BEFORE THE GOVERNING BOARD
OF THE APPLE VALLEY UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against: OLIVIA ALLALA, and other Certificated Employees of the Apple Valley Unified School District, Respondents.	OAH Case No.: 2008030328

PROPOSED DECISION

The hearing in the above-captioned matter was held on April 10, 2008, at Apple Valley, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by Margaret Chidester and Alexandria Davidson. Respondents were represented by Carlos R. Perez, Reich, Adell & Cvitan.

Oral and documentary evidence was received at the hearing, the case was argued, and the matter submitted for decision on the hearing date. The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders, as follow.

FACTUAL FINDINGS

1. Complainant Dan Leary filed the accusations[1] in this proceeding in his official capacity as Assistant Superintendent, Human Resources, of the Apple Valley Unified School District (District).

2. The following persons (Respondents) are certificated employees of the District:

Olivia Allala, Carrie Talataina, Aurora Mendoza, Kyla Gonzales, Cheryl Denny, Nichole Cateneso, Martell Olson, Debra Boyd, Angelica Munoz, Tanesha Collins, Elisabeth Bailey, Linda Cordova, Kittie Yonamine, Erica Luke, Nicole Portillo, Rhobley Montelongo, Bramlett Browne, Alicia Weber, Ashley Guadino, Paul Verduzco, Rebekah Michelson.

[1] The term "accusation" refers to a type of pleading utilized under the Administrative Procedure Act, Government Code sections 11500 and 11503. As noted by the District letters to its teachers, and by the ALJ during the hearing, it should be made clear that the Respondents are not "accused" in the every-day sense of that word; they have done nothing wrong. Instead, it might be said they are accused of not having enough seniority to retain their positions with the District in the face of a resolution to reduce positions.

3. (A) On March 5, 2008, the Governing Board (Board) of the District adopted resolution number 28-29, entitled "Reduction or Discontinuance of Particular Types of Services" (Reduction Resolution). The purpose of the Reduction Resolution was to reduce and discontinue particular kinds of certificated services no later than the close of the 2007-2008 school year, in light of budgetary projections and other factors, such as decreased enrollment. Specifically, the resolution requires the reduction of 44 "FTE"—Full Time Equivalents—by reducing classroom teaching in both the elementary school grades and the junior high school and high school grades. The Board, in making the resolution, was acting on the recommendation of the Superintendent of the District.

(B) The FTE's that the Board determined to reduce are described in the Reduction Resolution, as follows:

Preschool Teachers, 1 FTE
K-6 Elementary Class Teachers, 34 FTE
Elementary Instrumental Music Teacher, 1 FTE
Middle School 7/8 Core Classroom Teacher, 1 FTE
Alternative Education Teacher, 1 FTE
School Psychologists, 2 FTE
Coordinator, Career Education/Curriculum, 1 FTE
Coordinator, School Readiness, 1 FTE
High School Classroom English Teachers, 2 FTE

4. (A) In its Reduction Resolution the Board directed the Superintendent of the District, or a designee of the Superintendent, to give notice of termination to certificated employees in accordance with Education Code sections 44949 and 44955,[2] informing them that Respondents' services would not be required for the following school year (2007-2008).

(B) When the Board adopted the Reduction Resolution, it also adopted criteria to identify those permanent, probationary, and temporary personnel who would be exempted from the order of layoffs by virtue of their credentials, competence, assignment, experience, or certification. That criteria was set out in Exhibit A to the Reduction Resolution.

(C) Further, when the Board adopted the Reduction Resolution, it also identified tie-breaking criteria to be used when employees shared the same first date of paid service. That criteria was set forth on Exhibit B to the Reduction Resolution. The tie-breaking language was based on the tie-breaking criteria set forth in Article 6 of the contract agreement between the District and the Apple Valley Unified Teachers' Association, which represents certificated employees of the District in collective bargaining.

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[2] All further statutory references are to the Education Code unless otherwise noted.

5. The services which the District seeks to discontinue or reduce are particular kinds of services that may be reduced or discontinued under section 44955.

6. The decision by the Board to reduce or discontinue services was neither arbitrary nor capricious, but rather was a proper exercise of the District's discretion given uncertainty regarding the state budget and the District's financial resources, and other factors considered by the Board. The record establishes that District management attempted to consider a wide array of information regarding the District's needs, including the need to remain solvent, in determining to reduce or discontinue services.

7. The reduction and discontinuation of services 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.

8. Prior to March 15, 2008, Respondents and other certificated employees of the District were given a preliminary written notice, to the effect that that pursuant to sections 44949 and 44955, their services would not be required in the 2007-2008 school year. However, a number of the notices stated, to the particular recipient, that the District would attempt to "exempt" that employee from lay off in light of their credentials, expertise, and then-current assignment.[3]

9. Fifty-four certificated employees, including Respondents, requested a hearing to determine if there is cause for not reemploying them for the 2007-2008 school year. Those requests for hearing were timely filed, or the Board waived objection to any late filing.[4]

10. Thereafter, on or about March 18, 2008, an Accusation was served upon those persons who requested a hearing. That Accusation was accompanied by a notice which stated that failure to deliver a Notice of Defense to the Board within seven days of service of the Accusation would constitute a waiver of the right to a hearing, and that the Board might then proceed against the Respondents without a hearing. The majority of the persons served with an accusation—46—filed a Notice of Defense, including the Respondents.

11. Since the Reduction Resolution was passed some circumstances have changed, such that reduction of only 28 FTE of K through 6 elementary teachers was necessary as of the time of the hearing. At the same time, it is no longer necessary to reduce the two FTE of school psychologists, the one FTE of Coordinator, Career Education, and the one FTE of Coordinator, School Readiness. Thus, at the time of the hearing only 34 FTE were subject to reduction.

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[3] Exhibit 6 indicates that 91 certificated employees received layoff notices.

[4] It appears that notices were withdrawn as to a number of the employees before the time that a request for hearing was necessary.

12. Since the Reduction Resolution was made there has been attrition among the Districts' certificated employees, through retirement, resignation, or non-reelection. As a result, the proceedings against some personnel were withdrawn. For example, on the day of the hearing, Complainant dismissed the Accusation against Toni Peterson, number 669 on the seniority list.

13. In the course of the reduction in force process, the District created a seniority list. That seniority list took into account a number of factors, including first date of paid service and various tie-breaking criteria that were developed by the District and adopted by it. (See Factual Finding 4.) As to tie breaking, in many cases the District was obligated to resort to the last criteria, a lottery, which was conducted under the eyes of teacher association representatives, and with their assistance in the drawing of names or numbers at random. The tie-breaking criteria were appropriately applied to the teachers listed on the final seniority list.

14. (A) The District reviewed its records and the seniority list to determine which employees might "bump" other employees, because they held credentials in another area and were entitled to displace a more junior employee. No employee was found eligible to bump another employee.

(B) The District determined that certain junior teachers possessed superior skills, training, or capabilities which more senior teachers did not possess, which would allow the more junior teachers to be exempted from lay off or "skipped." Such teachers were needed by the District to teach particular courses or to provide particular services, and could do so in light of their credentials and qualifications. The lay off notices were withdrawn as to such teachers.

(C) During the hearing, no Respondents were able to show that they could bump or skip another teacher.

15. (A) An issue was raised as to the proper seniority date for Respondent Rhobly Montelongo. She is shown on the seniority list at number 677, with a seniority date of August 27, 2007. Her contract status is shown as "prob[ationary] 2", that is, as a teacher in her second year of probation, and eligible for tenure in one more year. Respondent Montelongo had first worked for the District on August 3, 2006, as a fourth-grade teacher.

(B) In June 2007, Respondent Montelongo desired to start work after the beginning of the next school year, because she had been invited to a wedding of family members which was to take place out of the country. She spoke to her school's principal, Ms. Schmitt, about the problem this posed for her. It is reasonably inferred that Ms. Schmitt wanted to retain Respondent's services at her campus, because she told Respondent she would speak to the District staff about the matter, and she did so. And, Respondent wanted to retain her job.

(C) After conferring with District staff, Ms. Schmitt told Respondent that the way to proceed was for Respondent to resign, and that Schmitt would re-hire her immediately upon the teacher's return. The two discussed the status of Respondent's tenure credit, and the principal told Respondent that she would remain a second year probationary teacher, or "prob 2." The two did not discuss the issue of a seniority date, and there is no evidence that the parties discussed the option of a short leave of absence, which would not have caused a break in service.[5] (See § 44975.)

(D) On June 15, 2007, Respondent submitted a letter to the District which stated: "I [Respondent] resign from the position of teacher with Apple Valley Unified School District due to the fact that I will be absent for the beginning of the school year 2007/2008." (Exhibit 9.)

(E) Thereafter, Respondent Montelongo took her extended vacation, and returned to her fourth grade classroom on August 27, 2007. Since that time she has been paid as a "prob 2" teacher.

(F) As a result of the transaction described herein, Respondent Montelongo is the sixth most junior person exposed to lay off, rather than being senior to all the person's still subject to lay off.[6]

16. No certificated employee junior to any Respondent was retained by the District to render a service for which a Respondent was certificated and qualified to render.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to Code sections 44949 and 44955, based on Factual Findings 1 through 4, and 8 through 10.

2. (A) A District may reduce a particular kind of services (PKS) within the meaning of 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.) The Court of Appeal has made clear that a PKS reduction does not have to lead to less classrooms or classes; laying off some teachers

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[5] Section 44962 authorizes school districts to grant leaves of absence to certificated employees, and section 44975 makes it clear that where a probationary teacher is granted a leave of absence, there is no break in service.

[6] All the other teachers with a seniority date of August 3, 2006, have had their lay-off notices withdrawn. The most senior person still subject to layoff, Ms. Allala, has a seniority date of August 16, 2006.

amounts to a proper reduction. (*Zalec v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 853-854. See also *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 631, 637 [Reduction of classroom teaching can be a reduction of a PKS; as long as there is a change in the method of teaching or in a particular kind of service in teaching a particular subject any amount in excess of the statutory minimum may be reduced]; *California Teachers Assn. v. Board of Trustees* (1982) 132 Cal.App.3d 32.)

(B) The services to be discontinued by the District in this case are particular kinds of services within the meaning of 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. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949. (See *Campbell Elementary Teachers Association, Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 808.) This Conclusion is based on Factual Findings 3 through 7 and the foregoing authorities.

3. (A) A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated 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.) At the same time, junior teachers may be given retention priority over senior teachers—may "skip" that senior employee—if the junior teacher possesses superior skills or capabilities not possessed by their more senior colleagues. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Governing Bd. of Santa Clara Unified School Dist.* (1981) 116 Cal.App.3d 831.)

(B) The District properly skipped a number of employees based on their qualifications. No Respondent established the right to displace a senior employee. This Conclusion is based on Factual Findings 14(B).

(C) No Respondent established at the hearing that they had the right to bump a junior employee.

4. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render, based on Factual Finding 14 (C) and 16.

5. (A) As to the matter of Respondent Montelongo's seniority date, the starting point for measuring seniority is section 44845. It provides that "Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position."

(B) However, section 44848 also speaks to this issue, because it controls the seniority date of persons who resign and are then rehired. It states that when a certificated

employee has resigned, and is thereafter reemployed, his or her date of employment is deemed to be the date when he "rendered paid service . . . after his reemployment."

(C) The parties have argued the effect of section 44931, which speaks to breaks in service of less than 39 months as not adversely affecting the teacher's rights. However, that statute on its face applies to permanent, and not necessarily to probationary, employees. In any event, as pointed out by the District, section 44931 has been interpreted as not reviving an earlier seniority date for a teacher who returns to service, because seniority placement effects, potentially, the rights of other employees. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 641.)

(D) Ultimately, section 44848 and the *San Jose Teachers* case are not controlling, because it must be concluded that the resignation was not effective. It is not effective because it is clear that Respondent Montelongo did not intend to terminate or end her employee relationship with the District, and the District did not intend for that either. Indeed, the District's intent is signaled not just by Ms. Schmitt's statements but by the fact that Respondent went right back to her assignment, as Ms. Schmitt said she would, and Respondent kept her probationary status, as she desired. The parties' real purpose was to "finagle" a short vacation for a valuable employee, and not to terminate the employer-employee relationship. In such circumstances, the resignation is not effective. (*Sherman v. Board of Trustees* (1935) 9 Cal.App. 2d 262, 265-266.)

In *Sherman v. Board of Trustee, supra*, the teacher had worked for the district for three years. Her employer did not approve of the then-new tenure law, and persuaded her to resign, promising her continued employment. She resigned, which resignation was accepted by the district board, and went back to work for another three years after having applied for reappointment. After her sixth year of service, there was a dispute over whether or not she was tenured, and the district asserted the resignation as a break in her contract that barred tenure at that point. The Court of Appeal rejected the board's position, holding that

> "the purported resignation was ineffectual for the reason that it was not made with the purpose of terminating [the teacher's] employment, but on the contrary was presented with the understanding that it was not to terminate her service, but was offered for the mere purpose of avoiding the effect of the tenure law and upon the definite promise that she would be reemployed. . . . A resignation is in the nature of a notice of the termination of a contract of employment and is contractual in nature. It is ineffectual without the intent of the incumbent to sever the relationship of employer and employee."
> (9 Cal.App. 3d at 265-266.)

It is noteworthy that the Court did not find an estoppel, or conclude that the

agreement was illegal because designed to circumvent the tenure law, both possible avenues of attack on the resignation in that case.[7] Instead, the Court looked to the rather fundamental issue of contract.

In this case is it clear that Respondent and the District did not intend to sever the employer-employee relationship, as evidenced by their conduct and the testimony of Respondent. Thus, Respondent Montelongo should be deemed to have a seniority date of August 3, 2006, and she should not be laid off.

ORDER

1. The Accusations are sustained, except as to Respondent Rhobly Montelongo.

2. Notice shall be given to the following Respondents that their services will not be required for the 2008-2009 school year because of the reduction and discontinuance of particular kinds of services:

> Olivia Allala, Carrie Talataina, Aurora Mendoza, Kyla Gonzales, Cheryl Denny, Nichole Cateneso, Martell Olson, Debra Boyd, Angelica Munoz, Tanesha Collins, Elisabeth Bailey, Linda Cordova, Kittie Yonamine, Erica Luke, Nicole Portillo, Bramlett Browne, Alicia Weber, Ashley Guadino, Paul Verduzco, Rebekah Michelson.

3. Notice shall be given to Respondents in inverse order of seniority, with Ms. Allala being the most senior of the Respondents, and Ms. Michelson being the most junior of the Respondents.

May ___, 2008

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

[7] To be sure, there are elements of an estoppel in this case, as Respondent appears to have relied on her supervisor to help solve her problem of starting work two weeks late, but still keeping her job; and she appears to have relied to her detriment. An estoppel may arise from the silence of the party who is to be estopped; an affirmative representation is not required. (*Elliano v. Assurance Co. of America* (1970) 3 Cal.App.3d 446.) However, such a finding or conclusion need not be reached in this case.