

BEFORE THE  
GOVERNING BOARD OF THE  
McKINLEYVILLE UNION SCHOOL DISTRICT

In the Matter of the Accusation Against:

JENNIFER ADAMS,

OAH No. N2007030991

Respondent.

**PROPOSED DECISION**

On April 20, 2007, in Eureka, California, within the facilities of the Humboldt County Office of Education at 901 Myrtle Avenue, Eureka, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter.

Stephen L. Hartsell, Attorney at Law of School and College Legal Services of California, 901 Myrtle Avenue, Eureka, California 95501-1219, represented Superintendent Alan W. Jorgensen.

Paul Hagan, Attorney at Law of Bragg, Perlman, Russ, Stunich, Rudolph & Eads LLP, 434 Seventh Street, P. O. Box 1248, Eureka, California 95502-1248, represented Respondent Jennifer Adams.

On April 20, 2007, the parties submitted the matter and the record closed.

**FACTUAL FINDINGS**

1. On April 4, 2007, in his official capacity, Alan W. Jorgensen, Superintendent (the Superintendent), McKinleyville Union School District (the District), made and filed the Accusation regarding Jennifer Adams (Respondent Adams).
2. Respondent Adams is a fully credentialed and certificated employee of the District. The District extends designation to Respondent Adams as a permanent teacher.
3. On February 14, 2007, the Superintendent presented the District's Board of Trustees a recommendation that the District give notice that particular kinds of services (PKS), then offered through the District, be reduced or eliminated by the District for the ensuing school year (2007-2008).

4. On February 14, 2007, the District's Governing Board unanimously adopted Resolution No. 06-07-07; however, one board member was absent at the time of the adoption of the resolution.

The resolution recites that, pursuant to Education Code sections 44949 and 44955, it has become necessary for the District to reduce and/or to eliminate, no later than the beginning of the 2007-2008 school year, particular kinds of services in the form of 4.844 full time equivalent (FTE) certificated positions as follows:

2.0	FTE	Kindergarten to 5th Grade Elementary Teaching positions;
0.166	FTE	Math Teacher positions;
2.328	FTE	Teacher positions for electives <sup>1</sup> for grades six to eight; and
0.35	FTE	Resource Specialist Teacher positions.

5. By a letter, dated March 12, 2007, the District's Superintendent dispatched preliminary notices to a number of FTE position holders, including Respondent Adams, that the District's Board of Trustees had an intention to reduce or to eliminate the particular service provided by each person who received the notice. Hence, due to the prospective elimination or reduction of the particular kind of service now rendered to the District, Respondent Adams learned the District would not reemploy her in the certificated position she had worked over the past school year.

Also the letter, dated March 12, 2007, which had attached to it the Board's resolution and other pertinent documents, conveyed to Respondent Adams that no certificated employee of the District having less seniority than Respondent Adams would be retained for the 2007-2008 school year to render a service that she was credentialed and competent to render to students under the District's competency criteria.

However, the letter was not personally served by the Superintendent on Respondent Adams until Tuesday, March 13, 2007.

6. The written preliminary notice to Respondent Adams from the Superintendent and the Governing Board's resolution set out legally sufficient reasons of the Governing Board's intent to eliminate the elementary school teacher position held by Respondent Adams.

7. Respondent Adams timely requested in writing a hearing to determine whether or not cause exists for not reemploying Respondent Adams for the ensuing school year.

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<sup>1</sup> The electives to be eliminated include: 0.322 FTE in Print; 0.664 FTE in Success; 0.5 FTE in Fine Arts; 0.5 FTE in Intervention, and 0.332 in Academic Support.

8. Certificated employee Holly Matthews Sexton filed a Notice of Defense by which she expressed a desire to contest the District's layoff action against her. However, before the date of the hearing, Ms. Sexton withdrew her request for a hearing under terms of a settlement agreement.

9. The Superintendent timely served upon Respondent Adams the Accusation, dated April 4, 2007, and related documents. Respondent Adams filed timely a notice of defense.

10. All pre-hearing jurisdictional requirements were met.

11. Alan W. "Skip" Jorgensen (the Superintendent), in his capacity as the Superintendent, offered evidence at the hearing.

The Superintendent established that the prospective elimination of particular kinds of services for the 2007-2008 school year directly results from a prospective shortfall in money for the District's budget. Moreover, there were teachers, with lengthy seniority with the District and during the current school year have worked in job-share positions, who have expressed a desire to return to full-time teaching positions during the ensuing school year. In order to partially aid the District in crafting a reasonable budget for the ensuing school year, the District's Superintendent recommended that certain certificated positions be eliminated due to lack of funds as well as lack of adequate work for the current number of teachers within District schools. Also, the prospective elimination of particular kinds of services is due to the declining pupil census for the District for the ensuing school year because the enrollment has fallen over the past three years from 1,584 students to 1,211 students for the current school year.

12. The Superintendent further established that on learning that the District was required to initiate layoff proceedings for teacher employees of the District, the Superintendent, with his staff, took steps to develop the District's seniority list for the District's teachers.

The Superintendent attended to identifying the District's teachers who were District teachers. He studied teachers' records and set forth on the District's seniority list dates calculated as the hire dates or first date of paid service for each teacher of the District.

On March 8, 2007, the Superintendent caused to be delivered to teachers, who were affected by the Board's resolution, notices to affected permanent and probationary teachers that their services would not be needed by the District for the next school year.

13. Although he is not an expert in the area, the Superintendent is familiar with the certification requirements by the California Commission on Teacher Credentialing (CTC) for issuance of a credential or authorization for a teacher to provide instruction



to English language learners in this state. The Superintendent showed that individual teachers in grades kindergarten through grade twelve who have one or more English language learners (ELL) in the teacher's classroom are required by CTC<sup>2</sup> to be ELL certified.

14. The Superintendent noted that on February 8, 2006, the Governing Board voted to adopt for the District a deadline date of January 1, 2007, for certificated employees to meet the California ELL certification requirements.

On February 14, 2006, the Superintendent issued a memorandum, whose subject was titled "California English Language Learner Certification." The memorandum set out, in pertinent part:

The approval of AB 2913 by the California Legislature in 2005 has provided the opportunity for an additional six-month period for teachers to earn the English Language Learner Certification.

As a result of the legislation, [the District's Governing Board] has approved January 1, 2007, as the date that certificated staff of the district are required to have the ELL Certificate. This is an extension to the earlier date of June 30, 2006, established as a result of the 2004 ELL Compliance Review. Individuals who have not earned the certification by January 1, 2007, risk being exposed to layoff for the 2007-2008 year.

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<sup>2</sup> The Superintendent offered that the CTC Internet's site that pertains to requirements for teachers of English learners includes the following:

ELs identified in K-12 . . . public schools in California are required to receive services designed to meet their linguistic and academic needs based on assessments made by the local employing agency. An appropriately authorized teacher for ELD and academic content instruction is required. The state laws do not specify exemptions for a small or particular number of ELs in a class, for a subject area such as elective classes, nor for a type of setting such as special education or vocational.

There is no numerical trigger and no percentage of students needing particular English learner services that determines a misassignment. If one or more of the students in the class needs English learner services or requires instruction in a subject area, the teacher providing the English learner services must hold an appropriate English learner credential or authorization.

Certificate is required on the date when a teacher is assigned to provide instructional services to an EL student or sooner if it is required by the employer.

....

For those who have completed a class, do not forget the requirement to file for certification with [CTC]. [CTC] will then approve and update your credential status.

15. During the immediate past school year, the Board has found that the District faces a prospective budget shortfall in that the amount of funding from the State of California may be markedly reduced for the upcoming school year. Hence, the Board has determined that sufficient money is not available to operate the same number of teacher positions and programs during the ensuing school year so that the District must prospectively reduce or eliminate a number of FTE of particular kinds of services, including the position held by Respondent Adams.

16. Under the proposed layoff action, Respondent Adams's 1.0 FTE teacher position as a middle school teacher of elective subjects will be eliminated.

17. The Superintendent noted that for the ensuing year the District will retain Ms. Carole Meng, who is junior to Respondent on the seniority list, to teach elementary school classes, for which Respondent Adams is also qualified to teach, except that Respondent Adams did not cause to be filed with the State of California Commission on Teacher Credentialing (CTC) until after March 15, 2007, an application for issuance of specialized credential under the English language learner law and regulations.

#### *District's Bases to Proceed Against Other Certificated Employees*

18. Except for the position held by Respondent Adams, the District's proposed elimination or discontinuation of a number of FTE positions, for the ensuing school year is related to the welfare of the District and its overall student population.

#### *Respondent Adams's Contentions and Arguments*

19. Respondent Adams contends the District's action is procedurally defective and improper insofar as the prospective layoff of the subject credentialed employee does not fully account for her seniority in light of the District's retention of teacher, Ms. Carole Meng, who is junior to Respondent Adams.

Respondent Adams contends she exerted good faith efforts to comply with the District's directive that all teachers, who have English language learners (ELL) in a classroom, make application for, and secure, an ELL credential or authorization. She contends that District's personnel erred when they failed to thoroughly instruct her that she was duty bound to deliver to CTC office in Sacramento an application for the ELL credential before March 15, 2007. Respondent Adams further contends that the District had ample notice before the dispatch of the preliminary layoff notices that she had completed the examination process that rendered her eligible to procure an ELL

certification and that District personnel were obligated to have her prospective receipt of an ELL credential reported on the District's seniority list. Hence, Respondent Adams avers the District erred when it did not provide her with a correct description of a pending credential application on the District's seniority list that would have enabled the District to retain her services for the ensuing school year in light of the fact the District has determined to reemploy another teacher—Ms. Meng—who has supposedly only filed in February 2007 her application for an ELL authorization with CTC. Additionally, the other teacher—Ms. Meng—has a first date of paid service to the District which is one year, six days after the date of hire of Respondent Adams and the junior teacher lacks proof that CTC has actually issued her either a CLAD or an ELL certificate or other proof the CTC deems Ms. Meng to have passed the CTEL (California Teachers of English Learners) or similar examination.

The contentions and arguments by Respondent Adams are persuasive. The weight of the evidence establishes that the Superintendent has not met his burden of proof so as to sustain the Accusation against Respondent Adams.

*Evidence on Behalf of Individual Respondent Adams*

20. Keith Wayne Adams (Mr. Adams) came to the hearing to offer evidence on behalf of Respondent Adams. By the consistency of his testimony, by his attitude towards the proceedings and by his general demeanor, Mr. Adams showed that he was a credible and compelling witness.

Mr. Adams has been married to Respondent Adams over a 15-year period.

Over the past year, Respondent Adams has discussed with Mr. Adams the importance of her securing an ELL credential relative to her maintaining employment as a teacher with the District.

On Wednesday, March 14, 2007, Mr. Adams traveled to a United States Post Office site to send, via overnight express mail, to CTC offices in Sacramento an envelope that contained a check in the amount of \$55 that was associated with the processing by CTC of test results of the examination as taken by Respondent Adams for issuance to her of a credential under the ELL program.

21. On Monday, March 19, 2007, the California Commission on Teacher Credentialing posted on its Internet site that that licensing agency had received and filed documentation and fees from Respondent Adams that pertained to her application for issuance to her of an ELL certification or authorization.

22. Respondent Adams has a first date of paid service with the District as a probationary-one teacher as of August 21, 1997. She holds a clear, multiple subject credential with supplemental authorizations in English and Computer Information Systems.



Respondent Adams teaches at McKinleyville Middle School. Her primary assignment for the current year is a CORE teacher. (CORE consists of subjects in language arts, reading and social studies.) Also Respondent Adams instructs seventh grade and eighth grade elective programs, which consists of technology and print media. In the past, she has taught academic support and sixth grade CORE. During her first year of employment with the District, Respondent Adams had an assignment in a self-contained elementary school class at a different school site in the District.

23. Respondent Adams offered credible and persuasive evidence at the hearing of this matter. By her demeanor, the consistency of her manner and presentation and her attitude towards the proceeding, Respondent Adams established that she was a credible<sup>3</sup> and reliable witness.

A "couple of years ago," Respondent Adams learned that the District had a policy for teachers to become qualified as ELL teachers. In 2005 or 2006 Respondent took a 15-week course with the Humboldt County Office of Education so as to acquire the ELL authorization. With her first attempt with the test, she did not pass all parts of the ELL examination. Her career progress was delayed due to a pregnancy in 2006. During her maternity leave, Respondent Adams learned that the District had a policy that teachers were required to pass the ELL examination and to become certified.

In December 2006, Respondent passed the ELL examination. On January 19, 2007, Respondent Adams received, via mail, the official news that she had passed the ELL examination.

24. Within a few days of gaining possession on January 19, 2007, of the ELL examination results Respondent Adams personally delivered the test results to the District's administrative office employee/personnel clerk, Ms. Lisa Jones, who copied the original ELL test results document. Respondent believed that when she presented the District with the test results from the ELL examination that she had effectively satisfied the District's policy of meeting a deadline for setting about to acquire the ELL credential.

Neither Ms. Lisa Jones nor any other District office personnel instructed or informed Respondent on or shortly after January 19, 2007, that the District required her to effect another step so as to cause the District's seniority list to reflect that Respondent Adams had, or was eligible to secure, an ELL credential. That additional step, under District guidelines, contemplated that the affected teacher would cause the test results to be mailed to and filed at the CTC office in Sacramento.

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<sup>3</sup> Government Code section 11425.50, subdivision (b), third sentence.

25. On March 12, 2007, in a meeting with the Superintendent, Respondent gained an understanding that the District required CTC actually to receive a teacher's ELL examination results and further that CTC must show on its Internet site the filing of the ELL results.

On March 12 or March 13, 2007, Respondent Adams "down loaded" an application form, completed the form, wrote a check for \$55 as the costs for CTC to process the credential application and deposited the documents into an envelope that was addressed to the CTC office in Sacramento. (On March 13, 2007, she received by personal delivery the letter that gave her preliminary notice of the layoff action that affected her future with the District.) On March 14, 2007, the husband of Respondent Adams paid postage for express mailing of the material to CTC in Sacramento.

On Monday, March 19, 2007, the CTC placed on its Internet site an announcement of its receipt from Respondent Adams of her application for issuance of an ELL credential certificate.

26. The District erred in failing to carefully analyze the extant personnel file that pertains to Respondent Adams and to record on the seniority list that Respondent Adams possessed test results and filed such documents and fees with CTC as to gain the ELL credential. Hence, within the meaning of Education Code section 44949, subdivision (c)(3), the District's procedural error was not "nonsubstantive," and such District neglect manifested as prejudicial error that adversely impacted Respondent Adams.

The District's failure to carefully study, analyze and weigh the District's own personnel file that pertained to Respondent Adams is a substantive error that necessitates dismissal of the Accusation against her.

#### *Additional Findings*

27. On March 14, 2007, when the Governing Board adopted Resolution No. 06-07-08, which prescribed the reduction or elimination of particular kinds of services, the Governing Board did not adopt a companion resolution that prescribed competency criteria for skipping of junior certificated employees over teachers who occupied higher ranking on the District's seniority list.

28. Ms. Carole Meng has a first date of paid service to the District on August 27, 1998, which is one year, six days after the date of hire for Respondent Adams by the District. Ms. Meng has a multiple subject credential. (Respondent Adams also has a multiple subject credential, but in addition she has supplemental authorization in English and Computer Information Systems.) In February 2007, CTC recorded on its Internet site that the application and fees for issuance of an ELL credential had been received from Ms. Meng. (On March 19, 2007, CTC announced on its Internet site its receipt of the application and fees by Respondent Adams for an ELL credential.)



Ms. Meng does not possess a CLAD. Nor does Respondent Adams hold a CLAD certificate. Both teachers have made application for an ELL credential, but the Superintendent offered no documentary proof that the junior teacher, namely Ms. Meng, actually holds an ELL certification.

The District filed no accusation against Ms. Meng so as to eliminate or reduce her services to teach under a Multiple Subject credential.

29. Because Respondent Adams has filed, like Ms. Meng, an application for an ELL and CTC notes receipt of the document necessary for such authorization, and because she holds a Multiple Subject credential and was hired more than one year before Ms. Meng's first date of service to the District, Ms. Meng is not senior to Respondent Adams insofar as competency may be determined.

30. As to Respondent Adams, the recommendation of the Superintendent and the Board's decision to eliminate or discontinue the 1.0 FTE position teacher who provides elective subjects were arbitrary or capricious. The Superintendent's recommendation and the Board's decision were not within the proper exercise of the District's discretion.

#### *Ultimate Findings*

31. Respondent Adams provided competent evidence that the District has retained a teacher junior to her for which Ms. Adams is currently competent to teach and for which she is entitled to possess a credential.

32. The District's layoff action against Respondent Adams was erroneous and must be reversed.

#### LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955.

2. The District provided all notices and other requirements of Education Code sections 44949 and 44955. This conclusion of law is made by reason of the matters set forth in Factual Findings 1 through 10, inclusive.

3. Education Code section 44955, subdivision (b), establishes that no certificated employee of a school district may be laid off if another employee with less seniority is retained to render a service that the noticed employee is "certificated and competent to render."

The District contends that its seniority list showed Respondent Adams to hold neither an ELL credential nor a CLAD certificate. The District further contends that Respondent Adams provided the CTC on too late a date to authenticate information to correct the District's seniority list that she had timely filed an application for an ELL credential. Hence, the District's Superintendent believed discretion could be exercised to issue the preliminary decision to give Respondent Adams notice that her teaching services would not be retained for the ensuing school year.

The District seems to rely on *Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796, and *Fine v. Los Angeles Unified School* (2004) 116 Cal.App.4th 1070, to support the proposition that the District cannot be held responsible for refusing to grant Respondent Adams the protective graces of seniority status by reason of her existing credentials and years of service to the District and its students. The District's position is that, even though a copy of the test results that made Respondent Adams eligible for an ELL credential existed in the personnel file, Respondent Adams did not perform a step of filing the test results along with a form application and processing fees with CTC's office in Sacramento.

*Degener v. Governing Board* (1977) 67 Cal.App.3d 689, does establish that after-acquired credentials, which are filed after the date of mailing of a preliminary layoff notice, need not be considered by a school district in crafting the seniority list for the use in a layoff action. But, neither *Campbell Elementary Teacher, supra*, 76 Cal.App.3d 796, nor *Fine v. Los Angeles Unified, supra*, 116 Cal.App.4th 1070, supports the District's refusal to acknowledge the credentials held by Respondent Adams.

The effect of a teacher's failure to obtain, hold or file a proper credential in a timely manner is governed by *Campbell Elementary Teachers Assn. v. Abbott, supra*, 76 Cal.App.3d 796. In that decision, a teacher caused the proper recordation of a critical credential one day after the *final notice* that she has been laid off by the governing board of the teacher's employing school district. The *Campbell* court set out, "[t]he governing board is not to be held responsible for the fact that [the affected teacher] recorded her credential *after all notices had been sent, a hearing held, and a decision rendered.*" (Emphasis added.)

*Fine v. Los Angeles Unified School District, supra*, 116 Cal.App.4th 1070, dealt with a teacher who began work under an emergency teaching permit but who in a subsequent year of employment secured a credential. The essence of the *Fine* court's holding was that the employing school district had no duty to classify the teacher as probationary to a date retroactive to the actual validity date of the credential. The basis of the result in the *Fine* opinion was that a necessary requisite for a teacher's service is the registration of a teaching credential. Thus "a teacher serving under an emergency permit continues to serve under that permit, and under the contract to which she agreed, until the teacher is issued a credential and registers it with the District." (*Fine, supra*, 116 Cal.App.4th at 1078.)



In another appellate court decision, the court noted a teacher was too late when the teacher filed a credential on a date six months after the layoff hearing was held, the ALJ had recommended layoff as to 60 percent of a full-time position, and the board had reduced him to 40 percent of a full-time position. (*Daux v. Kern Community College District* (1987) 196 Cal.App.3d 555, 568.) Such a six-month delay in presenting a credential that showed the affected teacher's capability to teach a particular subject was a practice condemned as overly burdensome to the District's ability to manage its costs of teacher personnel.

In the afore-cited appellate court decisions, the affected teacher presented the employing school district with a credential after the administrative hearing and after the issuance of a final layoff notice by the governing board of the school district. In the important decision of *Campbell Elementary Teachers Association v. Abbott, supra*, 76 Cal.App.3d 796, the County Office of Education, through a clerical error, had never registered the affected teacher's classroom teacher's credential, and hence the governing board could not be charged "with information which it did not have and was not responsible for recording." (76 Cal.App.3d at 814.)

In this matter, in January 2007 the District received from Respondent Adams a copy of test results that showed her to be eligible to hold an ELL credential. Thereafter, during January 2007, Respondent Adams had personally delivered the original of the test results to the District office where a copy was filed and then made a part of the personnel file for Respondent Adams. Respondent Adams met the burden of recording documentary proof of her eligibility or entitlement to issuance by CTC of an ELL credential. Contrary to the facts in the *Campbell Teachers Association* decision, Respondent Adams did not record "her credential after all notices had been sent, a hearing held, and a decision rendered." (76 Cal.App.3d at 815.) Here, due to scant instruction or prompts from District personnel, Respondent comprehended and became fully aware only on March 12, 2007, that the ELL test results had to be mailed by her to CTC offices in Sacramento and that receipt of the test results needed to appear on the CTC Internet site.

Respondent is unduly burdened by the District's guideline, which discounts her seniority status, that calls for an entry on the seniority list of her eligibility for an ELL certificate to hinge on the receipt by CTC of a check and standard form for the processing of the credential. The inequity is intensified by the fact that Respondent Adams dispatched, via express mail, the requisite material to CTC within one day after the date she received the preliminary notice, which was a date about five weeks before the hearing in this matter.

Here, the error, if any, by Respondent Adams was that she presented then recently procured test results, which was prima facie indicia of her entitlement to the ELL credential to a District's personnel officer in January 2007, which was nearly two months before the dispatch of the preliminary layoff notice. Respondent Adams



prompted her husband to send, via express mail, to CTC the test results on March 14, 2007, which was one day after she received the preliminary layoff notice. But the weight of credible evidence shows that the District's file contained the adequate documentary indicia of Respondent's eligibility to acquire an ELL credential and that District personnel failed to adequately instruct or prompt Respondent Adams of the need for her to mail the documents to CTC. And District personnel overlooked or ignored the copies of the tests results that showed proof of respondent's entitlement to issuance of the ELL credential.

Although the law has long recognized that where competency is not demonstrated by a senior employee, a junior employee who has the ability to service the needs of a school district program may be retained by a school district even though such action may result in the senior employee, who lacks such competence, being terminated. (*King v. Berkeley Unified School District* (1979) 98 Cal.App.3d 1016, 1023; *Moreland v. Kurze* (1980) 109 Cal.App.3d 648, 655.) However, a district's action to skip junior teachers over teachers with greater seniority must be carefully and deliberately implemented. (*Alexander v. Board of Trustees* (1982) 139 Cal.App.3d 567.) The paramount rule is that no person may be terminated while someone junior to that person is to be retained by a school district to perform a service that the senior employee is certificated and competent to render. (Ed. Code § 44955.)

The District bears a duty to carefully analyze its own records (that is, personnel files of certificated teachers) in crafting seniority lists that serve as a tool in layoff notices than was shown by the District in this instance of Respondent Adams.

4. Cause does not exist pursuant to Education Code sections 44949 and 44955 to give Respondent Adams notice of the discontinuation of full-time equivalent positions in the particular kinds of services rendered by Respondent Adams, by reason of the matters set out in Factual Findings 20 and 22 through 32 inclusive.

#### ORDER

1. The Accusation is dismissed as to Respondent Jennifer Adams.
2. Final notice may not be given to Respondent Adams that her services will be eliminated for the 2007-2008 school year because of the reduction or discontinuance of the particular kinds of services by the District.

DATED: May 4, 2007



PERRY O. JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings