

BEFORE THE
GOVERNING BOARD OF THE
BUENA PARK SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Certificated Employees of the Buena Park
School District,

Respondents.

OAH Case No. 2010030604

PROPOSED DECISION

Administrative Law Judge Susan L. Formaker of the Office of Administrative Hearings heard this matter on April 12, 2010, in Buena Park, California.

Aaron V. O'Donnell of Atkinson, Andelson, Loya, Ruud & Romo represented Greg Magnuson (Magnuson), Superintendent of the Buena Park Unified School District (District).

John F. Køhn, Staff Attorney, Department of Legal Services, California Teachers Association, represented the Respondents listed on Exhibit A, which is incorporated herein as if set forth in full. Respondents Nae Cho (Cho), Roya Ghanea, and Deborah Treadway were not represented by counsel at the hearing and did not appear.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision on April 12, 2010.

FACTUAL FINDINGS

1. Barbara Montelongo, Director of Human Resources for the District, acting in her official capacity and through authority delegated to her by Magnuson, caused all pleadings, notices and other papers to be filed and served upon Respondents pursuant to the provisions of Education Code sections 44949 and 44955.

2. Respondents are certificated employees of the District.

3. On February 23, 2010, the Governing Board of the District (Governing Board) adopted Resolution Number 09-15, reducing 38 full-time equivalent (FTE) positions for the 2010-2011 school year, in the following services:

1. Kindergarten through Grade 6 Elementary Classroom Instruction – 13.0 FTE

2. Junior High (Grades 7 – 8) Science Instruction – 1.0 FTE
3. Junior High (Grades 7 – 8) History Instruction – 1.0 FTE
4. Junior High (Grades 7 – 8) Math Instruction – 2.0 FTE
5. Junior High (Grades 7 – 8) English Instruction – 3.0 FTE
6. Elementary Resource Specialist Instruction – 1.0 FTE
7. Music Instruction – 1.0 FTE
8. Elementary Physical Education Instruction – 1.0 FTE
9. Registered Nurse Services – 2.0 FTE
10. Assistant Principals – 3.0 FTE
11. School Counselor Services – 1.0 FTE
12. School Readiness Coordinator – 1.0 FTE
13. Teacher on Special Assignment (Response to Intervention) – 2.0 FTE
14. Prevention-Intervention Instruction – 6.0 FTE

4. Pursuant to Resolution Number 09-15, the term “competency” as described in Education Code sections 44955, subdivision (b), 44956, and 44957, for the purposes of “bumping” and rehire rights, “shall necessarily include possession of a valid credential in the relevant subject matter area, an appropriate EL authorization (if required by the position), and experience in the position or assignment within the last five (5) years.”

5. Subsequent to adoption of the Governing Board’s Resolution, the District identified vacancies for the 2010-11 school year due to any positively assured attrition (confirmed resignations or retirements) and release of temporary certificated employees. Such attrition and release of temporary employees was taken into consideration in determining the order of layoff.

6. On or about March 8, 2010, Magnuson notified the Governing Board that he recommended that notice be provided to Respondents that their services will not be required for the 2010-2011 school year due to the reduction of particular kinds of services.

7. On or before March 15, 2010, the District provided notice to Respondents and the temporary employees identified as providing services slated for reduction (referred to in the Accusation as Precautionary Respondents) that their services will not be required for the 2010-2011 school year due to the reduction of particular kinds of services. A total of 48 certificated employees were served with preliminary notices of layoff. The District provided notice to the temporary employees in the event any of them challenged their status as temporary employees; the District also provided the temporary employees with notifications of nonreelection and release from employment.

8. All Respondents other than Elli Kambouris (Kambouris), Scott Magnin, and Akiko Tanaka filed timely requests for hearing. The District stipulated to waiving these three Respondents' failure to have requested a hearing for jurisdictional purposes.

9. On or about March 29, 2010, the District filed and served the Accusation. The District stipulated to waiving Respondent Hoa Nguyen's late submission of a notice of defense. While Respondents Georgina Bacchous and Laura Uruburu submitted requests for hearing, they did not submit notices of defense; because these Respondents were represented by Respondents' counsel and the District did not object to their participation in the hearing, the District is estopped from raising their failure to have submitted notices of defense. Diane Cavenee, Sarah Conlin, Hector Galicia, Carrie Gaston, Vanessa Gomez, Miyuki Hernandez, Angela Hidalgo, Seri Lee, Catalina Sanchez, Polyn Spirtos, and Julie Woo neither submitted requests for hearing nor submitted notices of defense; they thereby waived any right to a hearing and are not considered Respondents in this matter.

10. The parties stipulated that all prehearing jurisdictional requirements have been met.

11. The services set forth in Finding 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.¹

12. The decision to reduce the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion. The decision to include competency requirements, as set forth in Finding 4, for "bumping" rights likewise is not arbitrary or capricious and is a proper exercise of the District's discretion.

13. The reduction of services set forth in Finding 3 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 Governing Board.

¹ All further references are to the Education Code.

14. The District maintains a seniority list (Exhibit 13) which contains employees' names, seniority dates (first date of paid service), indications as to whether employees are probationary, tenured, or temporary, and current assignments, credentials, authorizations, and FTE. Certificated employees were provided the opportunity to review the list and confirm its accuracy, and the District modified the seniority list to take account of information provided by employees that was verified by the District.

15. At the hearing, the parties stipulated that Adrienne Wood (Wood) and Leona Kendall (Kendall) both have seniority dates of August 21, 2000, rather than the listed dates of August 28, 2000, based upon their having been paid to participate in a "Good Start" four-day orientation program prior to the start of classes in the 2000-2001 school year. These changes placed Wood and Kendall above Eva Araujo (Araujo) on the seniority list. Aside from Wood's and Kendall's movement above Araujo on the seniority list, the remaining order on the seniority list for all employees with seniority dates of August 28, 2000, or later, remained the same. No Respondents other than Wood and Kendall provided any information that changed their seniority dates or status.

16. On February 23, 2010, the Governing Board adopted Resolution 09-14 (Exhibit 12, Exhibit D thereto) setting forth criteria to break ties in seniority among certificated employees with the same first paid date of probationary service. Resolution 09-14 includes 17 different criteria (in paragraphs numbered 4 through 20 of the resolution), prioritizing types of credentials, certifications, qualifications, authorizations, and training, types and years of experience, education and degrees, and date of issuance of first credential. If a tie continued to exist, a lottery would be held to break the tie.

17. In creating the seniority list, the District applied each one of the tie-breaking criteria in order, one step at a time, as needed, with respect to teachers with the same first date of paid service on or after August 28, 2000. Going down the list of criteria, if no employee under tie-breaking consideration could satisfy a particular criterion, the consideration of the criteria stopped. The lottery number would then come into play only if all the prior tie-breaking criteria did not break a tie in seniority. The District did not apply the tie-breaking criteria to employees with seniority dates prior to August 28, 2000, because no employees with seniority dates prior to August 28, 2000, were subject to layoff; however, the District sent some of those employees the layoff notices set forth in Finding 7 because the tie-breaking criteria had not yet been applied at the time the District provided the notices.

18. Respondents challenged two of the tie-breaking criteria, listed as numbers 10 and 18 on Resolution 09-14, which provided for higher rankings on the seniority list, as among those with the same first paid dates of probationary service, for those with certain types of training and experience. Criterion 10 gave a tie-breaking advantage to those with training and experience in Response to Intervention, a program designed to address the needs of

struggling, at-risk students. Criterion 18 gave a tie-breaking advantage to those with verified participation, service and/or training in the following programs, in order of preference:

- (a) English Language Development Training
- (b) Specialized Training in Working with Special Education Students
- (c) Direct Interactive Instruction Training
- (d) Response to Intervention Steering Committee
- (e) Step Up to Writing Training
- (f) Service to School Site as Tech Lead
- (g) Training and Service to School Site as Data Lead
- (h) GATE Differentiated Instruction Training
- (i) Training and Service to School Site as ELD Lead

Respondents contended that because the District did not establish that the training programs listed in criteria 10 and 18 were provided to all employees, the criteria became subjective and, therefore, arbitrary. However, because the District established that the tie-breaking criteria were based on the needs of the District and the students thereof, the tie-breaking criteria were reasonable and valid. Moreover, in that Respondents acknowledged during the hearing that their order of termination was not affected by application of criteria 10 and 18 (once Wood's changed seniority date was taken into account), their arguments were irrelevant to this proceeding.

19. The tie-breaking criteria were properly applied, and the seniority list is accurate with the changes identified in Finding 15.

20. The District used the seniority list to designate who was proposed to be laid off and who could "bump" less senior employees currently assigned in the various services being reduced. The District then determined whether the least senior employees held credentials in another area and were entitled to "bump" other employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies created from the release of temporary employees and positive assured attrition, and determined the impact on current staff in inverse order of seniority, with probationary employees being proposed for layoff prior to any permanent (tenured) employees. The seniority list designates those employees the District proposes to lay off with a designation "L/O" in the far right-hand "Notes" column, along with an indication of the employee's order of termination for a particular kind of service being eliminated. The District argued that, taking Woods' changed seniority date into account, she should not be designated for layoff and that instead Felicia Clark, who received a layoff notice, should be designated for layoff. The District's contention is correct.

21. During the hearing, the District rescinded the layoff notices, and withdrew the Accusation, as against Cho, Kambouris, and Lisa Whyte, who are therefore not considered

Respondents. The District further stipulated that, if the seniority list, as modified during the hearing, was accepted as correct, the District was willing to withdraw the Accusation as against Respondents Araujo, Mary Biner (Biner), Andrew Osbourne (Osbourne), Kendall, and Wood. Dismissal as to these Respondents is therefore appropriate.

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

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of Findings 1 through 3 and 6 through 10.

2. The services listed in Finding 3 are determined to be particular kinds of services within the meaning of section 44955, by reason of Findings 3 and 11.

3. Cause exists under sections 44949 and 44955 for the District to reduce or discontinue the particular kinds of services set forth in Finding 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of Findings 1 through 22. A District may reduce services 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.)

4. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (§ 44955, subds. (b) and (c); *Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469, 473-474; *Krausen v. Solano County Junior College District* (1974) 42 Cal.App.3d 394, 402.) For purposes of analyzing "bumping" rights, a district may, in its discretion, define the term "competent," as used in section 44955, so long as the competency standard is reasonable. To be reasonable, a competency standard must relate to the skills and qualifications to teach. (See *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 564-567 [definition of competency under parallel statute applicable to community college districts held reasonable because it required one year's full-time teaching in the subject area in the prior ten years].) Junior teachers may be given retention priority over senior teachers if the junior teachers possess special credentials or needed skills, capabilities, or experience which their more senior counterparts lack. (§ 44955, subd. (d) (1); *Santa Clara Federation of Teachers, Local 2393 v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.)

5. In determining the order of seniority among employees who first rendered paid service to the District on the same date, the order of termination shall be “solely on the basis of needs of the district and the students thereof.” (§ 44955, subd. (b).) The District’s tie-breaking criteria met this standard.

6. Cause exists to terminate the services of all Respondents other than Araujo, Biner, Osbourne, Kendall, and Wood by reason of Findings 1 through 22, and Legal Conclusions 1 through 5.

ORDER

The Accusation is sustained and the District may notify all Respondents (other than Araujo, Biner, Osbourne, Kendall, and Wood), in inverse order of seniority, that their services will not be needed during the 2010-2011 school year due to the reduction of particular kinds of services. The Accusation is dismissed as against Araujo, Biner, Osbourne, Kendall, and Wood.

Dated: May 3, 2010

SUSAN L. FORMAKER
Administrative Law Judge
Office of Administrative Hearings