

BEFORE THE  
SUPERINTENDENT OF SCHOOLS  
ALAMEDA COUNTY  
STATE OF CALIFORNIA

In the Matter of the Statement of Reduction  
in Force Against:

AARON GRANT III, JOSEPH ROBERTS,  
NATHAN SAMSON AND HEIDI SMITH,

Respondents.

OAH No. 2015031272

**PROPOSED DECISION**

Administrative Law Judge Mary-Margaret Anderson, State of California, Office of Administrative Hearings heard this matter on April 23, 2015, in Hayward, California.

Erika Anderson, Attorney at Law, Garcia, Hernandez, Sawhney & Bermudez, LLP, represented the Alameda County Office of Education (ACOE).

Dale L. Brodsky, Attorney at Law, represented Respondents Aaron Grant III, Joseph Roberts, Nathan Samson, and Heidi Smith, who were present.

The record closed on April 23, 2015.

**FACTUAL FINDINGS**

1. Movetia Salter, Chief Human Resources Officer of the ACOE, filed the Statement of Reduction in Force in her official capacity.
2. Respondents are certificated employees of the ACOE.
3. On March 3, 2015, L. Karen Monroe, Alameda County Superintendent of Schools, adopted Resolution No. 01-14/15. The resolution provides that particular kinds of certificated services will be reduced by four full-time equivalent positions no later than the beginning of the 2015/2016 school year, and directs that notices be given to a corresponding number of certificated employees that their services will not be needed for the 2015/2016 school year.

4. Attached to the Superintendent's resolution are three exhibits. Exhibit A is entitled "'Skipping' Criteria Pursuant to Education Code Section 44955(d)(1)." It states that if an employee meets any of the criteria, he or she will be "skipped" from layoff, regardless of seniority status (unless the employee is "bumped" by a more senior and competent employee). The four criteria are, in sum, a special education credential, a speech services credential, an infant-early intervention credential, and a nursing credential.

5. Exhibit B contains tiebreaking criteria, to be used to break ties where employees share the same first date of paid probationary service. The tiebreaking criteria were not utilized in determining which employees would be noticed for layoff.

6. Exhibit C is entitled "Competency Criteria Pursuant to Education Code Section 44955(b)." Resolution paragraph E states that Exhibit C "shall be used to determine whether an employee is competent to render services. . . ." Exhibit C defines "competent to teach in the County School programs" as:

(1) The employee must be a "highly qualified professional" within the meaning of the No Child Left Behind Act in the subject matter areas necessary to teach secondary school Math and Science; and (2) the employee must be authorized by the California Commission on Teacher Credentialing to Teach English Learners as of March 15, 2015.

7. By letter dated March 10, 2015, Salter notified Respondents of her recommendation that their services would not be required for the 2015/2016 school year. The letters state that the reason for the recommendation is the Superintendent's adoption of a resolution to reduce particular kinds of services no later than the beginning of the 2015/2016 school year. Each Respondent timely requested a hearing.

8. In the County Office of Education Statement of Reduction in Force pleading, Superintendent Monroe and Salter allege, in part:

4. In the opinion of the Superintendent it has become necessary, for the reasons stated in Paragraph 5 herein, to decrease the number of certificated employees of the ACOE.

Paragraph 5, however, does not state reasons for the decrease. It states:

5. On or before March 15, 2015, the Superintendent gave notice to the Respondent, pursuant to Education

Code sections 44949 and 44955, that Respondent's services would not be required for the ensuing year, and stated the reasons therefore.

There is no statement of reasons in the pleading.

9. Salter testified that ACOE staff applied the skipping criteria and the competency criteria to determine which teachers would be notified of layoff. Employees were skipped for layoff if they held any of the four listed credentials. Employees were subject to layoff if they were not authorized to teach English learners or if they were not highly qualified teachers in both Math and in Science under the No Child Left Behind Act (NCLB).

Despite the competency criteria resolution, ACOE employs teachers in addition to Respondents who do not hold the NCLB certifications in Math and Science. Salter testified that these teachers are still employed because such was not necessary to achieve the reduction of four FTE positions.

10. Alysse Castro is the ACOE Interim Director for Student Programs and Services. She has held that position since 2014. She testified that she is "very slightly familiar" with the Resolution. To Castro, Exhibit C means that Superintendent Monroe has determined that the ACOE needs teachers who meet the NCLB requirements in Math and Science and are certified to teach English learners. Superintendent Monroe's staff told her that this is because the ACOE runs extremely small schools and typically only one or two teachers are available to work with students. In addition, there is "no capability to move students between schools" and ACOE "needs a workforce that can provide teaching in multiple subject areas."

11. Teachers employed by ACOE instruct students in a variety of locations, including the Juvenile Justice Center (Juvenile Hall). The students include those who are incarcerated or have been expelled from a school district within Alameda County, and others with special needs, such as pregnant teenagers.

12. No Respondent holds a credential that would have entitled him or her to be skipped. As to the competency criteria, all four are authorized to teach English learners. They were noticed for layoff because they do not hold both Math and Science NCLB certifications.

13. The ACOE's seniority list shows that there are teachers junior to Respondents. These teachers were not noticed for layoff because they hold both Math and Science NCLB certifications.

14. Aaron Grant III teaches at Bridge Academy, a community school. There are only two teachers there; the other teacher teaches Math and Life Skills and Grant teaches all of the other subjects. He holds a single subject Social Science

credential and NCLB certification in Math and English; he is not NCLB certified in Science. Grant is currently enrolled in the Science course, which is starting in May 2015. He is in compliance with the special terms of his employment contract, which requires that he “work towards NCLB compliance in Math & Science (Completing at least one of these by March 1, 2014).”

Grant was not informed that failing to obtain the certifications would result in termination. He was not notified prior to receiving the layoff notice that he was not competent due to a lack of Science certification.

15. Joe Roberts teaches physical education at Butler Academic Center, located at Juvenile Hall. He is the only PE teacher. Roberts has taught for ACOE for seven years. He holds a bachelor of science degree, with a major in PE and minor in biology, two masters’ degrees, and has training in adaptive PE. When Roberts was hired, he was instructed to obtain certification to teach English language learners, and did so.

Roberts teaches four PE classes and has substituted in science and special education. He was shocked when he was informed by the notice about the competency requirements of NCLB certification. Both principals he has worked for informed him that PE is exempt from NCLB. No one at ACOE has ever told him that he was not competent, or that he needed to obtain NCLB certification.

16. Nathan Samson was hired by ACOE in 2012, and teaches English and Social Science in a special program for pregnant and parenting teenagers at CalSAFE-Fruitvale. When hired, he was NCLB certified only in Social Science.

Samson is proceeding through a plan to become NCLB certified in four areas. His timing to do so was accepted by his principal, Carolyn Hobbs, and Adrian V. Kirk, who was the Director of ACOE Student Programs and Services. In a series of emails in February 2014, Kirk advised Samson that Kirk was “not trying to change the timing only looking to make sure that our information is correct.” Currently, Samson has obtained the English certification. He has taken Tier One in Science and will take Tier Two this summer. Following completion of that class, he will take Math.

17. Heidi Smith was hired in August 2011 as a teacher for Project EAT. No special terms were made part of her contract; it notes that she held Multiple Subject credential with EL Authorization. In 2013, Smith was assigned to Butler Academic Center, where she teaches now. Smith took the first half of the NCLB Science certification course last year. She enrolled for the second half this year, but withdrew after she was noticed for layoff.

Smith is aware that other teachers at Butler worked their way through the certification process slowly; “no one treated it as a necessary imperative.” She

assumed that she was qualified for her position, in that she was hired and became permanent. The first time Smith heard about a problem with the lack of certification in Math and Science was in connection with the layoff.

## LEGAL CONCLUSIONS

### *Estoppel contention*

Respondents contend that ACOE should be estopped from laying them off. The elements of estoppel are specific: 1) the party to be estopped must be apprised of the facts; 2) he or she must intend that his or her conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; 3) the other party must be ignorant of the true state of facts; and, 4) he or she must rely upon the conduct to his or her injury. (See *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462.) The basis for Respondents' estoppel argument was unclear. The theory appears to be that they relied on the fact that ACOE previously took no action regarding their lack of NCLB certifications. They also assert they were treated unfairly. Respondents did not establish the elements of estoppel.

### *Arbitrary or capricious competency criteria contention*

Respondents contend that the definition of competency to include NCLB certifications is arbitrary, thus invalidating the layoff. It is well established that "A reduction in services may not be based on fraudulent, arbitrary or capricious action of the District." (*Brough v. Governing Board of the El Segundo Unified School District* (1981) 118 Cal.App.3d 702, 717.) "Arbitrary" and "capricious" are largely synonymous terms; "arbitrary" has been defined in one dictionary as "capricious; unreasonable; unsupported" (Random House Webster's College Dictionary (1991)) and in another as "based on one's preference, notion, whim, etc.; capricious." (Websters New World Dictionary of the American Language, (2nd college ed. 1976) p. 70.) On the other hand, an action will not be found to be arbitrary or capricious if it is "supported by a fair and substantial reason." (*Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 808.) It is recognized that the Superintendent has wide latitude and discretion in these matters (See *Hildebrandt v. St. Helena Unified SD* (2009) 172 Cal.App.4th 224), but there still must be an articulated, fair and substantial basis for the decision.

Education Code section 44865 addresses the qualifications for teachers in special settings and schools, such as the settings and schools where Respondents teach. For such settings, a valid teaching credential is the only requirement, provided the teacher consents to the assignment. As stated in *Bledsoe v. Biggs Unified School District* (2009) 170 Cal.App.4th 127, "section 44865 provides an additional category of credentialed teachers who are authorized to teach" at the specified types of schools. As regards the NCLB requirements, California Code of Regulations, title 5, section

6105 subdivision (e), provides that teachers in such settings have three years to become certified. And for physical education, there are no NCLB requirements.

Given this context, the rationale for making NCLB certification in math and science a competency requirement for ACOE teachers is not substantiated. It was undisputed that all four Respondents are competent in the generic sense to teach for the ACOE in the positions they hold. Respondents are credentialed and hold various certifications; just not both the math and science NCLB certifications. The holding of such certifications does not materially improve flexibility in assignments because there is great flexibility under the Education Code. In the case of PE, NCLB certification is not relevant at all. Joe Roberts holds the least number of credentials and certifications among the four respondents; but under the Code, he may teach other classes.

The evidence did not establish a link between the competency requirement and the teaching positions; the ACOE's evidence consisted primarily of conclusory, often hearsay, statements. The record does not demonstrate a fair and substantial reason for Superintendent Monroe's creation of a competency requirement of NCLB math and science certification. The competency requirement is therefore arbitrary and capricious, and was an abuse of discretion. Accordingly, the matter will be dismissed.

### *Conclusions*

1. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955, and all notices and other requirements of those sections have been provided as required.
2. It was not established that the Superintendent's decision to establish competency criteria had a reasonable basis; it was therefore an arbitrary or capricious decision and not a proper exercise of her discretion.
3. It was established that application of the competency criteria would result in employees with less seniority than Respondents being retained to render services which Respondents are certificated and competent to render.

## ORDER

The County Statement of Reduction in Force against Respondents Aaron Grant III, Joe Roberts, Nathan Samson, and Heidi Smith is dismissed. Notice may not be given to Respondents that their services will not be required for the 2015/2016 school year.

DATED: April 29, 2015

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MARY-MARGARET ANDERSON  
Administrative Law Judge  
Office of Administrative Hearings