

BEFORE THE GOVERNING BOARD OF THE
WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Layoff of Certificated
Employees of the West Contra Costa Unified
School District,

OAH No. 2012031129

Respondents.

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in Richmond, California, on April 18-20, 2012.

Laurie S. Juengert, Attorney at Law, GCR, LLP, represented complainant Ann Reinhagen, Assistant Superintendent of Human Resources, West Contra Costa Unified School District (district).

Amy Moolin Cu, Attorney at Law, Schwartz Steinsaper Dohrmann & Sommers LLP, represented respondents Helene Burks, Yecenia Campos, Blanca Carrillo, Nerissa Contawe, Laura Curtis, Neil Gagen, Jennette Gay, Tiffany Holliday, Ian Keough, Kymberly Kuzmic, Corina Lefkowitz, Ignacio Leon, Brenda Lynn, Robert McCormick, Andrew McDonnell, Luz Nuñez, Tyler Peters, Delina Pleasants, Anjali Rodrigues, Christina Smith, Jessica Steinberg, Monica Tennison-Luthy, Victoria Vasquez and Nicole Wheeler.¹

There was no appearance by or on behalf of respondents Chelsea LaForest, Heather Nault, Jose Rodolfo Ramirez, or Ryan Tsugawa.

The record was left open for the parties to submit written closing argument, which was timely filed. The district's brief was marked for identification as Exhibit 36, and the brief of the respondents represented by Ms. Cu was marked for identification as Exhibit E. The matter was submitted on April 27, 2012, the date respondents filed their brief.

FACTUAL FINDINGS

1. Complainant Ann Reinhagen issued the accusation in her official capacity as Assistant Superintendent of Human Resources of the district.

¹ It appears that Ms. Cu also represented respondent Jean Pierre De Oliveira. He was served with an accusation and he requested a hearing, but his layoff notice was rescinded prior to hearing. De Oliveira is no longer a respondent in this proceeding.

2. Respondents are certificated employees of the district.

3. On February 15, 2012, the district's governing board adopted Resolution No. 89-1112 (the PKS resolution). In that resolution, the board determined that it is necessary to reduce or discontinue certain programs and services for the 2012-2013 school year.² It states that the particular kinds of services to be reduced or eliminated are as follows:

ELEMENTARY

Elementary K-6	27.00 FTE ³
----------------	------------------------

Subtotal:	27.00 FTE
-----------	-----------

SECONDARY

English	7.00 FTE
Social Science	3.00 FTE
Physical Science	1.60 FTE
Life Science	1.60 FTE
PE	1.60 FTE
Spanish	1.00 FTE
Japanese	0.20 FTE
Counselors	3.00 FTE

Subtotal:	19.00 FTE
-----------	-----------

DISTRICT-WIDE

Instructional Support Reading & ELD Coach	1.80 FTE
Project/Program Assistant	3.00 FTE
Teacher on Special Assignment	2.00 FTE

Subtotal:	6.80 FTE
-----------	----------

Total:	52.80 FTE ⁴
--------	------------------------

² The resolution actually states that the services shall be discontinued at the end of the "2012-2013" school year. This, however, was a typographical error that did not prejudice respondents, all of whom were given notices stating that their services would not be needed after the 2011-2012 school year.

³ "FTE" means full-time equivalent.

⁴ In light of attrition and other issues, the district now intends to reduce services by 45.1 FTE positions, not 52.80.

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

4. On or before March 15, 2012, the district gave written notice to respondents of the recommendation that their services will be reduced or eliminated for the 2012-2013 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 2012-2013 school year. An accusation was served on each respondent, all of whom filed timely notices of defense. All prehearing jurisdictional requirements have been met.

Stipulations

6. At hearing, the parties reached the following stipulations:

a. The district will rescind the layoff notices issued to Helene Burks, Brenda Lynn, Andrew McDonnell, Heather Nault, Delina Pleasants, and Jessica Steinberg. They are no longer respondents in this proceeding. (The district also rescinded the layoff notice it issued to Jason Strickland, who had not requested a hearing and therefore was not a respondent.)

b. The district will rescind 0.5 FTE of the 1.0 FTE layoff notice it issued to Laura Curtis.

c. The district will rescind 0.2 FTE of the 1.0 FTE layoff notice it issued to respondent Neil Gagen.

d. The most senior social science teacher who was bumped by respondent Laura Rader can be bumped only by 0.80 FTE.

Skip of certificated personnel at the turnaround schools

7. The PKS resolution states that the district will deviate from laying off teachers in inverse order of their seniority by skipping

[t]eachers and other certificated staff members serving in the District's "Turnaround Schools," Lincoln Elementary, Helms Middle School, De Anza High School. These schools are state-identified Tier I and Tier II persistently low-achieving schools within the District. It would be extremely harmful to the students of these schools to layoff teachers who have received extensive professional development and curriculum training to

work with students, developed relationships with students and who are devoted to this particular population of students.

Based upon this provision, the district did not issue layoff notices to 13 teachers at the turnaround schools: four multiple subject teachers at Lincoln; two English teachers and one Social Science teacher at Helms; and three English teachers, one Social Science teacher and two counselors at De Anza. Because they were not issued layoff notices, those 13 teachers must be reemployed by the district for the 2012-2013 school year. The 13 teachers at the turnaround schools, however, are junior in seniority to respondents who were issued layoff notices in the same service areas; had the district not skipped the teachers at the turnaround schools, 13 respondents would not have been noticed for layoff.

8. To oversimplify a complex system, the federal government provides funds to schools that have high percentages of students from low-income families. The state is obligated to monitor the academic achievement of students in those schools. A school that fails to meet its objectives, or fails to make adequate progress toward those objectives, is put in “program improvement” (PI). A school that is in PI, and that is identified as being persistently among the lowest achieving five percent of all similar schools, is classified as a “Tier I” school.

9. In March 2010, after being in PI for seven years, Lincoln was identified as a Tier 1 school. By virtue of this designation, the district was required by federal law to adopt one of four “intervention models.” The board chose the “turnaround” model. This model required the district to take a number of steps, which included the retention of no more than 50 percent of the school’s staff, and the use of locally-adopted “core competencies” to retain and select new staff,

10. To implement the turnaround model, in August 2010 the district applied for a School Improvement Grant (SIG). The district was awarded a three-year SIG grant in the amount of \$1.3 million per year.

11. Based upon the California Standards for the Teaching Profession and the “Four Domains of the Teaching Profession,” the board identified “core competencies” to be used in the selection of teachers for Lincoln. The document also included sample questions to be asked in the interview process. The “four domains” are Planning and Preparation, Classroom Environment, Instruction, and Professional Responsibility. Some of the sample questions from each domain are:

For all students, but especially traditionally underserved students, how do you engage the class in rigorous, authentic learning?
What does holding high expectations look like?
What does cultural competence mean?
How do you build respectful, caring, and collaborative relationships with students?

How do you manage your classroom so that instructional time is maximized?

How do you make sure that students know the classroom standards of conduct?

When a student breaks the rules, why is it important to discipline with dignity? Is it important?

Are you a reflective practitioner? What does that mean in teaching and learning?

12. The district used the core competencies to select teachers for Lincoln for the 2010-2011 school year. The board published the core competencies and the sample questions so that applicants could review them. Each applicant was interviewed and asked questions from the core competencies, and asked to complete a writing sample; the interview lasted about 30 to 45 minutes. All of the teachers selected to teach at Lincoln were drawn from the ranks of district teachers.

13. At some time prior to January 19, 2011, Helms Middle School and De Anza High School were identified as “Tier II” persistently low achieving schools. On January 19, 2011, the governing board decided to adopt the turnaround model for Helms and De Anza.

14. In Spring 2011, the principals at Helms and De Anza began interviewing teachers for the 2011-2012 school year, based upon core competencies adopted by the district. The district’s core competencies for Helms and De Anza are the same in all material respects as the core competencies adopted for Lincoln, and the interviews of prospective teachers for those schools followed the same model as the interviews for teachers at Lincoln. At Helms, around 50 percent of the existing staff was retained, and at De Anza around 45 to 50 percent of the staff was retained.

15. In November 2011, the district applied for a SIG grant for Helms and De Anza. Recently, the district learned that its application has been accepted. It expects to receive the grant money shortly.

16. Nia Rashidchi is the district’s Assistant Superintendent of Educational Services. She prepared the SIG grants and her office implements them. Asked whether the core competencies are significantly different from the expectations the district has for its teachers at other schools, Rashidchi stated that she “did not know how to answer,” but acknowledged that other district teachers could satisfy the core competencies. During her interview for a teaching position at Verde Elementary School, a non-turnaround school, respondent Jennette Gay was asked questions similar to those posed in the core competencies. She successfully completed the interview and was appointed to a teaching position.

17. Rashidchi testified that the district must strictly comply with all the terms of its SIG grants. It is her conviction that if district teachers were allowed to bump⁵ into positions at the turnaround schools based on their seniority, without passing a core competencies interview, the district would lose its SIG grants. Rashidchi also believes that, under the terms of the SIG grants, the district is obligated to establish a “culture of like-minded folks” at its turnaround schools, which prohibits new teachers from bumping into them.

18. The sincerity of Rashidchi’s beliefs is not questioned. It is noted, however, that the district has failed to comply with other terms of one of its SIG grants, notably its obligation to provide a full-time nurse at Lincoln. And, since it used the core competencies to select staff for the 2010-2011 school year, the teaching staff at Lincoln has not remained intact: one teacher resigned after the 2010-2011 school year, and the school had to hire approximately five new teachers for the 2011-2012 school year, out of a total staff of approximately 17 FTE’s. Despite these events, the district has not lost its SIG grant.

As of the date of hearing, Helms and De Anza had not received their SIG grant. It is noted, however, that since the 2011-2012 school year began and the turnaround model was instituted at those schools, their staffs have not remained intact. One math teacher at Helms changed to a “coach” position, and the principal hired a replacement teacher from outside the district. At De Anza, a physical education teacher resigned and the district hired a substitute.

19. When the PKS resolution was adopted, the express rationale for skipping certificated personnel at the turnaround schools was that they had received professional development and curriculum training to use at the turnaround schools, and had developed a special relationship with the students at those schools. The evidence presented at hearing did not establish that the teachers at the turnaround schools have special training and experience necessary to teach a course or course of study that other teachers in the district with greater seniority do not possess.

20. At hearing, the district offered a different rationale for the skip. It contends that it is justified in skipping certificated staff at the turnaround schools because they have successfully passed a core competencies interview and more senior teachers at non-turnaround schools have not.

21. The evidence does not establish that the district asked the more senior teachers whether they were interested in teaching at the turnaround schools, or that it offered them an opportunity to take a core competencies interview.

⁵ 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.” The process by which such a senior employee displaces a junior employee is called “bumping.”

22. The district has not identified any provision of federal or state law, or any term of its SIG grants, that prohibits the district from laying off teachers from turnaround schools, or from laying off teachers from turnaround schools based on their seniority.

District-wide positions

23. The PKS resolution calls for reductions in “Instructional Support Reading and ELD Coach,” “Project/Program Assistant,” and “Teacher on Special Assignment.” The resolution refers to these as “district-wide” services because there are teachers serving in these positions at different sites in the district.

24. Assistant Superintendent Reinhagen explained how she implemented the layoffs in these services. Reinhagen testified that she asked her staff to prepare a list of all teachers in categorically funded positions. The list – Exhibit 33 – contains the names of over 50 teachers; their site location; their position (e.g., Instructional Support Reading and ELD Coach, Project/Program Assistant, and Teacher on Special Assignment), and their FTE. Reinhagen then contacted particular sites and departments to see which sites would be losing their categorical funding, and asked them to identify the particular positions “for which we will not have funding next year.” She then identified the individuals to be laid off in inverse order of the seniority of the individuals at that site. Reinhagen followed this process for each of the three district-wide services: first she identified the site where reductions needed to be made, then she identified the seniority of each of the persons performing services at that site.

25. It is not clear why Reinhagen did not compile a list of all the teachers in a service area to be reduced, for example, Project/Program Assistants, and then effect the layoff in inverse order of their seniority, regardless of the particular site where they were working. The PKS resolution does not call for reductions in the district-wide positions by site. While temporary employees may be released when their categorical funding ends, there is no evidence that the employees affected by the PKS reductions in district-wide services are temporary employees.

INSTRUCTIONAL SUPPORT READING & ELD COACH

26. The PKS resolution calls for a 1.80 FTE reduction in “Instructional Support Reading & ELD [English Language Development] Coach.” The district identified Alison Evert and Summerlyn Sigler for layoff in this service area. Both of these teachers had bumping rights, which resulted in a layoff notice being issued to respondent Corina Lefkowitz, and perhaps also to respondents Laura Curtis and Tiffany Holliday.

27. The respondents being bumped by Evert and Sigler contend that Evert and Sigler are not subject to layoff under the PKS resolution. Exhibit 33 identifies Evert’s and Sigler’s positions as “Instructional Support Reading & RLA [Reading and Language Arts] Coach,” not “Instructional Support Reading & ELD Coach” as specified in the PKS resolution. There are 11 teachers on Exhibit 33 who are identified as holding the position of Instructional Support Reading & ELD Coach, and three teachers identified as holding the

position of Instructional Support Reading & RLA Coach. None of the Instructional Support Reading & ELD Coaches were identified for layoff. Assistant Superintendent Reinhagen testified, however, that despite the position title given to Evert and Sigler on Exhibit 33, they in fact hold the positions identified in the PKS resolution; Reinhagen testified, in effect, that the title given to Evert and Sigler on Exhibit 33 is incorrect. No contrary evidence was presented. Reinhagen's testimony is persuasive. The evidence establishes that Evert's and Sigler's positions fall within the service to be reduced under the PKS resolution.

28. Respondents argue that the district did not correctly apply seniority principles in determining the order of layoff in the district-wide positions. Notwithstanding the district's methodology as described in Findings 24 and 25, the evidence establishes that in this particular kind of service – Instructional Support Reading & ELD Coach – Evert and Sigler are the two most junior employees in the district. They were properly identified as being subject to layoff.

PROJECT/PROGRAM ASSISTANT

29. The PKS resolution calls for a 3.0 FTE reduction in "Project/Program Assistant." Exhibit 33 identifies 18 teachers serving in that position at various sites.

30. According to the district's seniority chart, the seniority of those teachers serving in the position of Project/Program Assistant, up to respondent Jennifer Rader, is as follows:

Laura Gilmore	8/21/03
Maria Huizar-Gomez	9/5/02
Susan King	10/11/00
Cheryl Noland	9/30/00
Kathleen Gliksman	8/24/00
Linda Frazier Stafford	2/1/00
Elizabeth Hamala	8/31/99
Susan Medsker	11/9/98
Jennifer Rader	8/26/97

31. The district identified Laura Gilmore (1.0 FTE), Linda Frazier Stafford (1.0 FTE), and Jennifer Rader (0.80 FTE) for layoff. Frazier Stafford and Rader have bumping rights.

32. Except for respondent Gilmore, the district did not notice teachers in the position of Project/Program Assistant for layoff in inverse order of their seniority.

TEACHERS ON SPECIAL ASSIGNMENT

33. The PKS resolution calls for a 2.0 FTE reduction in "Teacher on Special Assignment." Exhibit 33 identifies five teachers in that position and one teacher, Krista

Jann, in the position of “TOSA College & Career Center.” “TOSA,” Reinhagen testified, stands for teacher on special assignment.

34. According to the district’s seniority chart, the five teachers on special assignment, and Jann, have the following seniority dates:

Jason Lau	9/5/07
Ryan Shaw	8/23/05
Krista Jann	8/22/02
Lashauna Foster	12/10/98
Suzanne Turner	9/16/97
Susan Hernandez	8/29/89

35. Reinhagen identified Ryan Shaw and Jann for layoff; both had sufficient seniority and credentials to bump junior teachers. She did not identify Lau for layoff, even though he is junior to Shaw and to Jann.

LEGAL CONCLUSIONS

1. The fundamental principle of a PKS layoff is that permanent teachers must be laid off in inverse order of their seniority. (Ed. Code, § 44955, subds. (b) & (c).) A teacher’s seniority is measured from the first date he or she renders paid service to the district in a probationary position. (Ed. Code, § 44845.) A district may deviate from seniority and skip junior employees only when authorized by statute to do so. (Ed. Code, § 44955, subd. (b).)

Skip of certificated personnel at the turnaround schools

2. Under Education Code section 44955, subdivision (d)(1), a district may skip junior employees if it “demonstrates a specific need for personnel to teach a specific course of study . . . and that the certificated employee has special training and experience necessary to teach that course or course of study . . . which others with more seniority do not possess.” The term “course” means “an instructional unit of an area or field of organized knowledge, usually provided on a semester, year, or prescribed length of time basis.” (Ed. Code, § 51015.) The term “course of study” means the “planned content of a series of classes, courses, subjects, studies or related activities.” (Ed. Code, § 51014.) It is not sufficient for the district to prove merely that the proposed skip would meet the needs of the district and its students. (*Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567.) It is the district’s burden to prove: (1) a specific need for personnel to teach a specific course of study; (2) that junior employees possess special training and experience necessary to teach that course or course of study; and (3) that senior employees do not possess that special training and experience. (*Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127.)

The district argues that it has satisfied subdivision (d)(1), because it must have certificated personnel at the turnaround schools who have passed a core competencies

interview, and the more senior teachers at other schools have not taken and passed such an interview. The district's argument is not persuasive.

Passing a core competencies interview is not "special training and experience" within the meaning of subdivision (d)(1). The core competencies are based upon general principles applicable to the teaching profession. The core competencies are published by the district, along with the sample questions, and they appear to be well-known to district teachers: all of the turnaround schools retained 50 percent, or close to 50 percent, of their existing staff, the maximum percentage allowed under the turnaround model, and the balance of Lincoln's staff was filled entirely by district teachers. (How Helms and De Anza filled the balance of their teaching staffs was not established.) Even if passing the interview could be characterized as special training and experience, however, it is not special training and experience that is necessary to teach a course or course of study. The core competencies relate to general principles of teaching and classroom management, not to particular courses or courses of study. In effect, the district treats its entire K-12 instructional program as a "course" or "course of study," a position that is not consistent with the statutory definitions of those terms.

The skip of certificated personnel at the turnaround schools is not valid under subdivision (d)(1) of Education Code section 44955.

3. Under subdivision (d)(2) of Education Code section 44955, a district may skip junior employees "for the purpose of maintaining or achieving compliance with constitutional requirements relating to equal protection of the laws."

The district argues that its skip is necessary for it to comply with the equal protection clause of the California Constitution. Its argument is based on the premise that if the board had not skipped the junior teachers at the turnaround schools, teachers with greater seniority – who have not successfully completed a core competencies interview – would have been entitled to bump into the junior teachers' positions in the turnaround schools. This, the district claims, "would . . . worsen the plight of these students by: (1) depriving them of certificated staff specially selected to be teachers in the Turnaround Model; and (2) causing the State to withdraw SIG funds." Students taught by teachers who have not passed a core competencies interview, the district argues, would deny those students an equal educational opportunity.

The district's argument is not persuasive. It is based on the premise that senior teachers have the right to bump into positions at the turnaround schools without passing a core competencies interview, and on the premise that this is in fact a bumping case. Both premises are faulty.

The right to bump is not absolute. (*Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, 564.) A senior employee must not only be certificated, but also "competent" to bump a junior employee. (Ed. Code, § 44955, subd. (b).) It is within a district's discretion to define who is competent to bump within the meaning of section

44955. (*Duax v. Kern Community College Dist.*, *supra*, 196 Cal.App.3d at pp. 564-567.) The district has the authority to require that senior teachers pass a core competencies interview if they wish to bump into positions held by junior teachers at the turnaround schools.

This, however, is not a bumping case. The skipped teachers at the turnaround schools did not face the prospect of being bumped by senior teachers: they faced the prospect of being laid off. The skipped teachers fell within the services to be reduced under the PKS resolution. If the district had not skipped those junior teachers, then, under the seniority principle established by state law, it would have been required to lay them off; the bumping rights of senior teachers would never have come into play. And now, by virtue of the district's decision not to issue layoff notices to the junior personnel at the turnaround schools, those employees must be retained for the 2012-2013 school year. As such, there are no junior employees at the turnaround schools that senior employees can bump.

There is no equal protection issue here. The district failed to establish that it is necessary to skip junior employees to comply with constitutional principles. The skip of certificated personnel at the turnaround schools is not valid under subdivision (d)(2) of Education Code section 44955.

4. The district's skip of certificated personnel at its turnaround schools is invalid. Cause exists to order the district to identify the most senior certificated employees who were prejudiced by the improper skips, and to prohibit the district from giving final layoff notices to those employees.

Project/Program Assistant

5. Laura Gilmore is the least senior Project/Program Assistant and was properly identified for layoff.

6. The district misidentified Linda Frazier Stafford (1.0 FTE) and Jennifer Rader (0.80 FTE) as being subject to layoff under this service reduction; they are not the next most junior Project/Program Assistants after Laura Gilmore. (Findings 30-32.) By identifying Frazier Stafford and Rader for layoff based upon their seniority relative to other employees at the same site, rather than relative to all other employees rendering the same particular kind of service, the district deprived Frazier Stafford and Rader of their true seniority. Cause exists to order the district to identify the certificated employees who were bumped because of the misidentification of Frazier Stafford and Rader, and to prohibit the district from giving final layoff notices to those employees based on the bumps.

Teachers on Special Assignment

7. The PKS resolution calls for a 2.0 FTE reduction in this service. The district failed to issue a layoff notice to the most junior Teacher on Special Assignment, Jason Lau, but properly identified Ryan Shaw as the next most junior Teacher on Special Assignment.

The district improperly identified Kristen Jann as subject to layoff under this category, as she is senior to Lau and Shaw. (Findings 33-35.) Cause exists to order the district to identify the employee who was bumped by virtue of its misidentification of Jann, and to prohibit the district from giving a final layoff notice to that employee based on the bump.

Other matters

8. Cause exists to give notice to the remaining respondents that their services will not be required for the 2012-2013 school year. The cause for the reduction in particular kinds of services relates to the welfare of the schools and the pupils thereof.

9. Except as otherwise noted above, 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.

RECOMMENDATION

1. By reason of the matters set forth in Legal Conclusions 1-4, the district shall identify the most senior certificated employees who were prejudiced by its invalid skips of certificated employees at the turnaround schools. Final layoff notices may not be given to those employees.

2. By reason of the matters set forth in Legal Conclusions 5 and 6, the district shall identify the employees noticed for layoff by virtue of the bumps exercised Linda Frazier Stafford and Jennifer Rader. They may not be given a final layoff notice based on the bumps.

3. By reason of the matters set forth in Legal Conclusion 7, the district shall identify the employee noticed for layoff by virtue of the bump exercised by Kristen Jann. A final layoff notice may not be given to that employee based on the bump.

4. Except as set forth above, notice may be given to all remaining respondents in 45.1 FTE positions that their services will not be required for the 2012-2013 school year because of the reduction or elimination of particular kinds of services.

DATED: _____

DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings