoff via: (i) a 0.14 FTE PKS reduction in the music teaching services; (ii) a 0.50 FTE bump by the more senior Cinnamon Olivarez, a part-time elementary teacher; and (iii) a 0.36 FTE bump by the more senior Maria Rivera, also an elementary school teacher. Respondents contest the second component of Durgin’s proposed layoff (i.e., 0.50 of her full-time position) on the basis that a part-time employee (Olivarez) should not be permitted to bump a full-time employee. As explained below (Legal Conclusion 5), the district’s position that Durgin was properly bumped by Olivarez is correct.

15. The district currently employs eight individuals in intervention teaching services. All of these employees are in categorically funded positions, and the funding for

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<sup>2</sup> It appears that Anderson would be subject to layoff even if she were given the seniority date she requested. Nonetheless, this Finding is offered as guidance to the parties, since the matter was sufficiently litigated at the hearing to permit a finding to be made.

such positions is, at least for now, continuing. The two least senior of these eight employees, Cathryn Wilson and Charmaine Ramirez, received layoff notices; the remaining six did not. In fact, the six remaining individuals in this categorically funded position each have greater seniority than any identified by the district for layoff. Further, the district does not intend to terminate the employment of these six remaining individuals under any process; instead, these individuals are to be retained as district employees. Under these circumstances, and as explained below (Legal Conclusion 6), the district properly identified Wilson and Ramirez for layoff and properly declined to send layoff notices to any of the remaining six (more senior) employees in this assignment.

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

### LEGAL CONCLUSIONS

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

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

3. Pursuant to section 44995, a senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or “bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393 v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843; *Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 134-135.)

The district has an obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. (*Bledsoe v. Biggs Unified School Dist.*, *supra.* at 136-137.)

4. The decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. It is within the governing authority’s discretion to determine the amount by which a particular kind of service will be reduced or discontinued as long as the district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.) A school district has wide

discretion in setting its budget and a layoff decision will be upheld unless it was fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. (*California Sch. Employees Assn. v. Pasadena Unified Sch. Dist.* (1977) 71 Cal.App.3d 318, 322.)

5. School districts have broad discretion in defining positions within the district and establishing requirements for employment. This discretion encompasses determining the training and experience necessary for particular positions. Similarly, school districts have the discretion to determine particular kinds of services that will be eliminated, even though a service continues to be performed or provided in a different manner by the district. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.)

Pursuant to *Hildebrandt*, a district may generally not be *required* to split a full-time position held by a junior employee in order to accommodate a part-time employee who wishes to bump into that junior employee's position. However, and contrary to respondents' argument in this case, *Hildebrandt* does not *prohibit* a district from splitting a full-time position so as to permit a more senior, albeit part-time employee from bumping into the a more junior full-time employee's position. Instead, the broad discretion accorded to districts in connection with the implementation of PKS layoffs districts leads to the conclusion that in fact districts do retain the discretion to do just that.

6. *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4<sup>th</sup> 1260 held that certificated teachers assigned to a categorically funded program may not be laid off as temporary employees without according them the procedural formalities due permanent and probationary employees unless the program has expired. As such, *Bakersfield* serves to offer certain protections to employees whose employment a district wishes to terminate without according such employees the protections provided by the layoff statute.

Here, the two least senior teachers in the categorically funded position were properly designated for layoff. The district is *not* intending to layoff (i.e., outside the section 44955 process) the remaining six teachers holding this position. Accordingly, *Bakersfield*, which is intended to protect certain certificated employees from an attempt to lay them off without affording them the protections provided by the layoff statute, simply does not come into play in this case.

7. Pursuant to Education Code section 44845, certificated employees are deemed "to have been employed on the date upon which he first rendered paid service in a probationary position."

8. A preponderance of the evidence sustained the charges set forth in the accusation. Cause exists under Education Code sections 44949 and 44955 for the district to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. Cause exists to reduce the number of certificated employees of the district due to the reduction and discontinuation of particular kinds of services. The district

identified the certificated employees providing the particular kinds of services that the Board be directed be reduced or discontinued. It is recommended that the board give respondents notice before May 15, 2010, that their services are no longer required by the district.

#### ADVISORY DETERMINATION

The following advisory determination is made:

The accusations served on respondents are sustained. Notice may be given to respondents before May 15, 2010, that their services will not be required because of the reduction or discontinuation of particular services as indicated.

DATED: \_\_\_\_\_

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DONALD P. COLE  
Administrative Law Judge  
Office of Administrative Hearings

## Appendix A

1. Amanda Anderson
2. Jon Barnes
3. Heather Biewend
4. Marnee Durgin
5. Diana Garcia
6. Ashely Gudino
7. Christina Hoard-Guess
8. Laura Johnson
9. Asacia Lopez
10. Barbara Marrs
11. Debbie Mockler
12. Holly Ostrom
13. Krystina Ponce De Leon
14. Charmaine Ramirez
15. Maria Rivera (0.64)<sup>3</sup>
16. Abigail Serena
17. Catherine Tury
18. Jonathan Wilson

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<sup>3</sup> Respondent Rivera's layoff is partial, i.e., 64% of her full-time position.