

BEFORE THE GOVERNING BOARD OF THE
ANAHEIM UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusations Against:

CERTAIN CERTIFICATED EMPLOYEES,

Respondents.

OAH No. 2011030667

PROPOSED DECISION

Daniel Juárez, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 20, 2011, in Anaheim, California.

Stutz Artiano Shinoff & Holtz, and Jack M. Sleeth, Jr, Esq., and Jeanne Blumenfeld, Esq., represented the Anaheim Union High School District (AUHSD).

Reich, Adell, Crost & Cvitan, and Carlos Perez, Esq., represented Respondents listed in Appendix A.

Respondents Victor Barrios, Michael Avram, and R. Scott Morgan each represented themselves individually.

The parties submitted the matter for decision on April 20, 2011.

FACTUAL FINDINGS

1. Russell Lee-Sung, AUHSD Assistant Superintendent for Human Resources (sometimes hereafter “Lee-Sung”), filed the Accusations in his official capacity.

2. Respondents are presently certificated employees of AUHSD.

3. On March 8, 2011, the AUHSD Governing Board (Governing Board) adopted Resolution 2010/11-HR-04 to reduce and discontinue particular kinds of certificated services no later than the beginning of the 2011-2012 school year. The particular kinds of certificated services total 80 full time equivalent (FTE) positions. The Governing Board further determined that it was necessary because of those reductions or discontinuances to, among other things, decrease the number of certificated employees at the close of the present school year by a corresponding number of FTE positions and directed the Superintendent to notify the appropriate employees to implement the Governing Board’s determination.

4. By March 15, 2011, and pursuant to Education Code sections 44949 and 44955, the Superintendent recommended to the Governing Board that it notify Respondents

that Respondents' services will not be required for the ensuing school year, and inform Respondents of the underlying reasons for such notification.

5. By March 15, 2011, the Governing Board notified Respondents of its determination to terminate Respondents' services for the ensuing school year and the underlying reasons for termination, in accordance with Education Code sections 44949 and 44955.

6. In response to the written notice, each Respondent timely requested a hearing to determine if there is cause to not reemploy him or her for the 2011-2012 school year.

7. AUHSD served the Accusation and other required documents timely on each Respondent.

8. AUHSD offered the seniority list into evidence. The seniority list contains all certificated employees that are members of the teachers' union and are affected by AUHSD's proposed layoff. However, Lee-Sung acknowledged that the seniority list is not a complete list of all AUHSD employees. For example, the seniority list does not contain management positions, or positions held by counselors or teachers in the adult education program, as these employees are not members of the teachers' union

9. Respondents' counsel argued that AUHSD did not meet its jurisdictional requirements in this matter by offering an incomplete seniority list. Respondents' counsel explained that without a complete seniority list, Respondents could not assess whether any of them were improperly displaced. In his testimony, Assistant Superintendent Lee-Sung further acknowledged that in determining which employees to layoff, some management employees, who were former teachers, were returned to teacher positions. In this process, Lee-Sung explained, some of these management employees displaced other non-management employees. Respondents' counsel highlighted this circumstance to emphasize his argument.

10. Respondents did not offer testimony or other evidence of any individual who challenged their layoff by specifically challenging their displacement. No Respondent testified he or she was being displaced, or he or she thought they were being displaced, by a more junior employee, or that, due to the incomplete seniority list, he or she could not conclude whether he or she was being displaced in any improper manner.

11. All jurisdictional requirements were met.

12. Resolution 2010/11-HR-04 reduces or discontinues 80 FTE positions for the 2011-2012 school year.

13. The 80 FTE positions at issue in this matter are particular kinds of services that may be reduced or discontinued within the meaning of Education Code section 44955.

14. The Governing Board's decision to reduce or discontinue the particular kinds of services at issue in this matter was due to the anticipated decline in State funding; the Governing Board's decision was not arbitrary or capricious, but constituted a proper exercise of discretion.

15. The reduction or discontinuation of particular kinds of services related to the welfare of AUHSD and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of AUHSD, as determined by the Governing Board.

16. AUHSD identified the certificated employees providing the particular kinds of services that the Governing Board directed to be reduced or discontinued.

17. The recommendation that Respondents be terminated from employment was not related to their performance as teachers.

18. AUHSD seeks to "skip" the layoff of one respondent, Kerri Fenton (Respondent Fenton). By "skipping" Respondent Fenton, AUHSD seeks to exempt her from layoff.

19. According to Assistant Superintendent Lee-Sung, Respondent Fenton teaches in AUHSD's dance program. Lee-Sung asserted that Respondent Fenton has specialized skills, expertise, and experience to teach dance. Without the specialized services of Respondent Fenton, Lee-Sung asserted that AUHSD's dance program would end.

20. No Respondent asserted through testimony or other evidence that he or she was competent to teach dance for AUHSD. No Respondent contested the assertion that Respondent Fenton has specialized skills, expertise, and experience to teach dance. No Respondent contested the proposed "skipping" of Respondent Fenton.

21. Respondent Roberta Dieter (Respondent Dieter) disagreed with her seniority date of October 15, 2008. She argued that her seniority date should be September 3, 1996.

22. Respondent Dieter began working as a teacher for AUHSD on approximately September 3, 1996, but tendered her resignation in 2007. Before leaving AUHSD pursuant to her resignation, Respondent Dieter asked her school's principal if she would be able to return to AUHSD. The principal informed Respondent Dieter she could return to AUHSD if she returned within 39 months. The principal did not inform her that, upon resigning, she would lose her 1996 seniority date, nor did the principal inform her whether she could have requested a leave of absence instead of resigning. Respondent Dieter did not ask the principal about her seniority date or whether there were leave alternatives to resignation. Respondent Dieter argued that the principal should have informed her of these consequences.

23. Alternatively, Respondent Dieter argued that her seniority date should be October 13, 2008, because this earlier date was when she reported for teaching duty in the

2008-2009 school year, pursuant to the direction of her principal. Respondent Dieter asserted that she started on October 13, 2008, by assisting a long-term substitute teacher in the class she eventually took over. She recalls being paid out of a petty cash fund at an “extra duty pay amount,” but does not recall how much she was paid. Nevertheless, according to Respondent Dieter, her employment contract was not signed until October 15, 2008. At that time, she did not agree that October 15, 2008, was the appropriate start date of her contract, but because she was just beginning her employment again, she felt uncomfortable insisting on the earlier October 13th date, and allowed the October 15, 2008 date to stand.

24. Respondent Heather Gruenthal (Respondent Gruenthal) testified about her concern that AUHSD’s reductions for the 2011-2012 school year will damage AUHSD’s library system.

25. In his direct examination, Assistant Superintendent Lee-Sung explained that AUHSD’s reductions will leave only one librarian for all of AUHSD’s 18 school sites. According to Lee-Sung, while acknowledging that one librarian is far from optimal, the decrease in funding necessitates such a reduction and one librarian will have to travel to each school site and provide the most minimal of services to maintain AUHSD’s libraries.

26. Respondent Gruenthal has been a librarian for AUHSD since September 2000. She described the reduction in librarian services as a mistake. She is dubious that AUHSD will be able to meet library-related program requirements and meet California information literacy standards. Respondent Gruenthal cited Education Code section 18100 et seq. in support of her testimony.

27. Respondent Dale Miller (Respondent Miller) disagreed with his seniority date of November 13, 2007. He argued that his seniority date should be September 4, 2007.

28. Respondent Miller started teaching as a health science teacher for AUHSD in the 2007-2008 school year as a long-term substitute. He offered into evidence an AUHSD “Personnel Request Form” that documented his long-term substitute assignment in health began on September 4, 2007. The form contains the signatures of the “Principal/Program Director,” dated August 21, 2007, and the “Assistant Superintendent Human Resources,” dated August 31, 2007. The form does not contain Respondent Miller’s signature. The form shows Respondent Miller’s “Current Credential or Permit,” as an “Emergency 30-day Permit.” Respondent Miller argued that the Personnel Request Form was an employment contract, but the evidence was insufficient to establish that assertion. He also offered into evidence a “Progress Report Register,” dated October 17, 2007, showing that Respondent was a health teacher on that date. However, the Progress Report Register did not establish that Respondent Miller was a teacher within AUHSD or that AUHSD paid him on October 17, 2007. Respondent Miller asserted that he began teaching on September 4, 2007, and had no break in service thereafter. He presented no documentary evidence of payment.

29. Respondent Victor Barrios (Respondent Barrios) is a teacher in the AUHSD adult education program. His seniority date is September 7, 2004. Respondent Barrios has a Clear Crosscultural, Language and Academic Development Certificate (issued on July 1, 2003), and a Clear Single Subject Teaching Credential in Physical Education (valid through July 1, 2012). He argued that he should be able to transfer into the regular (kindergarten through 12th grade) education program based on his credentials. Respondent Barrios also argued that his ability to present an adequate defense was inhibited by the lack of legal representation. Assistant Superintendent Lee-Sung acknowledged that if Respondent Barrios were not in the adult education program, but in the regular education program, given his credentials and seniority date with AUHSD, it was probable that Respondent Barrios would not be subject to lay-off.

30. Respondent Barrios argued that his seniority date should be the beginning of the 2001-2002 school year, however, he could not establish a specific date, nor did he have any persuasive evidence establishing a first date of paid service in the 2001-2002 school year.

31. Respondent Michael Avram (Respondent Avram) is a teacher in the AUHSD adult education program. He argued that due to his credentials and seniority date, he should be able to transfer to the regular education program. In his Notice of Defense, Respondent Avram asserted that he began teaching in AUHSD on approximately September 8, 1998, although in a separate document from Respondent Avram to Lee-Sung, dated February 28, 2011, Respondent Avram asserted that he began teaching adult education in 1993. He holds a Clear Standard Secondary Teaching Credential in Health Science and Physical Education, and Clear Supplementary Authorizations in Biological Sciences, Introductory English, and Computer Concepts and Applications (issued January 11, 2000). Respondent Avram further argued in his Notice of Defense, that AUHSD acted deceptively in establishing his job classification, and noted that his ability to present an adequate defense was inhibited by the exclusion of adult education teachers from the AUHSD's teachers' union. The evidence did not establish any deception on the part of AUHSD in establishing Respondent Avram's job classification.

32. Respondents Barrios, Avram, and R. Scott Morgan (Respondent Morgan) presented a collective argument regarding the elimination of the adult education program. Respondent Morgan is a teacher in the AUHSD adult education program. Respondent Morgan presented the three Respondents' collective argument. Assistant Superintendent Lee-Sung testified that the proposed reductions will completely eliminate the adult education program. Respondents Barrios, Avram, and Morgan acknowledge that the statewide financial difficulties require drastic reductions. However, they question whether the adult education program should be completely eliminated. Respondent Morgan described the numerous benefits of the adult education program and asserted their collective concern that without the program, many adults will have no access to education. Respondent Morgan has contributed a great number of unaccounted-for hours in preparing to teach and in teaching students. He has given of his free time to AUHSD and his students and explained that by

AUHSD's layoff action, he feels the three adult education respondents and their program are improperly expendable and underappreciated.

33. The parties agreed that Respondent Bruno Preciado's correct seniority date is August 27, 2009, and that his status is probationary II.

34. No certificated employee junior to any Respondent was retained to render a service that any Respondent is certificated and competent to render.

LEGAL CONCLUSIONS

1. AUHSD bears the burden of proof by a preponderance of the evidence.

2. Respondents' argument regarding the incomplete seniority list was unpersuasive. By offering the seniority list of all certificated employees within the teachers' union who were affected by the layoff process, AUHSD met its requirements. Respondents provided no evidence that any Respondent required a more complete seniority list to prepare his or her defense. No Respondent challenged their displacement in a manner that would have required a more complete seniority list. As such, AUHSD's seniority list was sufficient evidence.

3. The parties met all notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955.

4. It is appropriate to amend Respondent Bruno Preciado's seniority date to August 27, 2009.

5. Education Code section 44955, subdivision (d)(1) provides that a school district "may deviate from terminating a certificated employee in order of seniority" when the school district "demonstrates a specific need for personnel to teach a specific course or course of study . . . and that the certificated employee has special training and experience necessary to teach that course."

6. AUHSD provided evidence, albeit limited, of the special training and experience of Respondent Kerri Fenton. No Respondent contested the proposed skip. There was no evidence that any other Respondent more senior than Respondent Fenton had the training, experience, or credentials to teach dance. AUHSD established that it has a specific need for dance instruction and that Respondent Fenton has that training and experience. Considered in total, the evidence constituted a preponderance of the evidence sufficient to sustain her proposed skipping.

7. Respondent Dieter's argument to change her seniority date to September 3, 1996, was unpersuasive. AUHSD was under no obligation to advise her of the consequences her resignation would have on her seniority date, or of alternatives to resignation. Upon resigning, Respondent Dieter lost her initial employment date with AUHSD, in accordance

with the law. While Respondent Dieter's circumstances are unfortunate, the law is nonetheless clear. Education Code section 44848 provides that, "[w]hen any certificated employee shall have resigned . . . and shall thereafter have been reemployed by the board, his date of employment shall be deemed to be the date on which he . . . rendered paid service after his reemployment."

8. Respondent Dieter's argument to change her seniority date to October 13, 2008, was also unpersuasive. Respondent Dieter provided no persuasive evidence of payment or of beginning her teaching services on either October 13 or 14, 2008. Her testimony alone was insufficient evidence to conclude that she worked and was paid for teaching services on either of those dates.

9. Respondent Gruenthal's implicit argument that librarian services should not be reduced as proposed was unpersuasive. Nothing in the Education Code requires any particular ratio of librarians to school libraries. While it is reasonable to be dubious about the ability of one librarian to serve all 18 of AUHSD's school sites, the Governing Board is allowed the discretion to decide whether to reduce or eliminate librarian services. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 718; *Campbell Elementary Teachers Association Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 811-812.)

10. Respondent Miller's argument that his seniority date should be September 4, 2007, was unpersuasive. The Personnel Request Form is not a contract. It does not bear Respondent Miller's signature, and fails to establish payment to him. This document, together with Respondent Miller's testimony, was insufficient to establish an earlier first date of paid service.

11. Education Code section 44929.25 provides that a school district may reduce the services of tenured adult education teachers in accordance with the layoff provisions.

12. Education Code section 44929.26 provides in part, "[n]othing in Sections 44929.20 to 44929.23, inclusive, shall be construed to give permanent classification to a person in the adult school who is already classified as a permanent employee in the day school." The same provision further provides:

Notwithstanding any other provision to the contrary, service in the evening school shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee in the day school Service in the day school shall not be included in computing service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee in the evening school.

13. The Legislature has therefore provided for two distinct teacher categories, day school (kindergarten through 12th grade or regular school) and evening school (adult school). Subject to certain exceptions that are not relevant to this matter, service in one category does not count toward service in the other. Pertinent here, service in the adult

school is not counted toward service in the regular school. Thus, adult school teachers do not have tenure or seniority in regular school and cannot bump into the regular school program and regular school teachers do not have tenure or seniority in adult school and cannot bump into the adult school program.

14. Respondent Morgan eloquently and passionately described the contributions he and the other adult school Respondents have made to the adult school program over their various years of service. However, despite his genuine concern for the adult school students and his and the other Respondents' (Avram's and Barrios's) efforts and contributions to the adult school program, there was no evidence or persuasive legal argument that would prohibit or minimize the elimination of the adult school program, as determined by the Governing Board.

15. The services identified in the Governing Board's resolution number 2010/11-HR-04 are particular kinds of services that the Governing Board can reduce or discontinue under Education Code section 44955. The Governing Board's decision to reduce or discontinue the identified services was not arbitrary or capricious; it was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of AUHSD's schools and pupils within the meaning of Education Code section 44949.

16. AUHSD properly identified the certificated employees providing the particular kinds of services that the Governing Board directed to be reduced or discontinued.

17. 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.)

18. AUHSD established cause to not reemploy Respondents for the 2011-2012 school year; it further established cause to skip the layoff of Respondent Fenton.

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

20. Cause exists to sustain AUHSD's action to reduce or discontinue the full-time equivalent positions set forth in AUHSD's Resolution 2010/11-HR-04 for the 2011-2012 school year, pursuant to Education Code sections 44949 and 44955, as set forth in Factual Findings 1-17, 21-34, and Legal Conclusions 1-4, and 7-19.

21. Cause exists to skip the layoff of Respondent Kerri Fenton for the 2011-2012 school year, pursuant to Education Code section 44955, subdivision (d)(1), as set forth in Factual Findings 18-20, and Legal Conclusions 5 and 6.

ORDER

1. The Anaheim Union High School District shall amend Respondent Bruno Preciado's seniority date to August 27, 2009.

2. With the exception of Respondent Kerri Fenton, the Accusations served on Respondents Michael Avram, Victor Barrios, Justin Buz'Zard, Anita D. Byers, Roberta L. Dieter, Yolanda Flores-Smith, Breysi Garcia, Laura Gonzalez, Heather Gruenthal, Linda Hodgins, William Hoffman, Lauren Klatzker, Marilyn Konowal, Erin McCown, Jennifer Mele, Dale Everett Miller, R. Scott Morgan, Wendy L. Parent, Bruno Preciado, Laura Quan, J. Suzanne Rahn, and Zachary Tilson, providing the particular kinds of services that the Governing Board of the Anaheim Union High School District directed to be reduced or discontinued, are sustained.

3. With the exception of Respondent Kerri Fenton, notice shall be given to Respondents Michael Avram, Victor Barrios, Justin Buz'Zard, Anita D. Byers, Roberta L. Dieter, Yolanda Flores-Smith, Breysi Garcia, Laura Gonzalez, Heather Gruenthal, Linda Hodgins, William Hoffman, Lauren Klatzker, Marilyn Konowal, Erin McCown, Jennifer Mele, Dale Everett Miller, R. Scott Morgan, Wendy L. Parent, Bruno Preciado, Laura Quan, J. Suzanne Rahn, and Zachary Tilson, that their services will be terminated at the close of the 2010-2011 school year.

4. The AUHSD shall "skip," that is, exempt Respondent Kerri Fenton from layoff.

Dated: April 29, 2011

DANIEL JUAREZ
Administrative Law Judge
Office of Administrative Hearings

Appendix A
OAH Case No. 2011030667
Respondents Represented by Reich, Adell, Crost & Cvitan

Buz'Zard, Justin
Byers, Anita D.
Dieter, Roberta L.
Fenton, Kerri
Flores-Smith, Yolanda
Garcia, Breysi
Gonzalez, Laura
Gruenthal, Heather
Hodgin, Linda
Hoffman, William
Klatzker, Lauren
Konowal, Marilyn
McCown, Erin
Mele, Jennifer
Miller, Dale Everett
Parent, Wendy L.
Preciado, Bruno
Quan, Laura
Rahn, J. Suzanne
Tilson, Zachary