

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
ACTING FOR AND ON BEHALF OF THE
RIVERSIDE COUNTY OFFICE OF EDUCATION
STATE OF CALIFORNIA

In the Matter of the Employment Status of:

OAH No. 2012030942

CERTAIN CERTIFICATED EMPLOYEES
OF THE RIVERSIDE COUNTY OFFICE
OF EDUCATION,

Respondents.

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Riverside, California on April 18, 2012.

Todd M. Robbins, Atkinson, Andelson, Loya, Rudd & Romo, represented the Riverside County Office of Education.

Carols Perez, Reich, Adell & Cvitan, represented respondents Suzanne Fevold, Richard Jones, and Mary Mende, each of whom was present throughout the reduction in force proceeding.

The matter was submitted on April 18, 2012.

FACTUAL FINDINGS

The Riverside County Office of Education

1. The Riverside County Office of Education (RCOE) is comprised of three components: the County Superintendent of Schools, who is elected to serve a four year term; seven elected members of the County Board of Education, each of whom serve four year terms; and approximately 1,500 employees, 425 of whom are certificated and employed directly by the County Superintendent of Schools.¹ RCOE provides educational services and

¹ A county superintendent of schools directly employs certificated employees under Education Code section 1293. This is not the case with local school districts, where certificated employees are employed by the district.

supports to meet the needs of students who do not or cannot receive services directly from the 23 local school districts within Riverside County (e.g., services provided to pregnant teens, juveniles residing in correctional facilities, or students with profound disabilities).

Kenneth M. Young is RCOE's Superintendent of Schools. Steven Hovey is the District's Chief Personnel Officer. Maribel Escobar (Director Escobar) is RCOE's Director of Classified Personnel.

RCOE's Budget Concerns and Need for Reorganization

2. Based upon budgetary concerns and RCOE's settlement of litigation with the U. S. Department of Education, Office for Civil Rights, relating to the provision of services to students with a disability, Chief Personnel Officer Hovey recommended to Superintendent Young that he approve a resolution authorizing the reduction and elimination of particular kinds of services. Chief Personnel Officer Hovey recommended that certain employees determined by seniority be given notice that their services would not be required for the 2012-2013 school year.

3. On March 7, 2012, Superintendent Young signed the following resolution:

REDUCTION OF PARTICULAR KINDS OF CERTIFICATED SERVICES

RESOLUTION NO.: 15-12

WHEREAS, the Superintendent of Schools of Riverside county has determined that it is in the best interests of the County Office and the welfare of the schools and the pupils thereof that the particular kinds of services set forth herein must be reduced or discontinued due to financial conditions; and

WHEREAS, it is the opinion of the Superintendent that because of the aforementioned reason, the number of certificated employees of the Riverside County Superintendent of Schools must be reduced; and

WHEREAS, the Superintendent does not desire to reduce the services of regular certificated employees based upon reduction of average daily attendance during the past two years.

NOW, THEREFORE, BE IT RESOLVED by the Superintendent of Schools for Riverside County as follows:

A. That the particular kinds of services set forth below be reduced or eliminated commencing in the 2012-2013 school year:

220 Day Correctional Education Teaching Services	5	F.T.E.
Cal-Safe Teaching Services	1	F.T.E.
Special Education Mentally Handicapped/Developmentally Disabled Teaching Services	3	F.T.E.
Special Education Trainable Mentally Handicapped Teaching Services	1	F.T.E.
Special Education Severely Handicapped Trainable Mentally Handicapped Teaching Services	1	F.T.E.
Special Education Severely Handicapped Autistic Teaching Services	1	F.T.E.
TOTAL CERTIFICATED POSITIONS	12	F.T.E.

B. That due to the reduction or elimination of particular kinds of services, the corresponding number of certificated employees of the Riverside County Superintendent of Schools shall be terminated pursuant to Education Code section 44955.

C. That the reduction of certificated staff be achieved by the termination of regular employees and not by terminating temporary and substitute employees.

