

BEFORE THE
GOVERNING BOARD
BENICIA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Termination of Services.

OAH No. N2005030353

PROPOSED DECISION

Administrative Law Judge Stewart A. Judson, State of California, Office of Administrative Hearings, heard this matter in Benicia, California, on April 22, 2005.

Melanie A. Peterson, Esq. represented complainant Shalee Cunningham, the Superintendent of the Benicia Unified School District of the State of California.

A. Eugene Huguenin, Jr., Esq. represented the respondents.

Submission of the matter was deferred to April 25 and extended to April 29, 2005, for the receipt of written argument that was duly filed and marked as complainant's Exhibit 4 for identification and respondents' Exhibit A for identification. The matter is deemed submitted on said date.

FACTUAL FINDINGS

1. Shalee Cunningham (complainant) is the Superintendent of the Benicia Unified School District (the District) and made and filed the accusations in her official capacity as said officer.
2. Each of the respondents is a certificated employee of the District.
3. On March 10, 2005, the Superintendent gave written notice to the Governing Board (the Board) of the District of her recommendation that notice be given to respondents that their services will be terminated at the close of the current school year.
4. On March 14, 2005, the Superintendent gave written notice to respondents of her recommendation that notice be given them that their services will be terminated at the close of the current year and stating the reasons therefor.

5. Respondents timely requested, in writing, a hearing to determine if there is cause for terminating their services for the ensuing school year.

6. Complainant recommended that the following services and programs for the 2005-06 school year be reduced:

K-5	4.0 FTE
Adapted Physical Education	.3 FTE
Art	1.0 FTE
Language Arts	5.0 FTE
Mathematics	4.4 FTE
Physical Education	.2 FTE
Science	2.6 FTE
Social Studies/History	2.0 FTE
Spanish	1.4 FTE
German	.4 FTE
French	.2 FTE
Computer Technology	.2 FTE
Home Economics	1.0 FTE
Transitions (6 th Grade Electives)	.4 FTE

TOTAL 23.1 FTE

7. The services sought to be reduced or eliminated by the District are particular kinds of services within the meaning of Education Code section 44955 and will be reduced or eliminated no later than the beginning of the school year 2005-2006.

8. Complainant avows the reductions are necessitated by a budgetary shortfall for the ensuing school year and that no mandatory services are being reduced below required levels. The District sent out more layoff notices than required. Before establishing its seniority list, the District sought input from its certificated employees regarding their credentials and seniority dates. In determining its needs for the ensuing school year, the Board enacted Resolution No. 04-05-16 containing the criteria to be applied for establishing the ranking of certificated employees with the same seniority date. The criteria awards points to said employees on the following bases:

- A. Credentials, certificates to teach one or more of the following particular programs or provide a particular kind of service:

RATING: +1 (B-CLAD, CLAD, SB 1969 or SB 395)

- B. Special Education Credential

RATING: +2

- C. Number of teaching and/or specialist service credentials in addition to primary credential of current assignment (K-12)

RATING: +1 per credential

9. When applying criterion C, the District awarded one rating (point) per additional teaching and/or service credentials beyond the employee's primary credential of current assignment. In other words, the employee's primary credential of current assignment did not warrant a rating. The District considered all resignations and retirements as attrition and will continue to do so until the Board makes its final decision.

10. The following respondents challenged their seniority dates:

a. Rebecca Dunavent was assigned a seniority date of August 19, 2004. This is her fifth year in the District. She possesses a biological science credential. According to the District's employment records, Dunavent served more than 75% of the 2003-04 school year under an emergency credential. If she were assigned a seniority date for her employment last year, she believes she can "bump" Marcus Tessier, whose seniority date is August 19, 2004 and who teaches sixth grade science this year.

Dunavent is not entitled to credit for her 2003-04 employment in the District because she only possessed an emergency credential. Time spent teaching under an emergency credential may not count toward attainment of permanent status (*Fine v. Los Angeles Unified School District* (2004) 116 Cal.App.4th 1070; *Smith v. Elk Grove Unified School District* (2004) 120 Cal.App.4th 563; *Culbertson v. San Gabriel Unified School District* (2004) 121 Cal.App.4th 1392).

b. Verena Huebner was assigned a seniority date of August 19, 2004. She was employed by the District the previous year under an emergency credential and served more than 75% of the school year as a long-term substitute. She has a credential authorizing her to teach physical science, biological science and a CLAD¹ embedded certificate. She is not entitled to credit for her 2003-04 employment in the District because she only possessed an emergency credential (see citations under Finding 10a).

c. Daniel Biro was assigned a seniority date of August 19, 2004. He was employed the previous school year to teach biology under an emergency credential and served for more than 75% of that school year. As a result, he is not entitled to credit for his 2003-04 employment in the District (see citations under Finding 10a).

11. The following respondents challenged the manner in which criterion C was applied:

¹ Crosscultural, Language and Academic Development.

a. Janet Lord's seniority date is August 22, 2002. She possesses one credential authorizing her to teach introductory English, journalism, psychology and health science. Because she has only one credential, she received no ratings (points) under criterion C. She was awarded one point under criterion A because she also holds a CLAD certificate. Other certificated employees with the same seniority date as Lord are being retained simply because they possess more than one credential and, therefore, were awarded points for each credential beyond their primary credential of current assignment despite the fact that Lord's single credential authorizes her to teach some of the same subjects as they. She challenges the fairness of this criterion.

b. Respondent Sandra Sutter's seniority date is August 22, 2002. She was awarded one point under criterion C though she holds authorizations to teach mathematics, multiple subjects (self-contained classroom), physical science, psychology and literature. As a result, others with the same seniority date are being retained because they possess more than one credential beyond their primary credential of current assignment despite the fact that Sutter's single credential authorizes her to teach some of the same subjects as they.

12. The evidence shows that the District applied the criteria equally throughout its certificated staff. In previous years, the District employed different criteria to those having the same seniority date. As a result, the individual rankings for those with the same seniority date may have been different for those years than their current year's placement.

LEGAL CONCLUSIONS

1. Respondents posture that once having properly ranked employees in a prior year, it is unreasonable and arbitrary to re-rank them in a subsequent year citing *Aebli v. Board of Education* (1944) 62 Cal.App.2d 706.

Education Code section 44955(b) authorizes governing boards to "determine the order of termination solely on the basis of needs of the district and the students thereof." As respondents note in their brief (Exhibit A for identification, p. 2): "The order of termination thus determined ranks employees with the same hire date relative to one another, creating seniority rights vis-à-vis other employees in the group." Respondents omit that the rankings are based upon "the basis of needs of the district and the students thereof" for that year. It cannot reasonably be contended that the needs of the District and the students do not change from year to year. Boards are granted the discretion to determine the needs of the districts and the students thereof on an annual basis. Re-rankings do not affect seniority dates. Accordingly, it is not unreasonable or arbitrary to re-rank employees with the same seniority date on a yearly basis in accord with a board's determination of the needs of the district and the students thereof for the ensuing school year. *Aebli, supra*, is inapposite since it dealt with placing teachers on a salary schedule in a discretionary manner with no statutory authority.

2. Respondents urge that criterion C, adopted by the Board to determine the ranking of those with the same seniority date, is not related solely to the needs of the District and the students thereof. Respondents argue that "applying C to credit pieces of paper

instead of authorizations cannot have served solely the interests of the Districts and its students (Exhibit A for identification, p. 8). Respondents do not argue, nor is there any evidence to establish, that criterion C was applied unfairly or arbitrarily. While the Board is granted broad discretion under Education Code section 44955 when determining the needs of the District and the students thereof, it may not act arbitrarily or unreasonably. It is understandable that respondents might differ with the Board as to what the needs of the District and students will be for the ensuing school year. The evidence, however, does not justify a conclusion that, by enacting criterion C, the Board acted in excess of its authority under section 44955.

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

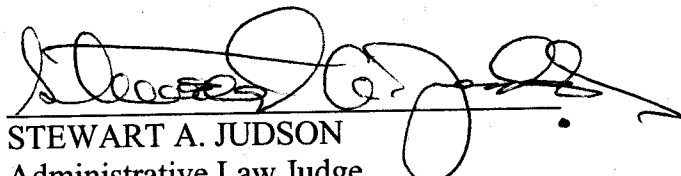
4. Cause exists under Education Code sections 44949 and 44955 for reducing or discontinuing 23.10 FTE positions.

5. Cause for not reemploying 23.10 FTE positions relates solely to the welfare of the schools and the pupils thereof.

ORDER

The District may notify respondents that their services will not be required for the ensuing school year.

DATED: May 6, 2005


STEWART A. JUDSON
Administrative Law Judge
Office of Administrative Hearings