

**BEFORE THE
GOVERNING BOARD
OF THE ANTELOPE VALLEY UNION HIGH SCHOOL DISTRICT**

In the Matter of the Accusation Against:

OAH Case No. 2010031481

Certificated Employees of the Antelope
Valley Union High School District,

Respondents.

PROPOSED DECISION

The hearing in the above-captioned matter was held on May 5, 2010, at Lancaster, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by James B. Fernow, Fagen, Freidman, and Fulfrost, LLP. Michael R. Feinberg and Amy M. Cu, Schwartz, Steinsapir, Dohrmann & Sommers represented the following Respondents: Michael Bernard, Natalie Brooks, Matthew Cole, Daphene Cowan, Cynthia Gadomski, Daniel Gorman, Jeanette Hjelm, William Holmes, Teresa Kinderman, Stella Konisek, Akilah Lyons-Moore, Sheron Nauzo, Kristine Parsons, Joseph Perez, Garret Root, Christopher Saucke, Muriah Shanklin, Joseph South, Alesia Stonerock, Alicia Viera, Shannon Williams, and Malinda Wittkopf.

Oral and documentary evidence was received, argument was heard, and the matter was submitted for decision on the hearing date. Because the matter had been continued from its originally scheduled hearing dates, the deadlines set out in the Education Code were extended. However, the parties stipulated that this Proposed Decision would be issued by May 12, 2010, that the Governing Board of the District would act on the decision on May 19, and that any final notices would be given by May 26, 2010. Based on the foregoing, the Administrative Law Judge hereby makes his factual findings, legal conclusions, and order, as follows.

FACTUAL FINDINGS

1. Complainant Mark Bryant filed and maintained the Accusation¹ in the above-captioned matter while acting in his official capacity as Assistant Superintendent, Personnel Services, of the Antelope Valley Union High School District (District).

¹ The term “accusation” refers to a type of pleading utilized under the Administrative Procedure Act, Government Code sections 11500 and 11503; that statutory scheme governs the hearing procedures in this case. The Respondents are not “accused” in the every-day sense of that word; they have done nothing wrong, and all appear to be dedicated

2. The following persons are certificated employees of the District and are the respondents in this case: Michael Bernard, Natalie Brooks, Matthew Cole, Daphene Cowan, Cynthia Gadowski, Daniel Gorman, Jeanette Hjelm, William Holmes, Teresa Kinderman, Stella Konisek, Akilah Lyons-Moore, Sheron Nauzo, Kristine Parsons, Joseph Perez, Garret Root, Christopher Saucke, Muriah Shanklin, Joseph South, Alesia Stonerock, Alicia Viera, Shannon Williams, and Malinda Wittkopf.

3. (A) On March 10, 2010, the Board of Trustees of the District (Board), the governing body of the District, adopted a resolution entitled “Resolution number 2009-10-20 Intention to Layoff Certificated Employees” (Reduction Resolution). The purpose of the Reduction Resolution was to reduce and discontinue particular kinds of certificated services no later than the close of the 2009-2010 school year. Specifically, the resolution requires the reductions of 44.7 “FTEs”—Full Time Equivalents—by reducing various types of services. This decision was based on financial concerns as the District faces a budget shortfall of several million dollars.

(B) The FTEs that the Board determined to reduce are described in the Reduction Resolution as follows:

<u>Personnel</u>	<u>Number of FTE</u>
Teachers:	
English	3.0
Math	3.0
Social Science	4.0
Science—Biology	1.0
Science—Geoscience	1.0
Foreign language—Spanish	1.0
Foreign Language—German	.2
Art	1.0
Physical Education	1.0
Behavioral Science (Health)	1.0
Special Education (Mild/Moderate)	1.0
Business	1.0
Total Teachers	18.2 FTE
Adult Education—Teacher at Desert Havens	.5

professionals. It might be said that they are simply accused of not having enough seniority or other qualifications to retain their positions with the District in the face of a resolution to reduce positions.

Continuation Teachers

26.0 FTE

Total Reduction

44.7 FTE

4. The services which the District seeks to discontinue or reduce are particular kinds of services that may be reduced or discontinued under Education Code section 44955.²

5. The decision by the Board to reduce or discontinue services was neither arbitrary nor capricious but rather was a proper exercise of the District's discretion given the uncertainty regarding the state budget and the District's financial resources.

6. The reduction and discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Board.

7. As part of the Reduction Resolution, the Board established and set forth tie breaking criteria, to be used in the event that two or more teachers shared the same seniority date. Fifteen tie breaking criteria were laid out in the resolution, the last being a lottery in the case that ties still were not broken after application of the other 14 criteria.

8. (A) On or about March 11, 2010, each Respondent was given written notice that, pursuant to sections 44949 and 44955, their services would not be required in the 2010-2011 school year (hereafter the preliminary notices). The preliminary notices were served on 36 certificated employees. This is less than the amount needed to meet the target of the Reduction Resolution, but the District had released temporary employees, and there had been some attrition among the ranks of the teachers.³ Thereafter, Respondents requested a hearing and then each was served with an Accusation and other documents pertaining to the hearing process.⁴ Each Respondent filed a notice of defense. To the extent any notice of defense was not timely filed, the District waived objection to such late notices.

(B) Following the service of the preliminary notices, and prior to the start of the hearing, the District rescinded preliminary notices that had been served on 15 employees. During the hearing, it gave notice that it was rescinding the preliminary notices as to four of

² All further statutory references are to the Education Code.

³ For example, the District did not need to serve preliminary notices on any English teachers, because all 10 FTE slated for reduction were accounted for by attrition that occurred before March 15.

⁴ Three certificated employees did not request a hearing. They are Tina Chadwick, Annette Dehorney, and Therese Young. However, the preliminary notice to Ms. Chadwick was later rescinded. (Ex. 19.)

the respondents: Cynthia Gadowski, William Holmes, Christopher Saucke, and Muriah Shanklin. Thus, the preliminary notices to 19 certificated employees were rescinded.

(C) All jurisdictional requirements have been met.

9. In the course of the reduction in force process, the District created a seniority list. That seniority list took into account a number of factors, including first date of paid service and the tie-breaking criteria.⁵

10. During the process of determining which staff should receive notice, the District skipped certain junior personnel who it deemed necessary to teach certain programs because the programs were necessary, and because the teacher had specific skills and training necessary for those classes. Thus, for instance, three junior special education teachers, Lefler, D'Errico, and Cvijanovich, were retained because they had special education credentials, were teaching special day classes, and discharged other duties in connection with special education. In another instance, Mr. Storrs was skipped because he is a continuing work experience teacher. He was skipped due to the District's need for such a teacher, and because he has special skills and training in that area, which were documented by the District. No other teacher has his skills, training, and qualifications.

11. It was established during the hearing that some teachers at some school sites have, during the current school year, and in prior years, carried assignments equal to 1.2 FTE, in that they are assigned a sixth class during the day, five classes being the normal load, and five classes constituting one FTE. None of the teachers who received preliminary notices were assigned a sixth class. Such assignments are normally made in August, shortly before the school year begins, and such assignments are subject to reduction at anytime.

12. (A) It was not established that any teacher shown on the District's exhibits as being entitled to displace, or "bump" a junior teacher from the junior teacher's position was doing so improperly.

(B) Respondent Alicia Viera was unable to establish that she is credentialed and competent to bump some or all of Mr. Roberts' assignment.

13. No junior certificated employee is being retained in a position that a more senior employee is certificated and competent to fill. No junior teachers established that they should have been skipped either.

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⁵ Three groups of teachers had to utilize the lottery process to complete the tie breaking process and thereby determine their relative seniority.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to sections 44949 and 44955, based on Factual Findings 1 through 8(C).

2. (A) A District may reduce a particular kind of service (PKS) 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.) The Court of Appeal has made clear that a PKS reduction does not have to lead to less classrooms or classes; laying off some teachers amounts to a proper reduction. (*Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 853-85; see also *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 631, 637 [reduction of classroom teaching can be a reduction of a PKS; as long as there is a change in the method of teaching or in a particular kind of service in teaching a particular subject, any amount in excess of the statutory minimum may be reduced]; *California Teachers Assn. v. Board of Trustees* (1982) 132 Cal.App.3d 32.)

(B) The services to be discontinued are particular kinds of services within the meaning of section 44955. The Board’s decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District’s schools and pupils within the meaning of section 44949. This Legal Conclusion is based on Factual Findings 3 through 6 and the aforementioned statutes.

3. 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.) At the same time, junior teachers may be given retention priority over senior teachers—may be “skipped” in favor of that senior employee—if a district demonstrates a specific need for personnel to teach a specific course or to provide a specific service, and if it is demonstrated that the junior employee has special training or experience necessary to teach that course or provide that pupil service. (§ 44955, subd. (d); *Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Governing Bd. of Santa Clara Unified School Dist.* (1981) 116 Cal.App.3d 831.)

4. (A) No Respondents established that they had the right to bump a junior employee or that they should have been skipped, based on the foregoing and Factual Findings 9 through 13.

(B) Some Respondents asserted that the District should reassign senior teachers who held more than one credential to positions that those senior teachers are not now assigned to and in which vacancies exist, so as to open positions that some Respondents

could take. Hence it was asserted, on behalf of Respondent Root, that Mr. Cuevas, who is senior to Respondent Root by approximately seven years, should be taken out of his current assignment as a history teacher, and assigned to teach Spanish, because Mr. Cuevas is certificated to teach that language. Then, it was asserted, Respondent Root could teach the social studies classes held by Mr. Cuevas. A similar argument was made on Mr. South's part, vis-à-vis Ms. Wolen, who is bumping him from his social studies position.

(C) This position is unavailing. A junior teacher can not force a senior from his or her position, even if that senior teacher is certificated for other assignments, so that the junior can make room for him or herself. This concept, known as inverse bumping, is not justified by section 44955, subdivision (c), which speaks to the obligation of districts to make assignments according to seniority. *Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, 568-569, the concept of inverse bumping was rejected. That case construed a statute pertaining to community college layoffs, which statute had language identical to the key part of section 44955, subdivision (c), pertaining to assignments. The court made it clear that the obligation to make assignments did not support inverse bumping. .

5. No junior certificated employee is being retained in a position that a more senior employee is certificated and competent to fill.

ORDER

1. Respondents Cynthia Gadowski, William Holmes, Christopher Saucke, and Muriah Shanklin are dismissed based on the rescission of the preliminary notices to them, which rescission was made on the record during the proceeding.

2. The remaining Respondents may receive final layoff notices in inverse order of seniority, those Respondents being: Michael Bernard, Natalie Brooks, Matthew Cole, Daphene Cowan, Cynthia Gadowski, Daniel Gorman, Jeanette Hjelm, William Holmes, Teresa Kinderman, Stella Konisek, Akilah Lyons-Moore, Sheron Nauzo, Kristine Parsons, Joseph Perez, Garret Root, Christopher Saucke, Muriah Shanklin, Joseph South, Alesia Stonerock, Alicia Viera, Shannon Williams, and Malinda Wittkopf.

May 12, 2010

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings