

BEFORE THE GOVERNING BOARD OF THE
SANTA BARBARA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

SCOTT S. BRENNAND,

Respondent.

OAH No. 2012040033

PROPOSED DECISION

Ralph B. Dash, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on May 2, 2012, at Santa Barbara, California.

Meredith G. Karasch, Attorney at Law, represented Santa Barbara Unified School District (District).

Alexis Ridenour, Attorney at Law, represented Scott S. Brennan (Respondent).

The record was left open for receipt of additional evidence regarding Respondent's qualifications vis-à-vis the District's "competency criteria" for the purpose of determining Respondent's "bumping rights." On May 11, 2012, the District filed the following documents, which collectively were marked as Exhibit 17 and admitted: FAX cover sheet; Declaration of Meredith G. Karasch; and Declaration of Ann Peak with attached exhibits. The matter was deemed submitted on May 11, 2012.¹

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

¹ This matter was originally set for hearing on April 17, 2012. Pursuant to the District's unopposed motion for continuance, the matter was re-scheduled for hearing on May 2, 2012. Accordingly, under the provisions of Education Code section 44949, subdivision (e), this Proposed Decision must be submitted to the District's Governing Board on or before May 29, 2012.

FINDINGS OF FACT

1. David E. Cash, Superintendent of the District, acting in his official capacity, caused all pleadings, notices and other papers to be filed and served upon Respondent pursuant to the provisions of Education Code² sections 44949 and 44955. All pre-hearing jurisdictional requirements have been met with respect to the District and Respondent.

2. On February 28, 2012, the District's Governing Board adopted a Resolution (Resolution) to reduce and discontinue the services of full-time equivalent (FTE) certificated positions at the close of the 2011-2012 school year, as follows:

Elementary	22
Computer Typing	1
Math	5
English/Theater	10
Social Science	5
Biology/Geoscience	5
Health	2
PE	6
Child Development	4
 TOTAL FTE	 60

3. On March 13, 2012, the District's Governing Board adopted another resolution (Amended Resolution), the net effect of which was to discontinue the same total FTE in the same kinds of services as set forth in the Resolution, except that the one FTE in "Computer Typing" was changed to .667, and "Tech Skills .333" was added. Respondent taught computer typing and tech skills during the 2011-2012 school year.

4. The services described in the Resolution and the Amended Resolution 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.

5. 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.

6. The Board properly considered all known attrition, resignations, retirements, deaths and requests for transfer in determining the actual number of necessary layoff notices

² Except as otherwise noted, all statutory references are to the Education Code.

to be delivered to its employees as of March 15, 2012. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 636 (1983)).³

7. In its Resolution and Amended Resolution, the Board directed the Superintendent or his designee to serve notices of termination in accordance with and in the manner prescribed by sections 44949 and 44955.

8. At the times it adopted the Resolution and the Amended Resolution, the Board also adopted criteria to be used in determining the order of termination of certificated employees who first rendered paid service to the District in a probationary position on the same date. The Board resolved that the order of termination of said employees would be determined by reference to certain tiebreaker criteria. It is found that such criteria best serve the needs of the District and its students.

9. At the times it adopted the Resolution and the Amended Resolution, the Board also adopted “competency criteria” for certificated personnel that it would use to determine whether a more senior employee who was being laid off was certificated and competent to render those services then expected to be provided in the coming school year by a junior employee.

10. Pursuant to the Resolution and the provisions of sections 44949 and 44955, the Superintendent gave timely written notice to the affected certificated personnel, including Respondent, that he had recommended to the Board that notice be given to them that their services would not be required for the 2012-2013 school year. Respondent, among others, requested a hearing to determine if there is cause for not employing him for the ensuing school year.

11. The District filed and timely served an Accusation, copies of the Resolution and Amended Resolution, a Statement to Respondent, a blank Notice of Defense, Request for Discovery, and pertinent sections of the Government and Education Codes upon Respondent, who filed timely a Notice of Defense.

12. At the start of the hearing, the District announced that it had rescinded all layoff notices to those certificated personnel receiving same, save and except for Respondent.

13. The District maintains a seniority list (Exhibit 8) which contains employees’ seniority dates, current assignments, and credentials. The District used the seniority list to develop a proposed lay-off list of the least senior employees currently assigned to the various services being reduced. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies

³ All layoffs were for particular kinds of service, and not “average daily attendance” which might have required positively assured attrition to be considered through May 15, 2012.

and determined the impact on incumbent staff in inverse order of seniority. The District then determined whether these employees held credentials in another area and were entitled to displace and replace (bump) other, more junior employees.

14. School districts have broad discretion in defining positions within the district and establishing requirements for employment. (*Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 299-300.) 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.” (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571, 1582-1585; *Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.)

15. What amounts to a particular kind of service for lay-off purposes varies according to the circumstances, and must in each case be determined in the light of the particular facts. A particular kind of service may be a certain subject, it may be the teaching of the subject for a particular purpose, or it may be a particular manner of teaching the subject. (*Walsh v. Board of Trustees of Redlands High School Dist.* (1934) 2 Cal.App. 2d 180, *Fuller v. Berkeley School Dist. of Alameda County* (1934) 2 Cal.2d 152; *Gallup v. Board of Trustees*, (1996) 41 Cal. App. 4th 1571.) *CTA vs. Goleta Union School District* (1982) 132 Cal.App.3d 32, holds that elementary teaching is a distinct particular kind of service. In *Gallup*, the court specifically noted that the issue is not *who* will perform the services, but *how* the services will be performed. (*Gallup, supra* at 1588.)

16. In order to justify skipping a junior employee in a reduction in force, a District must demonstrate a specific need for personnel with special training and experience to teach a specific course of study or to provide certain services, and that the more senior employee does not possess those skills. (Ed. Code § 44955, subd. (d).)

17. Appellate court decisions in the layoff context have held that where competency is not demonstrated by a senior employee, a junior employee having the ability to serve the needs of a program may be retained by the school district even though it may result in the senior employee's termination. (*Brough v. El Segundo Unified Sch. Dist.* (1981) 118 Cal.App.3d 702, citing *Moreland Teachers Ass'n v. Kurze* (1980) 109 Cal.App.3d 648, 655.) Courts have reasoned that the law requires “that someone make informed determinations whether a laid-off employee . . . is both ‘certificated and competent,’” and that “these determinations necessarily involve ‘discretionary decisions’ by a school district's responsible officials because they ‘have a special competence’ to make them.” (*King v. Berkeley Unified Sch. Dist.* (1979) 89 Cal.App.3d 1016, 1023; *Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, 565.) In making this determination, a school district must consider not only legal qualifications (i.e., whether a teacher is appropriately credentialed) but also actual competence, or “the correlation between the applicant's specific training and experience and the duties of the available position.” (*King, supra*, 89 Cal.App.3d at 1019.)

18. In *Bledsoe v. Biggs Unified School*, 170 Cal.App.4th 127 at 131, a senior English and social science teacher challenged the retention of two junior teachers teaching in a community day school, stating that the junior teachers were improperly skipped because the senior teacher was certificated and competent to render the services they were providing. The teacher argued that only formal, written program requirements are relevant in determining the District's needs and the teacher's competence to fill these needs. (*Id.* at 138.) The court rejected the teacher's argument, finding instead that subdivision (d)(1) of section 44955 “expressly allows a district to demonstrate its specific ‘needs’ and there is nothing in the statute that requires such needs to be evidenced by formal, written policies, course or job descriptions, or program requirements.” (*Ibid.*) The court went on to specifically find that while the teacher may have the base qualifications necessary to be certificated and competent because she held the appropriate credential to teach in the community day school, “subdivision (d)(1) recognizes a district may have specific needs for personnel to teach a specific course of study that go beyond base qualifications.” (*Ibid.*)

19. Section 44955, subdivision (b), provides, in pertinent part: “[t]he 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.” (Emphasis added.) “Certificated” is defined by the provisions of the Education Code pertaining to credentials, but “competent” is not specifically defined. In *Forker v. Board of Trustees* (1994) 160 Cal.App.3d 13, 19, the Court defined the term in a reemployment proceeding under section 44956, a statute that contains the same “certificated and competent” requirement, in terms of the teachers’ skills and qualifications, specifically, as “relating to special qualifications for a vacant position, rather than relating to the on-the-job performance of the laid-off permanent employee.” In doing so, the Court noted that courts in reduction in force cases, namely *Brough v. Governing Board* (1981) 118 Cal.App.3d 702, 714-15, and *Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, 654-55, and had interpreted the term in a similar manner.

20. As the *Forker* court recognized, school districts have the discretion to define competency, as had been permitted in earlier reemployment cases, *King v. Berkeley Unified School District* (1979) 89 Cal.App.3d 1016 (*King*) and *Martin v. Kentfield School District* (1983) 35 Cal.3d. 294 (*Martin*). In *King*, the court upheld a district’s requirement that laid off teachers have prior teaching experience in the open jobs in which they claimed competency, namely, mathematics and physical education. In *Martin*, a district was permitted to require prior teaching experience in middle school before deeming laid off elementary school teachers competent to teach in middle school, if such requirement was equally applied to all certificated employees, not just those on a preferential rehire list.

21. In *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 565 (*Duax*), a case arising under the community college reduction in force statute, now section 87743, the governing board had established a standard of competency that required one year of full-time teaching in the subject area within the last ten years. After acknowledging the discretion afforded to school districts, and set forth in *King* and *Martin*, the court stated: “While these decisions stress the discretion reposed in a school board in defining the term ‘competent,’

the court in *Forker* . . . added further assistance in stating, “[a]s interpreted by the *Martin* court, the term ‘competent’ as used in section 44956 relates to specific skills or qualifications required of the applicant. Decisions prior to *Martin* have interpreted that term in a similar manner.” (*Id.* at p. 9; see also *Moreland Teachers Assn. v. Kurze* (1980) 109 Cal. App.3d 648, 654-655; Ozsogomonyan, *Teacher layoffs in California: An Update* (1979) 30 Hastings L.J. 1727, 1749-1751). 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.” The *Duax* court upheld the governing board’s definition of competence as a reasonable exercise of its discretion.

22. Respondent’s counsel did not challenge the appropriateness of the competency criteria used by the District to determine the bumping rights of senior teachers who were to be laid off while junior employees were retained. So far as is applicable to the facts of this case, the competency criteria in the Resolution and Amended Resolution include “NCLB (No Child Left Behind) Compliance in Discipline”⁴ and “Prior experience in discipline within the last 10 years.” As more fully explained below, Respondent is neither certificated to teach Economics nor “NCLB compliant” in that subject when the same is taught through the Social Sciences curriculum. Accordingly, it is not necessary to determine whether Respondent has the experience required by the competency criteria to teach the subject.

23. There are a number of ways for a teacher to become NCLB Compliant (i.e. highly qualified) to teach a given subject. One way is to have a baccalaureate degree in the subject one teaches. Another way is via examination offered by a national testing agency. According to the District’s personnel coordinator, a teacher must be NCLB Compliant before teaching a “core” (i.e. required for graduation) subject, such as English, Math or Economics. Respondent has a bachelor’s degree in psychology. On July 13, 1996, he passed a national examination in business education. He holds a single subject credential in Business. Under California Code of Regulations, title 5, section 80005, subdivision (a)(3), Respondent’s “Business” credential permits him to teach such subjects as accounting, business marketing, typing and “economics.” A single subject business credential does not authorize one to teach “Social Sciences,” which also authorizes the teaching of economics.⁵ Respondent contends that he should be permitted either to bump a junior employee who currently teaches 12th grade Economics, or that he should be retained to teach Economics in the Santa Barbara County Regional Occupational Program (ROP) in which the District participates.

24. The ROP provides career technical education classes in areas such as information technology, agriculture, business, culinary arts, healthcare, construction and auto technology. ROP classes are funded and staffed through the County. The District does not know, during any school year, whether the County will offer a particular ROP during the

⁴ Being “NCLB Compliant” carries the same meaning, for these layoff proceedings, as being “highly qualified” to teach a given subject.

⁵ See, California Code of Regulations, title 5, section 80005, subdivision (a)(16).

following school year. In this matter, no evidence was presented to suggest that economics will be taught in the ROP in the 2012-2013 school year. In any event, the county, not the District, staffs the ROP program and Respondent has no right to bump any teacher in that program.

25. One issue could not be determined based on the evidence presented at the hearing. That issue was whether Respondent's having passed a national examination in business education meant that he is highly qualified to teach Economics. The answer was that Respondent is considered highly qualified to teach "business economics," but his business credential does not entitle him to teach economics offered as part of the Social Science curriculum. As noted above, the record was left open to obtain additional information regarding Respondent's bumping rights. One attachment to Ms. Peak's declaration (part of Exhibit 17) is a copy of email correspondence between Ms. Peak and Lynda Nichols, Education Programs Consultant, Title II, Part A State Coordinator, Title II Leadership Office, California Department of Education.⁶ Ms. Peak sent Ms. Nichols a copy of Respondent's certification that he had passed a national examination in business education (Exhibit C) and inquired whether Respondent's having passed the examination and his holding of a business credential entitled him to teach Economics in the District. Ms. Nichols' response was as follows: "If the economics class is a social science class (i.e. 12th grade standard driven class) someone holding a business credential would not be authorized or highly qualified to teach the class. If the economics class is an alternative pathway to graduation course (i.e. business economics) [Respondent] would be appropriately authorized and highly qualified for the assignment." As noted above, Respondent seeks to bump a junior teacher who currently teaches 12th grade Economics that is part of the Social Science curriculum. His business credential does not permit him to teach that subject. Accordingly, Respondent is not "certificated and competent," within the meaning of Section 44955, subdivision (b), to teach Economics for which a junior employee was retained.

CONCLUSIONS OF LAW

1. Jurisdiction for these proceedings exists pursuant to sections 44949 and 44955.
2. The services set forth in Findings 2 and 3 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.)

⁶ At hearing, the parties stipulated that the anticipated email exchange could be received in evidence without the need for the information received from the Department of Education to be under penalty of perjury.

3. Cause exists because of the reduction in particular kinds of services to reduce the District's teaching positions as set forth in the Board Resolutions and to give notice to the affected teachers pursuant to Education Code section 44955. (*Campbell v. Abbot* (1978) 76 Cal.App.3d 796; *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

4. 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.

5. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

ORDER

As a result of the reductions of services, the District may give notice to Respondent Scott Brennand that his services will not be required for the 2012/2013 school year.

Dated: _____

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings