

BEFORE THE GOVERNING BOARD OF THE
OAKLAND UNIFIED SCHOOL DISTRICT
COUNTY OF ALAMEDA, CALIFORNIA

In the Matter of the Non-Reemployment of:

CERTAIN CERTIFICATED EMPLOYEES,

Respondents.

OAH No. 2010040155

PROPOSED DECISION

This matter was heard before Diane Schneider, Administrative Law Judge, State of California, Office of Administrative Hearings, in Oakland, California, on April 28, 2010.

Marion McWilliams, Deputy General Counsel, Office of General Counsel, Oakland Unified School District, represented the Oakland Unified School District.

David Weintraub and Dusty L. Collier, Attorneys at Law, Beeson Tayer & Bodine, represented respondents, all of whom are identified in Attachment A.

The record was held open at the request of the parties to permit them to file simultaneous closing briefs, which were timely filed on April 29, 2010. The Oakland Unified School District's brief was marked as Exhibit 13, and respondents' brief was marked as Exhibit I.

The record closed and the matter was submitted on April 29, 2010.

FACTUAL FINDINGS

1. Anthony Smith made and filed the Accusation in his official capacity as Superintendent of the Oakland Unified School District (district).

2. On March 10, 2010, the district's governing board adopted Resolution No. 0910-0159, which sets forth the board's determination that it will be necessary for the district to reduce or discontinue particular kinds of services (PKS) for the 2010-2011 school year, for a total of 121 full-time equivalent (FTE) certificated positions. (Resolution No. 0910-0159 is set forth in Attachment B.)

3 All notices were timely and properly served. All notices and other jurisdictional requirements contained in Education Code sections 44949 and 44955 have been provided or satisfied.

4. The respondents in this matter are identified in Attachment A. At the hearing, the parties stipulated that Evelyn Chan and Rodney Jones have resigned. The parties further stipulated that the following teachers identified in Attachment A are not parties to the layoff proceedings because they were not served with layoff notices or because they are temporary employees: Christine Illochi, Sharon Jeffery, Dana Lee McIntyre, Jessica Sawczuk, Ruby Simmons, Yolanda Young and Wesley Jacques. The Accusation will be dismissed as to these employees.

Additionally, at the hearing, the district fully rescinded layoff notices issued to Sylvester Saunders, Joan Adams, Catherine Borquez, Terri Barr, Susanna Mori, Deborah Gordon, Diana MacDonald and Anne Hamilton. The Accusation will be dismissed as to these employees. In light of these rescissions, any issues raised by these respondents in connection with their layoffs are moot. The district partially rescinded the layoff notice issued to Armando Florez, who will be retained for 0.6 FTE and laid off for 0.4 FTE. The Accusation filed against Florez will be dismissed for 0.6 FTE.

5. Pursuant to Resolution No. 0910-0159, the board took action to reduce or eliminate the following particular kinds of services for the 2010-2011 school year.

<u>Position</u>	<u>FTE</u>
Counselor	2.0
Adult Ed, OACE Central Instruction Support	2.0
Adult Ed, English as a Second Language	14.0
Adult Ed, Parenting Education	1.0
Adult Ed, Career Technical Education	5.0
Adult Ed, Adults with Disabilities/50+	16.0
K-8 Multi-Subject Classroom Teachers (CORE and Self-contained classrooms)	<u>81.0</u>
	121.0
Total FTE: 121.0	.

6. Board Resolution No. 0910-0159 also resolved to retain, regardless of seniority (i.e., “skip” in the layoff process), certificated employees who possess a CLAD¹ or BCLAD² certificate:

BE IT FURTHER RESOLVED that pursuant to Education Code § 44955(d)(1) it will be necessary to retain the services of

¹ Cross-Cultural, Language and Academic Development.

² Bilingual, Cross-Cultural, Language and Academic Development.

K-12 teachers in the 2010-2011 school year regardless of seniority, who possess certification and credentials needed for the following programs: CLAD or Bilingual Education/BCLAD in the K-12 program. The CLAD/BCLAD skipping criteria does not apply to Adult Education or Counselors.

Superintendent Smith recommended that the board adopt this resolution to “enable the District to meet its state and federal requirements for serving English learners by not laying off employees who are in the program area to be reduced (K-8) if they have CLAD or BCLAD certification.”

Skipping Issues

7. Respondents do not contest the validity of the board’s skipping criteria per se.³ They contend, however, that the district applied the criteria in an arbitrary and capricious manner.

8. Failure to Skip Emergency CLAD and BCLAD: The district did not skip teachers who possess an emergency CLAD or BCLAD certificate because there is no guarantee that such teachers will be able to renew their emergency certificate or that they will complete the necessary requirements to obtain clear CLAD or BCLAD certification. Respondents who hold an emergency CLAD or BCLAD certificate contend that the district should have skipped them too because, like holders of a CLAD or BCLAD certificate, they are authorized to teach in bilingual programs with the emergency credential. This contention lacks merit. It is within the district’s discretion to determine that it would only skip bilingual teachers who have received CLAD or BCLAD certification.

9. Expansion of Skipping Criteria to Encompass Credentials not Expressly Listed in Resolution: The district interpreted the board’s “CLAD/BCLAD skipping criteria” to include authorization to skip any employee who possessed an English learner (EL) certification. The district, therefore, skipped employees who possessed any certification to teach EL, including Bilingual Certificate of Competence (BCC), Language Development Specialist Certificate (LDS) and the Certificate of Completion of Staff Development (CCSD). The skipped employees were not issued preliminary layoff notices and are not respondents. Respondents contend that the district’s inclusion of these EL certifications in its skipping criteria impermissibly broadens the board’s resolution. They are correct. The plain language of Resolution 0910-0159 only authorizes the district to skip holders of BCLAD and CLAD certifications. The prefatory language in the resolution that affirms the board’s intent to retain employees who are qualified to serve the needs of English learners is

³ Respondents acknowledge that Education Code section 44955, subdivision (d)(1), allows a school district to deviate from seniority order in terminating a certificated employee when “the district demonstrates a specific need for personnel to teach a specific course or course of study . . . and that the certificated employee has special training or experience necessary to teach that course or course of study . . . which others with more seniority do not possess.”

not part of the skipping criteria adopted by the board and, therefore, does not authorize the district to skip employees who hold EL certifications other than CLAD or BCLAD. The district's inclusion of other EL certifications into its skipping criteria exceeds the board's mandate and, therefore, constitutes an abuse of discretion.

The employees who were improperly skipped should have received layoff notices. The appropriate remedy, which will be ordered, is to direct the district to identify the teachers who were improperly skipped and a corresponding number of the most senior employees who were prejudiced by such skips. Those employees who were prejudiced by the district's invalid skips may not be laid off. (See *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567, 576.)

Equitable Estoppel

10. Six respondents who were recruited by the district to move here from Spain in order to teach in the district assert that the district is estopped from laying them off in this proceeding.⁴ While their individual circumstances are somewhat different, the gist of their collective claim is that district personnel knowingly misrepresented that their jobs would be secure with emergency credentials as long as they pursued their CLAD or BCLAD and obtained it within a specified time.⁵ This assertion lacks merit. There is no basis, either in fact⁶ or law,⁷ to justify application of the doctrine of equitable estoppel.

⁴ The teachers asserting this claim are Alberto Alonso De La Cruz, Jorge Urdaniz, Maria Moreno De La Fureto, Marta Poyatos Martin, Maria Cristina Turienzo, and Mireya Artabe-Torviso.

⁵ Most of the respondents claim they were told that they had three years to obtain CLAD or BCLAD certification. One respondent, Rocio Aranda-Alcaide, was not given a specified time period in which to obtain CLAD or BCLAD certification. She claims, however, that she was assured by a district representative that her job would be secure as long as she possessed an emergency BCLAD and continued to pursue a CLAD or BCLAD.

⁶ The elements of estoppel are (1) a representation or concealment of material facts (2) made with knowledge of the facts (3) to a party ignorant of the truth (4) with intention that the latter act upon it and (5) the party must have been induced to act upon it. (See 7 Witkin, Summary of Cal. Law (1974 ed.), Equity § 132, p. 5352, and cases cited therein.) "Where one of these elements is missing there can be no estoppel." (*California School Employees Assn. v. Jefferson Elementary School District* (1975) 45 Cal.App.3d 668, 692.) Here, the evidence failed to establish that district personnel made intentional misrepresentations to respondents.

⁷ *Shoban v. Board of Trustees of the Desert Center Unified School District* (1969) 276 Cal.App.2d 534, 544 [estoppel should not be invoked against the government where to do so would be harmful to a specific public policy or public interest]; *Fleice v. Chualar Union Elementary School District* (1988) 206 Cal.App.3d 886, 893 [estoppel cannot be invoked to contravene statutory provisions that define an agency's powers]. Application of equitable estoppel in the instant case would defeat the Board's statutory authority to define skipping criteria and would provide respondents with greater rights than other employees.

Other Matters

11. The reduction or discontinuation of services is related to the welfare of the district and of its pupils.

12. With the exception of the teachers who have been prejudiced by the district's improper skipping, as described in Factual Findings 6, 7, and 9, no permanent employee is being terminated while any junior employee is being retained to render a service which the permanent employee is certificated and competent to perform.

13. Any contentions raised by respondents and not discussed above have been found to be without merit and are hereby rejected.

LEGAL CONCLUSIONS

1. The services identified in Attachment B 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 complies with the guidelines set forth in Education Code section 44955. The board's decision was neither arbitrary nor capricious, and was a proper exercise of its discretion.

2. Based upon the matters set forth in Factual Finding 4, cause does not exist to issue final layoff notices to Evelyn Chan, Rodney Jones, Christine Illochi, Sharon Jeffery, Dana Lee McIntyre, Jessica Sawczuk, Ruby Simmons, Yolanda Young, Wesley Jacques, Sylvester Saunders, Joan Adams, Catherine Borquez, Terri Barr, Susanna Mori, Deborah Gordon, Diana MacDonald, Anne Hamilton, and Armando Florez (for 0.6 FTE).⁸

3. Based upon the matters set forth in Factual Findings 6, 7 and 9, it was established that the district impermissibly broadened the scope of the skipping criteria contained in Resolution No. 0910-0159 when it skipped employees who possessed English learner authorizations other than CLAD or BCLAD certifications. Cause, therefore, exists to require the district to identify the most senior employees who have been prejudiced by the district's invalid skips. Cause does not exist to issue final layoff notices to these employees.

4. Cause exists because of the reduction or elimination of particular kinds of services pursuant to Education Code section 44955 to give notice to the remaining respondents identified in Attachment A, that their services will not be required for the 2010-2011 school year. The cause relates to the welfare of the schools and the pupils thereof within the meaning of section 44949.

⁸ Florez may be issued a final layoff notice for 0.4 FTE.

ORDER

1. The Accusation is dismissed as to Evelyn Chan, Rodney Jones, Christine Illochi, Sharon Jeffery, Dana Lee McIntyre, Jessica Sawczuk, Ruby Simmons, Yolanda Young, Wesley Jacques, Sylvester Saunders, Joan Adams, Catherine Borquez, Terri Barr, Susanna Mori, Deborah Gordon, Diana MacDonald, Anne Hamilton, and Armando Florez (for 0.6 FTE)
2. The district shall identify the most senior employees who were prejudiced by the district's invalid skips, as set forth in Legal Conclusion 3. The district may not issue final layoff notices as to these employees. The Accusation as to these employees is dismissed.
3. Notice may be given to the remaining respondents identified in Attachment A, that their services will not be required for the 2010-2011 school year because of the reduction or elimination of particular kinds of services.

Dated: May 6, 2010

DIANE SCHNEIDER
Administrative Law Judge
Office of Administrative Hearings