BEFORE THE GOVERNING BOARD
OF THE ACTON-AGUA DULCE UNIFIED SCHOOL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

In the Matter of the Layoff of: Marilyn Alford, Lela Anderson, Danielle Cancasci, Misty Cervantes, Melissa Crawford, Danielle Johnson, Ariel Levitch, Charmony Murray, Kelly Oliver, Daniel Tirozzi, Melissa Trusel, Lonnie Woodley, Gilbert Yoon, Respondents	OAH No. 2011030982

PROPOSED DECISION

This matter came on regularly for hearing before Janis S. Rovner, Administrative Law Judge of the Office of Administrative Hearings, State of California, in Acton, California, on April 19, 2009.

Fagen, Friedman & Fulfrost, LLP, by Maggy M. Anthanasious, Attorney at Law, represented the Superintendent of the Acton-Agua Dulce Unified School District (District).

California Teachers Association Representative Penny Upton represented Marilyn Alford (Alford), Lela Anderson Harrison (Anderson), Danielle Cancasci (Cancasci), Danielle Johnson (Johnson), Ariel Levitch (Levitch), Charmony Murray Martin (Murray), and Kelly Oliver (Oliver) (Respondents), who were present at the hearing. Respondent Lonnie Woodley appeared on his own behalf. Respondents Melissa Crawford (Crawford), Misty Cervantes, Daniel Tirozzi (Tirozzi), Melissa Trusel (Trusel), and Gilbert Yoon did not appear at the hearing, nor did anyone appear on their behalf.

The District has decided to reduce or discontinue certain educational services and has given Respondents notice of its intent not to reemploy them for the 2011-2012 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2011-2012 school year.

Oral and documentary evidence was received, and closing argument was heard on April 19, 2011. The record was left open to allow Respondents to submit a post-hearing brief addressing whether they agreed with the District that school counseling is not a legally

mandated service. The District was permitted to file a reply brief no later than April 26, 2011, only if Respondents' brief disagreed with the District on this issue. Respondents' letter brief, agreeing in substance with the District, was submitted on April 22, 2011, and is identified as Exhibit D. The matter was submitted for decision on April 22, 2011.

FACTUAL FINDINGS

Jurisdiction and Governing Board's Actions

1. Brent Woodard is the Superintendent of the District.

2. Respondents are probationary or permanent certificated employees of the District.

3. On March 10, 2011, the Governing Board of the Acton-Agua Dulce Unified School District (the Board) resolved to reduce or discontinue the following particular kinds of services for the 2011-2012 school year:

Particular Kinds of Service	**Full-Time Equivalent (FTE) Positions Eliminated**
Elementary Classroom Teacher, K-6	6.0
Secondary Classroom Teacher-Social Science	1.0
Secondary Classroom Teacher-Biological Science	1.0
Secondary Classroom Teacher-Physical Education	1.0
Special Education Teacher-Special Day Class, Preschool	.5
Special Education Teacher-Special Day Class	1.0
Speech & Language Pathology	.5
School Psychologist	1.3
School Counselor	1.0
Total Full Time Equivalent Reduction:	13.3 FTE

4. On or before March 15, 2011, in accordance with Education Code sections 44949 and 44955, Superintendent Woodard gave written notice to the Board and to Respondents that it has been recommended that notice be given to Respondents that their services will not be required for the 2011-2012 school year due to the reduction or discontinuation of particular kinds of services. The written notice (March 15th notice) included the reasons for the recommendation and also notified Respondents of their right to request a hearing to determine if cause exists for not employing each Respondent for the 2011-2012 school year.

5. Ten Respondents timely and properly filed a written request for hearing to determine if there is cause for not reemploying them for the 2011-2012 school year.

6. Superintendent Woodard filed the Accusation in his official capacity. The Accusation was timely and properly served on the ten Respondents who had requested a hearing and on Respondent Melissa Crawford, who had not requested a hearing.[1]

7. Eleven Respondents, including Respondent Crawford, filed a notice of defense, and were notified of the hearing date.[2] This proceeding ensued. All prehearing jurisdictional requirements have been satisfied.

8. The Board took action to reduce or discontinue the services set forth in Factual Finding 3, due to the District's fiscal crisis and need to reduce services to balance its budget. The District estimates that for the 2011-2012 school year it will incur a substantial operating deficit if it does not reduce these services. The decision to reduce or discontinue the particular kinds of services is neither arbitrary nor capricious, and is a proper exercise of the District's discretion. The reduction or discontinuation of services set forth in factual finding number 3 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.

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[1] The District gave a March 15th notice to two other certificated employees. Karen Atkinson Mayo filed a request for hearing; the other teacher did not. (See Education Code section 44944, subdivision (a).) By letter dated March 31, 2011, the District notified both Ms. Mayo and the other teacher that as it pertained to them the March 15th notice was incorrect in stating that they had a right to a hearing. The letter further stated that as university interns they did not have a right to a "layoff hearing" pursuant to Education Code section 44464, and that the District would not include them in any further mailings related to the layoff proceedings. Consequently, the District did not give the two teachers notice of this hearing or serve an Accusation on them, the two teachers did not appear at the hearing, and they are not Respondents or parties in this proceeding.

[2] Respondents Gilbert Yoon and Misty Cervantes did not request a hearing or file a notice of defense.

9. The Board considered all known attrition, including vacancies, resignations and retirements, in reducing the services and determining the actual number of necessary March 15th notices to be delivered to its employees.

10. The District's seniority list contains certificated employees' seniority dates (first date of paid service), current and previous assignments, credentials held, authorizations, and major and minor subjects. Ms. Maxine Griffin, the District's Director of Human Resources, implemented the technical aspects of the reduction on behalf of the District. She used the seniority list to develop a proposed layoff list of the least senior employees currently assigned in 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 known vacancies, and determined the impact on incumbent staff in inverse order of seniority. Using a selection process involving a review of credentials, seniority, assignment and reassignment of certificated employees, and breaking ties between certificated employees with the same first dates of paid service, the District identified the certificated employees to whom it sent March 15th notices.

11. The Board's Resolution No. 10-11.8 established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service to the District on the same date. The Board's tie-breaker resolution consists of a point system based on four factors: type of credential (2 points for Clear and 1 point for Preliminary); number of teaching and/or special service credentials (1point per credential); number of supplementary authorizations (1 point per supplementary authorization); and earned degrees beyond the BA/BS level (1 point per degree). If a tie continues to exist after the District applies the four rating factors, a lottery would be utilized to break ties. The District used information from the District's seniority list to apply the tie-breaker criteria. The criteria were reasonably conceived and applied based on the needs of the District and its students.

Tie- Breaker Issue

12. (A) The District hired Ariel Levitch on August 31, 2009. His current teaching assignment is seventh grade history. He has a preliminary single subject credential. Kathy Her has the same hire date as Mr. Levitch. She possesses a clear single subject credential and is currently teaching eighth grade history in the District. Mr. Levitch and Ms. Her were the least senior social sciences teachers. In implementing the reduction of one FTE secondary social sciences classroom, the District had to break the seniority tie between them to determine which one would receive a March 15th notice of termination.

(B) On March 11, 2011, Mr. Levitch and Ms. Her were invited into the school office to participate in a lottery to determine their relative placement on the seniority list as between the two of them. A union representative and Maxine Griffin, the District's Director of Human Resources, were also present. At that point, neither Mr. Levitch nor Ms. Her had received a March 15th notice of termination. When Mr. Levitch won the lottery, Ms. Griffin told him that Ms. Her would be receiving a March 15th notice of termination, and Mr. Levitch would not. Ms. Griffin readily admitted at hearing that she was mistaken in

applying the lottery before applying the other tie-breaker criteria. She used the lottery as the only means of breaking the tie and had not applied apply the primary rating criteria before conducting the lottery. She did not realize that the lottery was to be utilized if, and only if, a tie still existed after applying the four rating factors.

(C) Mr. Levitch was not aware of the four rating factors as the primary means of breaking seniority ties, and left the school office on March 11, 2011, believing that he would not receive a March 15th notice based solely on the lottery result. When the District discovered its error, it applied the four rating factors in the tie breaker criteria correctly to determine the order of termination as between Ms. Her and Mr. Levitch. In applying the four rating factors, Ms. Her prevailed based on the point system. Therefore, it was not necessary for the District to use the lottery. As a result, Ms. Her was treated as being senior to Mr. Levitch in determining their relative order of termination. Consequently, Mr. Levitch was given a March 15th notice; and Ms. Her was not.

(D) Although the accidental error that temporarily misled Mr. Levitch about his layoff prospects was unfortunate, Mr. Levitch did not contest that the District provided him with the March 15th notice on a timely basis. According to Ms. Griffin, the March 15th notice was given to Mr. Levitch on or before March 15, 2011. The District was able to mail a March 15th notice to him on a timely basis, as required by Education Code section 44949, subdivisions (a) and (d). It was also deposited in the United States mail by certified mail, postage prepaid, addressed to his last known address. On March 16, 2011, he filed with the District his request for hearing. Understandably, Mr. Levitch believes that the District should rescind its March 15th notice based on the lottery error. The District has no basis for doing so in that Mr. Levitch did not rely on the District's erroneous representation to his detriment and the District's error was quickly corrected.

School Counseling

13. Lela Anderson Harrison has been a school counselor with the District since August 1, 2007. She holds a Clear Pupil Personnel Services credential and is the only school counselor in the District. She worked previously for other employers as a licensed social worker and a school-based therapist, conducting psychological assessments and evaluations. The District sent her a March 15th notice because of its decision to reduce or discontinue school counselor services.

14. Ms. Anderson Harrison believes the District will continue to offer counseling services using other personnel. The District is currently advertising an administrative position for a dean of students for the next school year. The dean of students will work under the superintendent's supervision in assisting the principal carry out his or her duties, and among other qualifications, must have the ability to "counsel with students," communicate effectively, utilize appropriate management and leadership skills, organize time efficiently, and successfully communicate with all types of children, and must possess technical knowledge of student and master scheduling. The advertised position also requires the applicant to possess or be working toward an administrative services credential.

15. Contrary to Ms. Anderson Harrison's belief, Superintendent Woodard's testimony supports a finding that the dean of student's position will not replace the school counselor; nor will any other position. It has been advertised in previous years, but has not been filled. At this time, the District has no plans to offer school counselor services during the next school year; nor is the District legally mandated to offer these services.[3]

Opportunity High School

16. As part of Resolution No. 10-11.7, the Board determined that for purposes of assignment and reassignment to a position of teacher in the Opportunity High School pursuant to Education Code section 44955, subdivision (c), those persons assigned or reassigned must have one year of full-time experience within the last five years teaching in an opportunity school. The District did not issue a March 15th notice to a junior employee who is assigned to teach at the Opportunity High School and is the only teacher at that school. His first date of paid service with the District was December 1, 2007, and he has taught at the Opportunity High School for more than one year. He holds an internship single subject credential in health science and is listed as a probationary teacher with no seniority.

17. The opportunity school is for students from 7th to 12th grades. They tend to be "at risk" students who have problems with attendance, behavior, and academic performance in the general school setting and need specialized assistance. The District's opportunity program is taught in a self-contained setting at a separate campus. The student population consists of 20 to 30 students. Instruction is delivered differently, often on a one-to-one basis, because the students are working at different grade levels. A teacher must have outstanding classroom management skills and the ability to deal with students who try to intimidate the instructor. The teacher must also be able to teach a variety of subjects and possess a high level of knowledge in all subjects. Unique skills and experience are necessary to teach in this highly-stressful and challenging program. The junior employee who now teaches in the program has being doing so for between one and two years. The skills, training and experience he gained during this time give him the special skills and qualifications that are necessary for an instructor in the District's opportunity program.

18. No senior teacher asserted that he or she was certified and competent to teach at the Opportunity High School.

Other Findings

19. The services to be discontinued or reduced are "particular kinds of services" that may be reduced or discontinued within the meaning of Education Code section 44955. The reduction of services set forth in Factual Finding 3, and the decrease in certificated employees necessitated by the reduction of services, are related to the welfare of the District and its pupils.

[3] See Education Code section 52378.

20. No permanent or probationary certificated employee with less seniority than Respondents is being retained to render a service that Respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met.

2. A school 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.) A school district's decision to reduce or discontinue particular kinds of services must not be "an arbitrary decision arrived at through the exercise of mere caprice, but rather . . . a decision supported by a fair and substantial reason." (*Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796, 808.)

3. The services identified in Board Resolution No. 10-11.7 are particular kinds of services that may be reduced or discontinued under Education Code 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, as specifically provided in Factual Findings 3, 4 and 8.

Respondent Anderson Harrison contends that the District should rescind her March 15th notice of termination because the District does not really intend to reduce school counselor services because it plans to offer them in a different manner. As provided in Factual Finding 15, the District does not presently plan to offer these services during the next school year and does not know whether they may be offered in a different manner. Even so, the Board may reduce or discontinue particular kinds of services and then provide the service in a different manner. (*Campbell Elementary Teachers Assn. v. Abbott, supra,* 76 Cal.App.3d 796, 812.)

> It is true that a district may not dismiss an employee . . . and yet continue the identical kind of service and position held by the terminated employee. [Citations.] But the *particular kind* of service of the employee may be eliminated even though a service continues to be performed or provided in a different manner by the district. [Citations.] (*Id.* at page 812.)

The Board does not intend to provide school counseling services in the same manner during the next school year. It acted in a fair and reasonable manner in discontinuing those services.

4. In applying the tie-breaker criteria, the Board determined the order of termination solely on the basis of the needs of the District and the students thereof pursuant to Education Code section 44955, subdivision (b), based on Factual Findings 11 and 12.

Mr. Levitch argued that the Board should rescind its March 15th notice and be estopped from terminating him based on the error they made in initially applying the tie-breaker criteria to him incorrectly (see Factual Finding 12) . The doctrine of equitable estoppel is available in certain circumstances to those who detrimentally rely on representations made by another. In order for equitable estoppel to apply, the following requirements must be met: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true facts; and (4) he must rely upon the conduct to his injury." (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 399, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) Although the doctrine can be applied against the government "where justice and right require it," it cannot be applied against the government where to do so would effectively nullify a "strong rule of policy, adopted for the benefit of the public . . . ." (*City of Long Beach v. Mansell*, supra, 3 Cal.3d at p. 493.) Nor can estoppel be applied where to do so would enlarge the power of a governmental agency or expand the authority of a public official. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28.)

The evidence did not show that Respondent Levitch relied to his detriment upon the District's error when the District initially told him on March 11, 2011, that he would not be terminated. Accordingly, the District is not required to rescind its March 15th notice and is not estopped from terminating Mr. Levitch. After discovering its error, the District properly and timely gave a March 15th notice to Mr. Levitch, as required by Education Code section 44949, subdivisions (a) and (d).

5. Cause exists to reduce certificated employees of the District due to the reduction and discontinuation of particular kinds of services by reason of the Factual Findings and Legal Conclusions 1 through 4. The District's decision to reduce or discontinue particular kinds of services, and to implement the reduction or discontinuation of services by reducing the number of certificated employees, relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

6. Section 44955, subdivision (b), provides, in pertinent part that "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." (Italics added.)

"Certificated" is defined by the provisions of the Education Code as relating to credentials. "Competent" is not specifically defined. In *Forker v. Board of Trustees* (1994) 164 Cal.App.3d 13, 19, the court defined "competent" in the context of a reemployment

proceeding under Education Code section 44956, 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, had interpreted the term in a similar manner.

Courts have recognized a school district's discretion to establish rules defining teacher competency. In *Duax v. Kern Commuinty College District* (1987) 196 Cal.App.3d 555, 565, the court wrote: "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." (See *Martin v. Kentfield School District* (1983) 35 Cal.3d 294, 299-300.) In *Duax*, the board established a standard of competence that required one year's full time teaching in a subject area within the last ten years. The court found the standard reasonable because it "clearly related to skills and qualifications to teach." (*Duax, supra*, 196 Cal. App.3d 555, 567.) The court also concluded that the standard did not define competency too narrowly.

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.)

Education Code section 44955, subdivision (c), states that 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."

The District has the initial duty to examine a teacher's academic and professional experience and make a determination of competency or lack thereof. Once the district finds the teacher lacks competence by way of skills and qualifications, the burden shifts to the teacher to present evidence of competency. (See *Davis v. Gray* (1938) 29 Cal.App.2d 403, 406-408; *Krausen v. Solano County Junior College District* (1974) 42 Cal.App.3d 394, 402-404.)

Here, the Board retained a junior employee who is currently assigned to teach in the opportunity program (Opportunity High School), rather than reassigning a senior employee to the position. It did so in carrying out its duties to "make assignments and reassignments" to retain certificated employees to "render any service which their *seniority and qualifications* entitle them to render." (Italics added.) (Ed. Code, § 44955, subd. (c).) The junior employee who was retained met the Board's "assignments and reassignments"

standard of having one year of full-time experience within the last five years in an opportunity school. The standard the Board conceived for determining whether a teacher possesses qualifications in the context of teaching in the opportunity school is reasonable and is similar to "competence" standards approved, or not rejected, in other reported cases. (See *Duax v. Kern Commuinty College District* (1987) 196 Cal.App.3d 555, 565-567; *Bledsoe v. Biggs Unified School District* (2009) 170 Cal.App.4th 127, 135-137, 142.) It is an objective standard which does not impermissibly narrow the meaning of the term "qualifications," as used in the statute. Based on the testimony of Superintendent Woodard and Director of Human Resources Griffin, the junior employee also possesses other the skills, training and qualifications for the position, some of them gained during his more than one-year period as the opportunity school teacher (see Factual Findings 16-18). The Board's standard, and the manner in which it was applied, was not arbitrary or capricious. Notably, no senior certificated employee asserted the right to "bump" the junior opportunity school teacher at hearing.

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

ORDER

The Accusation is sustained as to all Respondents. The District may notify Respondents that their services will not be required for the 2011-2012 school year because of the reduction or elimination of particular kinds of services.

Dated: May ___, 2011

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Janis S. Rovner
Administrative Law Judge
Office of Administrative Hearings