D. That “competency” as described in Education Code section 44955(b) for the purposes of bumping shall necessarily include (1) possession of a valid credential in the relevant subject matter area, (2) possession of both a mild/moderate or equivalent special education credential and a single subject or multiple subject credential to bump into a Specialized Academic Instruction position, (3) “highly qualified” status under the No Child Left Behind Act (if required by the position), (4) an appropriate EL authorization (if required by the position), and (5) a completed security clearance (if required by the position).

E. That, as between certificated employees with the same seniority date, the order of termination shall be determined solely by criteria adopted by the Superintendent.

F. That the Superintendent’s designee is directed to initiate layoff procedures and give appropriate notice pursuant to Education Code sections 44955 and 44949.

PASSED AND ADOPTED by the Superintendent of Schools of Riverside County on March 7, 2012.

Respondent Employees

4. The following certificated personnel were permanent employees of RCOE who received preliminary layoff notices as a result of Resolution No. 15-12: Develyn Biagas; Sally Costa; Kenneth Eldred; Suzanne Fevold; Richard Jones; Joanne Kleveland; and Mary Mende.

5. Superintendent Young's decision to reduce and eliminate particular kinds of services was the direct result of California's fiscal crisis, the probable reduction in RCOE funding for the 2012-2013 school year, and the settlement of the litigation which required the phasing out of resource teachers and Cal-Safe teachers who do not possess a special education credential for students with mild to moderate disabilities. The particular kinds of services identified in Resolution No. 15-12 were services Superintendent Young was authorized to reduce and discontinue. The resolution to reduce and eliminate certain services was neither arbitrary nor capricious, and making the decision to do so was a matter squarely within Superintendent Young's sound discretion.

6. On March 5, 2010, Superintendent Young signed a non-exclusive delegation of authority appointing Chief Personnel Officer Hovey to act on his behalf with regard to the reduction in force proceeding required under Resolution No. 15-12.

The Reduction in Force and the Issuing of Preliminary Layoff Notices

7. Chief Personnel Officer Hovey and Director Escobar determined which employees were subject to Resolution No. 15-12, determined if any of the employees whose positions were being eliminated had bumping rights, and then caused preliminary layoff notices to the most junior employees holding those positions that were subject to reduction and elimination. Before issuing the preliminary layoff notices, Chief Personnel Officer Hovey and Director Escobar considered all known positive attrition including resignations, retirements and probationary non-reelects.

Jurisdictional Matters

8. On and before March 15, 2012, RCOE served upon respondents Develyn Biagas, Sally Costa, Kenneth Eldred, Suzanne Fevold, Richard Jones, Joanne Kleveland, and Mary Mende written notice of that recommendation made to Superintendent Young that their services would not be required for the 2012-2013 school year. RCOE filed and served accusations and other required documents on each respondent. Each respondent appearing in this reduction in force proceeding was served thereafter with a notice of hearing. All jurisdictional requirements were met.

9. On April 18, 2012, the record in the administrative hearing was opened. Attorney Todd M. Robbins appeared on behalf of the district. Attorney Carlos Perez appeared on behalf of all respondents present at the hearing. Counsel for RCOE gave a brief opening statement. A stipulation concerning certain jurisdictional documents was reached;

sworn testimony was given; documentary evidence was received; closing arguments were given; the record was closed; and the matter was submitted.

The Seniority List and Bump Analysis

10. RCOE maintains a seniority list for certificated employees, a continuously evolving schedule that sets forth each employee's seniority number, name, seniority date, position title, unit, annual length of service, status (tenured or probationary), the employee's credentials as of March 15, 2010, whether the employee holds English language authorization, whether the teacher holds No Child Left Behind (NCLB) status, and "bump notes."

11. RCOE sent letters to all certificated employees regarding its seniority list. Each letter contained the employee's current position, first paid date of probationary service with RCOE, certificated status, credentials and authorizations, and NCLB and EL Authorization status. Director Escobar requested each employee review the information and provide RCOE with any corrections or additional information. The information provided to Director Escobar was verified and included in RCOE's seniority list.

12. Under Director Escobar's supervision, RCOE's updated its master seniority list, which she used to produce the "bump analysis" that was employed in this layoff proceeding. The bump analysis utilized Resolution No. 15-12 to identify the services being reduced or discontinued, the persons who were providing those services, and whether the persons being displaced under Resolution No. 15-12 had the seniority and qualifications to displace (bump) a more junior employee. The process Director Escobar used to create the bump analysis complied with the economic layoff statutes found in the Education Code, which generally require the retention of senior certificated employees over more junior employees and the retention of permanent employees over probationary employees and others with less seniority. There was no "skipping" of any junior employees.

13. Before the hearing in this reduction in force proceeding was opened, RCOE dismissed the Accusation filed against Sally Costa, whose seniority, credential and competence permitted her to move into a vacant position created by a retirement. The dismissal of the Accusation was in good faith and was appropriate.

14. Under RCOE's settlement agreement with the Office of Civil Rights, employees providing services as resource teachers for students in the alternative education program were subject to being phased out unless they possessed (1) a general teaching credential, such as a multiple subject teaching credential or a single subject teaching credential, and (2) a special education credential or equivalent authorization for students with mild to moderate disabilities.

For the 2012-2013 school year and under the RCOE/Office of Civil Rights settlement agreement, only specialized academic instructors (SAI) were authorized to provide services to these alternative education students. The credentialing requirement that SAI teachers hold

a special education credential or the equivalent thereof extended to employees providing 220 Day Correctional Education Teaching Services and Cal-Safe Teaching Services.

As was demonstrated by the evidence, many teachers who had taught alternative education students obtained a special education intern permit (mild to moderate) or an equivalent authorization for a special education teaching credential (mild to moderate), which authorized these employees to continue their employment with RCOE as SAI teachers.

Respondents Fevold, Jones, and Mende did not obtain authorization to teach special education students (mild to moderate) by March 15, 2012, and were unable to bump into an SAI position held by an employee with less seniority because they did not hold an appropriate credential.

15. The competency requirements set forth in Resolution No. 15-12 required an employee to possess a completed security clearance on file by March 15, 2012, for employment in correctional facilities.

Respondents Fevold and Mende were unable to bump into a position in which services would be provided to juveniles or adults in custody because they did not have a completed security clearance on file by March 15, 2012.

16. Suzanne Fevold served as a “220 teacher” at Val Verde Regional Learning Center and as a Plano Distance Learning instructor at various sites. She holds a life teaching credential in Physical Education and Speech. She has experience teaching GED courses, which are taught in adult detention facilities. She is authorized to teach any subject in a juvenile detention facility. Ms. Fevold has taught the Come Back Kids (CBK) program. She is NCLB-compliant and holds EL authorization.

Ms. Fevold was unable to bump a more junior employee providing SAI services because she does not hold a special education credential (mild to moderate). Ms. Fevold, who has worked with the Riverside County Sheriff’s Department, does not hold a formal security clearance as of March 15, 2012 and she cannot provide services at this time to juveniles or adults in jail facilities.

The only available position that Ms. Fevold could occupy at this time by reason of Resolution 12-15, her seniority, credential, and competence was a part time position, several of which were vacant and one of which was as a driver’s education instructor. A 19- hour per week employment offer as a driver’s education instruction was provided to Ms. Fevold. Ms. Fevold was not certain at the time of this layoff proceeding whether she would accept the offer of part time employment as a driver’s education instructor.

Ms. Fevold did not establish that RCOE retained any junior credentialed employee to provide full time services which she was certificated, competent and qualified to render.

17. Richard Jones, Ed.D., served as a “220 teacher” in Independent Studies and CBK. He served as a special education teacher in the 1980s, but is not credentialed as a special education teacher at this time. He currently teaches at a school site in Perris where he has transportation from his home in Moreno Valley through Dial-A-Ride.

The only available position that Dr. Jones could occupy at this time by reason of Resolution 12-15, his seniority, credential, and competence was a part time position, several of which were vacant. A 19-hour per week employment offer was provided to Dr. Jones in Temecula, which would make his getting to work very difficult. Dr. Jones believed he should be permitted to bump a junior teacher providing the same services on a 19-hour per week basis who was working at a school site in Perris. Dr. Jones was not certain at the time of this layoff proceeding whether he would accept the offer of part-time employment in Temecula. He hoped that RCOE could accommodate his partial vision disability.

Dr. Jones did not establish that RCOE retained any junior credentialed employee to provide full time services which he was certificated, competent and qualified to render. He did not establish that his partial vision disability entitled him to bump a junior teacher through this reduction in force proceeding.

18. Mary Meade has provided services to pregnant minors, teenage mothers, and teenage fathers for the past 17 years through the Cal-Safe program. She holds a single subject teaching credential in Physical Education, but RCOE provided her with authorization to teach Math, English, History and Science three or four years ago based on her experience and testing.

The only available position that Ms. Meade could occupy at this time by reason of Resolution 12-15, her seniority, credential, and competence was a part time position, several of which were vacant. A 10-hour per week employment offer was initially provided to Ms. Meade, and at the hearing in this proceeding Ms. Meade was advised that a 19-hour per week part time position had become available. Ms. Meade was not certain at the time of this layoff proceeding whether she would accept the offer of part-time employment in Temecula.

Ms. Meade did not establish that RCOE retained any junior credentialed employee to provide full time services which she was certificated, competent and qualified to render.

Ultimate Conclusions Regarding RCOE's Reduction in Force

19. The termination of respondents' full time equivalent teaching positions as a result of Superintendent Young's decision to reduce and discontinue particular kinds of services was totally unrelated to the quality of the professional services provided by these fine teachers. The length of service provided by these employees bespeaks of their value to RCOE.

20. Superintendent Young resolved to reduce and discontinue particular kinds of services provided by RCOE certificated employees for legitimate reasons. His decision was unrelated to the competency or dedication of the employees whose services were proposed to

be reduced and discontinued. Superintendent Young's determination was lawful, reasonable, and ultimately in the best interest of RCOE and its students.

RCOE's administrative staff initiated and followed a systematic procedure to identify employees who were directly affected by the resolution. A careful evaluation was made to determine each employee's seniority date, tenured status, credentials and authorizations, and qualifications in making determinations about what bumping rights, if any, an employee had. RCOE did not retain any junior credentialed employee to provide services which a more senior employee was certificated, competent and qualified to render. RCOE properly and in good faith applied relevant provisions of the Education Code in this reduction in force proceeding. RCOE was under no duty to consolidate two partial assignments into one full time equivalent assignment; even if RCOE were inclined to do so, the juvenile and adult detention facilities have set times for the provision of education over which RCOE has no control.

RCOE made assignments and reassignments in such a manner that respondents in this proceeding were retained to render services which their seniority and qualifications entitled them to render, albeit not on a full time basis. No junior employee who is qualified and competent to render the same services as respondents will be employed in the 2012-2013 school year to work more than 19 hours per week.

Issuance of the preliminary layoff notices is upheld, and the assignment of respondents was within RCOE's discretion.

LEGAL CONCLUSIONS

Statutory Authority

1. Education Code section 44949 provides in part:

No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee that it has been recommended that the notice be given to the employee, and stating the reasons therefor

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with . . . the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

[¶] . . . [¶]

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced . . .

2. Education Code section 44955 provides in part:

(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . and when in the opinion of the governing board of the district it shall have become necessary to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, 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.

[¶] . . . [¶]

As 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 needs of the district and the students thereof

[¶] . . . [¶]

(c) Notice of such termination of services shall be given before the 15th of May and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

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. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the

governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

3. Education Code section 1294.5 provides:

Any county superintendent of schools may employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted under contract with public or private agencies, or other categorically funded projects of indeterminate duration. The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the county superintendent and such agreement shall be reduced to writing. Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of county superintendent by which he is employed are maintained, and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications. Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially funded project without regard to

other requirements of this code respecting the termination of probationary or permanent employees.

This section shall not be construed to apply to any regularly credentialed employee who has been employed in the regular educational programs of the county superintendent of schools as a probationary employee before being subsequently assigned to any one of these programs.

Jurisdiction

4. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and other jurisdictional requirements contained in those sections were satisfied as to all respondent employees identified herein.

The Reduction of Particular Kinds of Services

5. The decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. It is within the governing authority's discretion to determine the amount by which a particular kind of service will be reduced or discontinued as long as the district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.) A school district has wide discretion in setting its budget and a layoff decision will be upheld unless it was fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. (*California Sch. Employees Assn. v. Pasadena Unified Sch. Dist.* (1977) 71 Cal.App.3d 318, 322.)

Competence

6. The Education Code leaves to the governing authority the discretion to determine whether in addition to possessing seniority an employee is also "certificated and competent" to be employed in a vacant position. The term "competent" in this regard relates to an individual's specific skills or qualifications including academic background, training, credentials, and experience, but does not include evidence related to on-the-job performance. (*Forker v. Board of Trustees* (1984) 160 Cal.App.3d 13, 18-19.) In addition to seniority the only limitation in placing a teacher in a vacant position is that the teacher that is selected be "certificated and competent" to render the service required by the vacant position. Among employees who meet this threshold limitation, there is no room in the statutory scheme for comparative evaluation. (*Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 299.) An employee holding a special credential or needed skill, if such credentials or competence are not shared by a more senior employee, may be retained though it results in termination of a senior employee. (*Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648, 655.)

Seniority and Bumping

7. Seniority: Under Education Code section 44845, seniority is determined by the date a certificated employee “first rendered paid service in a probationary position.”

8. Education Code section 44846 provides in part: “The governing board shall have power and it shall be its duty to correct any errors discovered from time to time in its records showing the order of employment.”

9. The Statutory Scheme: Education Code section 44955, the economic layoff statute, provides in subdivision (b), in part:

Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while . . . any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

Essentially this language provides “bumping” rights for senior certificated and competent employees, and “skipping” authority to retain junior employees who are certificated and competent to render services which more senior employees are not.

School districts have broad discretion in defining positions within the district and establishing requirements for employment. This discretion encompasses determining the training and experience necessary for particular positions. 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. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.)

Documents Filed after March 15, 2012

10. Documents filed after March 15 cannot be used by an employee to assert bumping rights. The practical reason for this rule is that layoff notices must be given by March 15 to effect a reduction in teaching staff for the ensuing school year. If an employee were allowed to present a certificate after March 15 to retain employment, the employer would by that date be precluded from serving a layoff notice to a more junior teacher. This circumstance would result in the employer being forced to retain an extra teacher when the entire purpose of the layoff procedure is to allow the reduction of staff positions because there are fewer services being offered. (*Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, 567-568.)

Cause Exists to Give Notice to Certain Employees

11. As a result of Superintendent Young’s lawful decision to reduce or discontinue particular kinds of service being provided by certificated employees, cause exists under the

Education Code to give notice to respondents that their employment will be terminated at the close of the current school year and that their services will not be needed by the district for the 2012-2013 school year.

Determination

12. The charges set forth in the accusation were sustained by a preponderance of the evidence and related to the welfare of RCOE and the students thereof. RCOE's staff made assignments and reassignments under Resolution 15-12 in such a manner that RCOE employees were retained to render services which their seniority and qualifications entitled them to render. No RCOE employee with less seniority than any respondent will be retained to render a service which any respondent is certificated, competent and qualified to render.

Superintendent Young's decision to reduce and discontinue particular kinds of services was totally unrelated to the competence of these fine teachers whose employment is subject to this economic layoff proceeding.

RECOMMENDATION

It is recommended that Superintendent Young give notice to Develyn Biagas, Kenneth Eldred, Suzanne Fevold, Richard Jones, Joanne Kleveland, and Mary Mende that their services will not be required for the 2012-2013 school year.

DATED: April 19, 2012

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings