

BEFORE THE GOVERNING BOARD OF THE  
HAMILTON UNIFIED SCHOOL DISTRICT

In the Matter of Accusation Against:

ELLESE BUTTITTA-MELLO, LESLIE  
CARLSEN, FRANK CATOMERISIOS,  
MARIA ESQUIVEL, SANDRA ESTRADA,  
BLANCA GODINEZ, ERICA GORDEN,  
KELLY HENNING, and BETTY MERCADO,

Respondents.

OAH No. 2011031371

**PROPOSED DECISION**

Administrative Law Judge David L. Benjamin, Office of Administrative Hearings, heard this matter in Hamilton City, California, on April 21, 2011.

Matt Juhl-Darlington, Attorney at Law, Matt Juhl-Darlington & Associates, represented complainant Ray Odom, Superintendent, Hamilton Unified School District, who was present.

Michael N. McCallum, Attorney at Law, Law Office of Michael N. McCallum, represented respondents Ellese Buttitta-Mello, Leslie Carlsen, Frank Catomerisios, Maria Esquivel, Blanca Godinez, Erica Gorden, Kelly Henning, and Betty Mercado.

There was no appearance by or on behalf of respondent Sandra Estrada.

The matter was submitted on April 21, 2011.

**FACTUAL FINDINGS**

1. Ray Odom issued the accusation in his official capacity as Superintendent of the Hamilton Unified School District (district).

2. Respondents Ellese Buttitta-Mello, Leslie Carlsen, Frank Catomerisios, Maria Esquivel, Sandra Estrada, Blanca Godinez, Erica Gorden, Kelly Henning, and Betty Mercado are certificated employees of the district.

3. On March 9, 2011, the district's governing board adopted Resolution No. 10-105 (the PKS resolution). In that resolution, the board determined that it is necessary to decrease certain programs and services no later than the beginning of the 2011-2012 school

year. The resolution states that the particular kinds of services to be reduced or eliminated are as follows:

<b>POSITION</b>	<b>FTE<sup>1</sup></b>
Hamilton Elementary School Multiple Subject Teaching Position	5.00
Community Day School Teaching Position	1.00
Hamilton High School Counseling Position	.33
Hamilton High School Social Studies Teaching Position	.17
Hamilton High School Art Teaching Position	.33
Hamilton High School Science Teaching Position	.33
Hamilton High School English Teaching Position	.33
Hamilton High School Physical Education Teaching Position	.33
Hamilton High School Spanish Teaching Position	.17
Hamilton High School Agriculture Teaching Position	.33
Hamilton High School Mathematics Teaching Position	.33
Administration Services	1.00
Total	9.65

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<sup>1</sup> “FTE” means full-time equivalent.

The resolution directs the superintendent to send appropriate notices to all employees whose positions may be lost by virtue of the board's action.

4. On or before March 15, 2010, the district gave written notice to respondents of the recommendation that their services will be reduced or eliminated for the 2011-2012 school year. The reasons for the recommendation were set forth in these preliminary layoff notices.

5. Respondents filed timely requests for hearing to determine if there is cause for terminating their services for the 2011-2012 school year. An accusation was served on respondents, all of whom filed timely notices of defense. All prehearing jurisdictional requirements have been met.

#### *Preliminary notice to Buttitta-Mello*

6. The PKS resolution authorizes a reduction of .33 FTE in high school science. Respondent Buttitta-Mello holds a 1.0 FTE position as a high school science teacher; there is no high school science teacher who is junior to her. In the preliminary layoff notice issued to her on March 10, Buttitta-Mello was informed that her position was being reduced by .17 FTE, not .33 FTE. At hearing, Superintendent Odom testified that he reduced Mello's position by only one class because he anticipates the retirement of another teacher.

The district seeks a decision authorizing a reduction of .33 FTE in Buttitta-Mello's position. The preliminary notice issued to a certificated employee, however, is jurisdictional. (Ed. Code, § 44951; *Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, 360-362.) Unless a teacher is given a preliminary notice by March 15 that she will be released from her position for the following year, she "shall be continued in the position." (Ed. Code, § 44951.) As Buttitta-Mello was given notice only of a .17 FTE reduction for the 2011-2012 school year, her services may be reduced only by .17 FTE and she must be continued in the remainder of her position.

#### *Bump of Catomerisios*

7. Under Education Code section 44955, subdivision (b), no permanent employee may be terminated "while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render." A school district must "make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render." (Ed. Code, § 44955, subd. (c).) The process by which a senior employee displaces a junior employee is commonly referred to as "bumping."

8. The PKS resolution calls for a reduction of 1.0 FTE at the Community Day School. The district operates a community day school on its own site. Leroy Zambrano holds a 1.0 FTE position and he is assigned to the community day school. At the beginning of the 2010-2011 school year, Zambrano had no students at the community day school so he

was given temporary assignments. Within the last month or so, a student enrolled in the school and the district expects to get one more community day school student this year. The district plans to close its community day school before the beginning of the 2011-2012 school year. It is exploring other options to provide this service.

Zambrano was not given a preliminary layoff notice. Instead, the district gave notice to respondent Frank Catomerisios on the premise that Zambrano, who has stronger seniority, can bump Catomerisios from his position at Ella Barkley High School, the district's continuation school for grades 10-12. (Zambrano's seniority date is August 23, 2000; Catomerisios's seniority date is October 11, 2004.) There is no teacher junior to Catomerisios who is being retained to perform a service that Catomerisios is certificated and competent to render.

Catomerisios argues that, despite the PKS resolution, there has not been a reduction in the community day school because Zambrano has only one student. This argument is not persuasive. Although the community day school did not have a student at the beginning of the 2010-2011 school year, the district has historically maintained a community day school, it has a teacher who is presently assigned to that site and who is providing instructional services, and the district intends to eliminate the community day school.

Catomerisios asserts that Zambrano cannot bump him. In Catomerisios's opinion, Zambrano's single subject credential in art does not give him the "academic background" necessary to teach in the continuation school. In addition, Catomerisios believes that the demands of the continuation school, where he teaches 20 or 21 students, are much greater than the demands Zambrano faces at the community day school.

Zambrano must be "certificated and competent" to bump Catomerisios from his position at the continuation school. This is not a question of the relative work performance of Zambrano and Catomerisios. (*Forker v. Board of Trustees* (1984) 160 Cal.App.3d 13, 19.) The issue is whether Zambrano has the qualifications to perform the services rendered by Catomerisios at the continuation school. (*Ibid.*) Although Zambrano has a single subject credential in art, as Catomerisios testified, he has supplementary authorizations in English and math, and extensive experience teaching in the alternative education environment. Superintendent Odom has determined that Zambrano is certificated and competent to teach at the continuation school. The evidence fails to establish that his determination is wrong.

#### *Other bumping issues*

9. Respondent Mercado's full-time position is being reduced by .17 FTE because of the reduction in high school Spanish. Mercado holds a single subject credential in Spanish that allows her to teach Spanish in grades 7 to 12. She is the most junior Spanish teacher.

Mercado asserts that, although there are no less senior Spanish teachers, there are less senior teachers who are teaching subjects that she is also capable of teaching, such as driver's education, study skills, and health. No specific credential is required to teach these classes;

they are assigned by the superintendent. At the present time, for example, driver's education is being taught by Deborah Sioux-Thorup, a teacher junior to Mercado who has a single subject credential in business and math. Mercado argues that, under Education Code section 44955, the district must reassign her to one period of driver's education so that she can maintain her full-time position.

Mercado's argument is not persuasive. Under section 44955, the district is obligated to make reassignments "in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render." Mercado's qualifications do not entitle her to teach driver's education; she is entitled by virtue of her credential to teach Spanish. Mercado cites no authority for the proposition that the district is obligated to reassign her to teach matters outside her certification. In addition, Mercado cites no authority for the proposition that the district is obligated to divide the full-time position of a less senior teacher so that she can maintain a full-time position. The courts have been reluctant to require a school district to divide a full-time position, even where the senior employee seeks an assignment authorized by his or her credential. (See *Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334 and cases cited therein.)

10. Respondents assert that the district improperly classified Sylvia Robles, an Adult Education teacher, as a temporary employee and released her. They argue that because (in their view) Robles was improperly released, she must retain her position and the most senior respondent can bump her. Robles, however, is not a respondent. The governing board has no jurisdiction in this proceeding to address Robles's classification or release.

11. Respondent Buttitta-Mello was given a preliminary notice reducing her position by .17 FTE based upon the reduction in high school science. (Finding 6, above.) Although respondents' counsel argues that Buttitta-Mello can partially bump a less senior agriculture science teacher and teach agricultural biology, Buttitta-Mello candidly acknowledges that her credential does not allow her to do so.

#### *Skips of respondents Gorden and Carlsen*

12. Under Education Code section 44955, subdivision (c), probationary and permanent employees must be laid off in the inverse order of their seniority. Subdivision (d)(1) of that section, however, provides that a district may deviate from terminating an employee in order of seniority and "skip" that employee if

[t]he 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 or course of study or to provide those services, which others with more seniority do not possess.

13. In this case, the board's PKS resolution establishes skipping criteria. The resolution states:

[I]t will be necessary to retain the services of certificated employees in the 2011-2012 school year regardless of seniority, who possess the following qualifications/certificates authorizing instruction in: 7th/8th grade mathematics and Music. The mathematics qualification criteria applies to those teachers who are currently assigned to a teaching position within the subject area of teaching 7th/8th grade mathematics at the Hamilton Elementary School.

Based on their seniority, respondents Gorden and Carlsen are subject to layoff due to the reductions in elementary school multiple subject teaching positions. The district issued “precautionary” layoff notices to them, but it proposes to skip them based on the district’s skipping criteria. In grades 7 and 8, the district is departmentalized in mathematics, and Gorden has a supplemental credential in mathematics that allows her to teach single subject classes in math in grades 9 and below. She is currently teaching Algebra 1 to 8th grade students. The district needs Gorden to teach Algebra 1 next year and, if her credential will allow it, the district also wants her to teach geometry to 9th grade students. Carlsen is the only teacher in the district with a credential that allows her to teach music (a supplemental music credential). This year, she is teaching glee club and chorus to grades 7 and 8, while the district contracts for a band teacher; next year, the district wants to expand its music program to the high school and have Carlsen teach band.

The district has not yet established the 2011-2012 schedules for Gorden and Carlsen. Superintendent Odom anticipates that Gorden and Carlsen will be pulled out of their self-contained classrooms to teach math and music, but nothing has been finalized.

Although none of the respondents objects to the proposed skips, they argue that the most senior among them should be retained to teach in Gorden’s and Carlsen’s self-contained classrooms when they are pulled out to teach music and math. If the senior respondents are arguing that they have the right to bump into a portion of Gorden’s and Carlsen’s assignments, their argument is not persuasive. Respondents acknowledge that Gorden and Carlsen were properly skipped. The evidence, therefore, does not establish that the district is improperly retaining junior employees to perform services that senior employees, who are being terminated, are certificated and competent to perform. Perhaps the senior respondents are arguing that they have the right to be reassigned to Gorden’s and Carlsen’s classrooms when (and if) they are pulled out. No legal authority has been cited for adjudicating such a right in this proceeding, and none has been found. Permanent teachers who are laid off have certain reemployment rights under Education Code section 44956. It is beyond the jurisdiction of this proceeding, however, to resolve issues pertaining to reemployment rights. Even if jurisdiction existed, it would be premature to address respondents’ argument as the 2011-2012 schedules for Gorden and Carlsen have not been established.

*Other matters*

14. The cause for the reduction in particular kinds of services relates to the welfare of the schools and the pupils thereof.

15. With the exception of respondents Gorden and Carlsen, who are being skipped pursuant to Education Code section 44955, subdivision (d), no permanent employee is being terminated while any probationary employee, or any other employee with less seniority, is being retained to render a service which the permanent employee is certificated and competent to render.

16. Any contentions raised by respondents and not discussed above have been considered, found to be without merit and rejected.

LEGAL CONCLUSIONS

1. Cause exists to retain the services of respondents Gorden and Carlsen for the 2011-2012 school year.

2. Cause exists because of the reduction or elimination of particular kinds of services pursuant to Education Code section 44955 to give notice to respondent Buttitta-Mello that her services in .17 FTE of her position will not be required for the 2011-2012 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

3. Cause exists because of the reduction or elimination of particular kinds of services pursuant to Education Code section 44955 to give notice to the remaining respondents that their services, to the extent set forth in the preliminary layoff notices issued to them, will not be required for the 2011-2012 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

ORDER

With the exception of respondents Erica Gorden and Leslie Carlsen, notice may be given to respondents that their services, to the extent set forth in the preliminary layoff notices issued to them, will not be required for the 2011-2012 school year because of the reduction or elimination of particular kinds of services.

DATED: \_\_\_\_\_

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DAVID L. BENJAMIN  
Administrative Law Judge  
Office of Administrative Hearings