

BEFORE THE
BOARD OF EDUCATION
OF THE
SAN BERNARDINO CITY UNITED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2008030391

Respondents listed on Exhibit "A"

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Bernardino, California on April 15, 2008.

Sherry G. Gordon, Esq., Atkinson, Andelson, Loya, Ruud & Romo, represented Harold Vollkommer, Assistant Superintendent, Human Resources, San Bernardino City Unified School District.

Carlos R. Perez, Esq., Reich, Adell & Cvitan, represented Respondents, with the exception of Respondents Jessica Aguilar, Lori Caruthers Collins, Karen Castille, John Cooper, Erika Cordova, Cassandra Hart, Tara Schmidt, Herbert Shand and/or Rebecca Southworth.

There was no appearance by or on behalf of Respondents Jessica Aguilar, Lori Caruthers Collins, Karen Castille, John Cooper, Erika Cordova, Cassandra Hart, Tara Schmidt, Herbert Shand and/or Rebecca Southworth.

The matter was submitted on April 15, 2008.

FACTUAL FINDINGS

1. Harold Vollkommer (Vollkommer) made and filed Accusation, dated March 14, 2008, against the Employees listed in **Exhibit "A"** (Respondents) in his official capacity as Assistant Superintendent, Human Resources (Assistant Superintendent), San Bernardino City Unified School District (District) and designee of Dr. Arturo Delgado, Superintendent (Superintendent) of the District.

2. Respondents are permanent, probationary, intern, provisional, waiver, and/or temporary certificated employees of the District.

3. The Superintendent notified the Board of Education of the San Bernardino City Unified School District (Board) and Respondents that he recommended that notice be given to Respondents that their services would not be required for the 2008-2009 school year.

On March 11, 2008, the Board adopted the Resolution that reduced or eliminated particular kinds of services and tie-breaker criteria for the ensuing school year.

Respondents were served with the preliminary layoff notice on March 14, 2008.

The written notice of termination stated that Respondents' services would not be required for the 2008-2009 school year and set forth the reasons for the recommendation. The recommendation that Respondents be terminated from employment was not related to competency.

In addition, the notice advised Respondents of the right to hearing, that the request for hearing was required to be delivered to the Superintendent's Office no later than April 3, 2008, not less than seven days after the date the notice of termination was served and that the failure to request a hearing would constitute waiver of the right to a hearing.

Some but not all Respondents filed a timely Request for Hearing and Notice of Defense.

An Accusation was timely served on Respondents.

4. All prehearing jurisdictional requirements were satisfied.

5. There was no appearance by or on behalf of Respondents Jessica Aguilar, Lori Caruthers Collins, Karen Castille, John Cooper, Erika Cardova, Cassandra Hart, Tara Schmidt, Herbert Shand and/or Rebecca Southworth.

6. The District rescinded the preliminary layoff notices previously issued to Respondents Janine Milligan and Roberta L. Lehfeldt.

7. On March 11, 2008, the Board adopted a Resolution and took action to reduce or eliminate the following particular kinds of certificated services commencing in the 2008-2009 school year:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Elementary Teachers	101
Counselor	27

English	4
Social Studies	7
Physical Education	7
Cadet Corps	5
Foreign Language (Spanish)	2
Art	1
Auto Shop	1

The proposed reductions totaled 155.0 full-time equivalent (FTE) positions.

8. The services were "particular kinds of services" that could be reduced or discontinued within the meaning of Education Code section 44955.

9. The Assistant Superintendent was responsible for implementing the technical aspects of the layoff. The District developed a seniority list that contained, among other things, each employee's name, seniority date, tie-breaker number (if any), current assignment, credential(s) and authorization(s).

The seniority date was based on the first date of paid service rendered.¹ A teacher hired as a probationary employee, who worked as a substitute or temporary employee for at least 75 percent of the school days during the previous year and performed the duties normally required of a certificated employee of the school district was deemed to have served a complete school year as a probationary employee, if the employee was employed as a probationary employee for the following school year. The teacher was entitled to have that earlier year counted as a year of probationary service. The prior year was "tacked" on for seniority purposes.² Only one year could be tacked.

10. The District used the Seniority List to develop a proposed layoff and "bumping" list to determine the least senior employees currently assigned in the various services being reduced. The District then determined if the least senior employees held credentials in another area and were entitled to "bump" other more junior employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and whether they could "bump" other employees.

11. Respondent Santford Summers challenged the information contained in the District's file regarding his seniority date and credential status.

¹ Education Code section 44845.

² Education Code section 44918.

According to District records, Respondent Santford Summers' seniority date was August 20, 2007; he holds a Clear Pupil Personnel Services (PPS) Credential and a Preliminary Single Subject Credential in Social Sciences. He was assigned to San Bernardino High School as a counselor; on or about June 1, 2008, he will receive an additional stipend from the District for services provided as Associated Student Body (ASB) Director one period each school day during school year 2007 - 2008.

Respondent Santford Summers testified that he reported to work sometime between July 31 and August 2, 2007 in his capacity as ASB Director and began working two days later as a counselor; further, Respondent Santford Summers holds a Clear Single Subject Credential. The status of his Single Subject Credential changed on or prior to March 15, 2008. He offered no testimonial or documentary evidence to establish that he filed this updated information with the District on or before March 15, 2008.

The District is only required to consider credentials that Respondent Santford Summers had on file by the time of the March 15 notice deadline. (*Degener v. Governing Board of Wiseburn School District* (1977) 67 Cal.App.3d 689.) Insufficient evidence was offered to establish that Respondent Santford Summers' Clear Single Subject Credential was on file with the District on or before March 15, 2008.

A teacher may serve as ASB Director if he holds any credential. Therefore, Respondent Santford Summers was allowed to provide services as ASB Director with his PPS Credential.

Even if appropriate, modification of Respondent Santford Summers' seniority date had no impact on the issue of whether he should have received a layoff notice.

12. The Board adopted tie-breaker criteria to determine the order of termination of employees with the same seniority date, which provides, in pertinent part:

"WHEREAS, Education Code section 44955, subsection (b), related to certificated layoffs, provides in relevant part, '[a]s 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 need of the district and the students thereof;'

NOW, THEREFORE, BE IT RESOLVED that based upon the needs of the District and the students thereof, in the event of a certificated layoff the following criteria shall be applied in order based on information on file as of March 11, 2008, one step at a time until the tie is broken, to resolve ties in seniority between certificated employees:

1. Highly Qualified status pursuant to the No Child Left Behind Act.
2. Authorization to teach English Language Learners (CLAD, BCLAD, SB395, SDAIE, etc.)
3. Number of additional credentials or supplemental authorizations.
4. Credential status in area of assignment in order of priority: a) clear; b) preliminary; c) intern; d) provisional/other.
5. Total years of creditable service outside the District
6. Possession of a Masters Degree – earliest date prevails.
7. If a tie still exists after applying steps one through six (1 – 6) above, seniority shall be determined based upon a comparison of the most recent employee evaluations or classroom observations if there is no employee evaluation on file.”

13. Vollkommer was the individual responsible for implementing the tie-breaker criteria adopted by the Board. As described in the Resolution, the District applied one step at a time until the tie was broken.

After step six, if two or more employees remained tied, the teachers' most recent employee evaluation³ or observation⁴ was to be considered. The evaluation or observation was a written document, completed by the principal or assistant principal who was included in the employee's permanent personnel file. If a teacher had not been in the District long enough to have an evaluation, the most recent observation was considered. The evaluation or observation subject to review was completed in its entirety prior to consideration by the District's panel members.

When considering the evaluation or observation, the District considered/counted ratings in eight categories; six are California Standards for the Teaching Profession, one added by the District (professional work habits) and an overall rating. The District had three ratings: (1) "M" - meets or exceeds acceptable performance, (2) "I" - needs improvement, (3) "U"- unsatisfactory. For example, if one employee had "M" in each of the eight categories and another had "M" in seven but one "I", the employee with "M" in all standards was given the highest ranking.

After application of the seventh step, there were some employees who had the same ranking. In these cases, the District used a three-member panel⁵ to review the evaluation or observation. Each member read the evaluation or observation (including the conference summary and any evaluator comments) and considered the employees' strengths and weaknesses. The panel members were all former principals. Based on the reader's opinion

³ An evaluation is completed every year for probationary employees and, typically, every other year for permanent employees.

⁴ An observation is a formative part of the supervision process during which the evaluator considers the teacher's performance at that time and preliminary to the annual evaluation.

⁵ The three people included the Assistant Superintendent, the Director of Human Resources and a principal on assignment to Human Resources. Each of the readers had served as a principal previously.

of how closely the individual met teaching standards, each reader assigned a numerical value of 1 to 10, for a total maximum of 30 points. The scores were tallied and the employees ranked.

Thereafter, if there were tied certificated employees, the District's Director of Certificated Resources, reviewed the evaluation or observation of the certificated teachers in the manner described in the foregoing paragraph. This process continued with an additional reader until all ties were broken.

14. Respondents' argued that some Respondents were prejudiced by the District's application of steps one and seven of the tie-breaking criteria.

Not all certificated employees were required to be No Child Left Behind (NCLB) compliant; the teachers in core areas were but counselors, elective and adult education teachers were not. This standard was applied to all certificated employees with the same seniority date, irrespective of whether they were required to have the NCLB compliant or not.

Application of step seven involved subjective information; there is insufficient evidence in the record of objective evaluation of this information. Each reader considered comments made by the principal or vice-principal included as part of the evaluation or observation; as a result, some teachers were at an unfair disadvantage if the principal or vice-principal wrote or did not write comments, an issue over which the evaluated employee had no control. In addition, there are questions regarding the consistency and degree to which different readers of evaluations or observations assigned the numerical score and/or the impact of subjective comments of evaluators on the readers. There is insufficient evidence in the record to determine if the District scrutinized the process to assure some minimal attempt to calibrate scores.

15. Steps one and seven of the District's tie-breaker criteria were prejudicial to Respondents whose positions did not require them to be NCLB compliant or whose ranking was based on comparison of the most recent evaluation or classroom observation.

16. According to the evidence, application of the District's tie-breaker criteria resulted in the retention of some employees while others received layoff notices.

The District sought to terminate 155.0 full time equivalent positions; over 100 Respondents filed a Request for Hearing and/or filed a Notice of Defense. There was some general testimony regarding examples of the inequitable application of steps one and seven of the District's tie breaker criteria. However, no Respondent was specifically identified as an individual who received a layoff notice as a result of the foregoing. There was insufficient evidence in the record to conclude that the application of step one or seven actually impacted ranking for the purpose of layoff.

17. The services were "particular kinds of services" that could be reduced or discontinued within the meaning of Education Code section 44955.

18. 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.

The reduction or discontinuance of particular kinds of services related to the welfare of the schools and its pupils and is necessary to decrease the number of certificated employees of the District, as determined by the Board.

19. 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 are 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 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. Cause exists under Education Code sections 44949 and 44955 for the San Bernardino City Unified School District to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuance of particular kinds of services is related solely to the welfare of the schools and the pupils thereof.

4. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he/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.)

5. 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. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Board of Santa Clara Unified Local 2393 v. Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831.)

6. No employee with less seniority than any Respondent is being retained to render a service which any Respondent is certificated and competent to render.

ORDER

1. The Accusation served on Respondents Janine Milligan and Roberta L. Lehfeldt is dismissed. Respondents Janine Milligan and Roberta L. Lehfeldt shall be retained for the 2008 – 2009 school year.
2. Except as provided in Paragraph 1 of this Order, the Accusation served on Respondents listed in **Exhibit "A"** are sustained. Except as provided in Paragraph 1 of this Order, notice shall be given to Respondents before May 15, 2008 that their services will not be required for the 2008-2009 school year because of the reduction or discontinuance of particular kinds of services.
3. Notice shall be given in inverse order of seniority.

DATED: _____

5/5/08



VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT "A"
RESPONDENTS

Aguilar, Jessica
Aguirre, Gabriela
Allen, Jamnia Joy

Luna, Felicia
Lyons, Jessica
Manjarrez, Amanda
Mao, Elisa

Arreola, Fiorella
Arroyo, Nancy
Back, Tiffany
Baird, Nicole

McDonough, Matthew

Basoco, Kelly J.
Bautista, Patricia
Beckley, Alica
Bogarin, Alexis R

McNair, Lisa
Milligan, Janine
Mojica Mastranzo,
Diana
Montez-Stine, Monica

Bracken, Michelle
Brink, Jennifer
Brown, Norma
Bruce, Pamela
Caruthers Collins,
Laura

Murguia, Anna
Myers, Michelle
Nahm, Sierra
Ohira, Meghan

Ortega, Anna Marie

Castaneda, Martha
Castille, Karen L

Pardus, Sara
Perez, Angela I
Phillips, Ramona

Chavez, Karla
Chen, Susan
Chermik, Brian

Raarup, Brigitte
Raef, Teresa
Rees, Laurie
Reyes, Gisell
Robinson, John
Rodriguez III, Santos
Rosales, Crystal
Roundy, Robin
Salazar-Villegas,
Mayra

Cook, Edward
Cooney, Melody
Cooper, John D
Cordova, Erika

Davenport, David

Scheuerman, Dolores L
Schlagel, Lacie

Dorame, Eric
Eck, Barbara

EXHIBIT "A"
RESPONDENTS

Fields, Mary	Schmidt, Tara
Garcia, Sofia J	Scott, Jessica
Garza, Monica	Shand, Herbert Olivier
Girasek, Berenise	Shih, Angela
Godfrey, Kenneth	Shuss, Ericka
	Simental-Gladin, Maribel
Green, Meaghan	Smith, Christal
Guillen, Karla	Smith, Kevin
Gutierrez, Mayra	Smith, Lauren
	Solano, Jenai
Hart, Cassandra	Sorrell, LaTonya
Heaton, Brian	Southern, Jennifer
Heckman, Sheri	Southworth, Rebecca
Hewlett, Albert	Stephens, Eileen
	Stone, Gregory
Hidalgo, Monica	Summers, Santford S.
Ann	Summers, Shyla
Horta, Naomi	Swogger, Wesley
	Edward
Hunter, Marcia	Telphy, Kimberly
Hurtado, Christina	Tornero, Jessica
Jacka, Robert E	Tucker, Raquel
Jensen, Michelle	Verduzco, Georgina
	Wagner, Veronica
Kennedy, Bridgette	
Keyser, Laura	
Ladipo, Ladapo	
Lehfeldt, Roberta L	Westerhaus, Anja
Lopez, Elizabeth	
Lopez, Haide	Wilson, Danielle
	Wong, Jessica
Lovett, Wikitoria	Zapata, Norma
Lujano-Calderon, Andrea	Angelica