

BEFORE THE  
GOVERNING BOARD  
OF THE  
ESCONDIDO UNION SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusation for Lay-Off  
of Certificated Employees Against:

OAH No. 2008030380

69 Certificated Employees of the  
Escondido Union School District,

Respondents.

**PROPOSED DECISION**

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in Escondido, California on April 8, 2008.

Melanie A. Petersen, Esq. and Dean T. Adams, Esq., Fagen Friedman & Fulfrost LLP, represented Escondido Union School District.

With the exception of Respondents Frances Morales and Robert Riebel, Fern M. Steiner, Esq., Tosdal Smith Steiner & Wax, represented Respondents who filed a Request for Hearing.<sup>1</sup>

There was no appearance by or on behalf of Respondents Frances Morales or Robert Riebel.

The matter was submitted on April 9, 2008.

**FACTUAL FINDINGS**

1. Jennifer Walters made and filed the Accusation, dated March 14, 2008, in her official capacity as the Superintendent (Superintendent) of the Escondido Union School

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<sup>1</sup> Respondents' Exhibit "A" set forth a list of the names of Respondents that she represented. The District's Exhibit 1-4 sets forth a list of employees who received a layoff notice and filed a Request for Hearing. There is a discrepancy between the names on the two exhibits.

District (District) against the certificated employees listed in attached **Exhibit "A"** (Respondents).

2. Respondents are certificated employees of the District.

3. The Superintendent notified the Governing Board of the Escondido Union School District (Board) and Respondents that she recommended that notice be given to Respondents that their services would not be required for the ensuing school year.

On March 5, 2008, the Board adopted Resolution No. 2007-08-18 that reduced or eliminated particular kinds of services for the 2008-2009 school year and set forth the tie-breaking criteria for determining the order of termination of employees with the same seniority date.

Respondents were served with the preliminary layoff on or before March 15, 2008.

The notice of termination stated that Respondents' services would not be required for the 2008-2009 school year and set forth the reasons for the recommendation. The recommendation that Respondents be terminated from employment was not related to competency. In addition, the notice advised Respondents of the right to hearing, and the request for hearing must be delivered to Human Resources no later than March 14, 2008, not less than seven days after the date the notice of termination was served, and the failure to request a hearing would constitute waiver of the right to hearing.

Respondents filed a timely Request for Hearing.

The District served an Accusation for Lay-Off of Certificated Employees, Notice to Respondent and blank Notice of Defense form, accompanied by relevant sections of the Education Code and Government Code, upon each Respondent in a timely manner.

The District considered any Respondent served with the Accusation entitled to a hearing, regardless of whether the Respondent filed a timely Notice of Defense.

4. All pre-hearing jurisdictional requirements were met.

5. Prior to hearing, the District rescinded layoff notices issued to Respondents Dawn Ayles-Challman, Carrie Eros, Marissa Palmquist, Donna Sellier, Audrey Taylor, Talene Dodd, Robyn Solomich, Jennifer Lucas, Shadlee Moyneur, Wendy Zeugschmidt, Kay Mitchell, Maria Hernandez and Kristina Medina.

6. On March 5, 2008, the Board adopted Resolution Number 2007-08-18 and took action to reduce or eliminate the following particular kinds of certificated services commencing the 2008-2009 school year:



<u>Particular Kind of Services</u>	<u>Full-Time Equivalent Positions</u>
Counselor	9.0
Elementary Teacher (K CSR)	40.0
Teacher on Special Assignment	28.0
Special Day Class/Non Severe	1.0

The proposed reductions totaled 78.0 full time equivalent (FTE) positions.

7. The District considered all known attrition, including resignations and retirements, in determining the actual number of necessary layoff notices to be delivered to its employees.

8. Robert Leon (Leon), Deputy Superintendent, Human Resources (Deputy Superintendent), was responsible for implementing the technical aspects of the layoff. The District developed a seniority list that contained the seniority date, employee's name, current assignment and credential(s) including authorization(s).

The seniority date was based on the first date of paid service rendered.<sup>2</sup> A teacher hired as a probationary employee who worked as a substitute or temporary employee for at least 75 percent of the school days during the previous year and performed the duties normally required of a certificated employee of the school district, was deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year. The teacher was entitled to have that earlier year counted as a year of probationary service. The prior year was "tacked" on for seniority purposes,<sup>3</sup> but only one year could be tacked on.

The Deputy Superintendent gave certificated employees an opportunity to update or challenge information on file with the District prior to drafting the seniority list. He contacted all who received layoff notices by memorandum, dated February 8, 2008. Among other things, he informed them of the definition of seniority date, provided the employee's seniority date and credential(s) on file with the District, and advised them to contact Ellen Bose or him by February 26, 2008 regarding inaccurate or incomplete information. The District received additional information from some noticed employees and considered the foregoing when Leon prepared the District's seniority list.

9. The District hired teachers to provide services in categorically funded programs. The majority of certificated employees who provided services in these programs were hired on temporary contracts and classified as temporary. These programs were ongoing from year to year. Their time toward seniority was counted as other certificated employees classified as temporary. The District did not know what the funding would be for

<sup>2</sup> Education Code section 44845.

<sup>3</sup> Education Code section 44918.



categorically funded programs for the ensuing school year, anticipated that it would be reduced but had no information that any program would be terminated.

Respondents argued that the District improperly classified teachers who provided services in categorically funded programs as temporary. Relying on the holding in *Bakersfield Elementary Teachers Assn. v. Bakersfield Unified School District* (2006), 145 Cal.App.4<sup>th</sup> 1260, 1281, 1285-87, Respondents asserted that these teachers could only be classified as temporary when the program expired. According to the evidence, on the date of the hearing, none of the programs were to be terminated; therefore, the District's teachers in categorically funded programs should not have been classified as temporary.

Education Code section 44909 states, in pertinent part:

"Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of the district by which he is employed are maintained and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications."

No Respondent was identified as providing service in a categorically funded program. It was not established that any Respondent met the requirements of Education Code section 44909 and, therefore, should have been classified as a probationary employee. Insufficient evidence was offered to establish it was improper for the District to classify any Respondent who served in a categorically funded program as temporary or that this classification impacted whether any Respondent should have received a layoff notice.

10. The District used the seniority list to develop a proposed layoff and "bumping" list to determine the least senior employees currently assigned in the various services being reduced. The District then determined whether the least senior employees held credentials in another area that would entitle to "bump" other junior employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and whether they could "bump" other employees.

11. The District may deviate from terminating a certificated employee in order of seniority if the District demonstrates a specific need for personnel to teach a specific course or course of study, and the certificated employee has special training and experience necessary to teach the course or course of study or to provide those services, which others with more seniority do not possess.<sup>4</sup>

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<sup>4</sup> Education Code section 44955, subdivision (d).



12. The District skipped teachers certified to provide special education services because the District and students need teachers to have this certification who have served and will continue to service in this assignment. As required by the Board Resolution that reduced PKS, despite the foregoing, the District reduced special education by 1.0 FTE.

13. The District skipped seven teachers who hold a Bilingual, Crosscultural, Language and Academic Development (BCLAD) Certificate. The District has programs that provide primary language instruction as a component of the programs at seven of its sites. Each program requires that the teacher hold a BCLAD Certificate in order to provide instruction in the program. During the ensuing school year, each skipped teacher will teach full-time in programs that require that the teacher have a BCLAD Certificate.

Some teachers who hold BCLAD Certificates were skipped not because they hold BCLAD Certificates but for other reasons.

14. The District skipped teachers authorized to teach math or science because the District needs teachers with the certification to provide instruction in the respective subject area.

Teachers with Multiple Subject Credentials are authorized to teach core subjects to the students in the same grade level. For example, certificated employees who hold the foregoing credential may teach math and science to sixth graders. However, there are a variety of assignments that require additional competency in math, science or social science, to wit: If a teacher is required to teach a single subject six periods a day to the same grade level, if the subjects being taught are Algebra, Life Science or Biology, or if the assignment involves a single subject but is being taught to more than one grade level.

15. Respondents argued that the District skipped junior teachers who do not have special training or experience while more senior teachers are being laid off; further the District failed to establish that all of these teachers will be assigned to classes for which the additional training or experience is necessary.

Respondents identified the junior teachers that were improperly retained as Kathy Smith (Smith), Michael De Neve (De Neve) and Rochell Bernsdorf (Bernsdorf) and Robin Flynn (Flynn).

Smith has a seniority date of August 22, 2007. She is a probationary one teacher with the District. She holds a Multiple Subject Credential, a Single Subject Math Credential and a Single Subject Social Science Credential. The District hired her to teach math. With her math credential, Smith taught math to seventh graders in a departmentalized classes during the 2007 – 2008 school year.

De Neve has a seniority date of August 22, 2007. He is a probationary one teacher and holds a Multiple Subject Credential. He was hired to teach math because De Neve satisfied the District's criteria. He had five years experience outside the District teaching math; he is NCLB compliant in the area of math and has completed the requisite number of



units to obtain a math authorization from the California Commission on Teacher Credentialing (CCTC). In accordance with Education Code sections 44256, subdivision (b), 44258.2 and 44263, the Board authorized De Neve to teach in a math assignment, as set forth in Board Resolution Number 2007-08-06, adopted November 1, 2007. During the current school year, he taught math to sixth, seventh and eighth graders, a departmentalized math assignment.

Bernsdorf had a seniority date of August 22, 2007. She holds a Multiple Subject Credential; she has completed all requirements, has applied for and is waiting for a Supplemental Authorization in Math from CCTC. She taught Algebra during the 2007 – 2008 school year.

Flynn has a seniority date of August 23, 2006. She holds a Multiple Subject Credential; she has completed all requirements, has applied for and is waiting for a Supplemental Authorization in Math from CCTC. During the 2007 – 2008 school year, she taught math to sixth, seventh and eighth graders.

16. The District skipped Alex Quan (Quan). During 2007 – 2008, he has been assigned to teach Community Day School.

The Assistant Superintendent described the Community Day School as a unique alternative learning facility for students who are not able to meet the requirements in a regular elementary or middle school classroom. The students who attend Community Day School have a variety of different behavioral and/or academic challenges. The District needed a teacher who was willing to work in this challenging environment and had the background to do so. The District hired Quan because he had his extensive experience (12 years) working with and/or teaching students with similar challenges.

In order to teach in the Community Day School, the teacher is required to have a Multiple Subject Credential. Quan holds a Multiple Subject Credential and a CLAD Certificate. His seniority date is January 8, 2007. There are more senior teachers employed by the District who hold a Multiple Subject Credential. None of these teachers were offered this assignment. There is no evidence in the record that any more senior employee has the experience or desire to teach in this position.

17. The District has the discretion to determine whether teachers are certificated and competent to hold the position for which said teachers have been skipped and retained. (*King v. Berkley Unified School District* (1979) 89 Cal.App.3d 1016.) In this case, the District made the decision to skip and retain more junior teachers described in Findings 12, 13, 14, 15 and 16 based on the requirements of the programs or the subject matter the certificated employee has additional training and experience to teach. The criteria used by the District to make the determination were reasonable and not arbitrary or capricious. There is no evidence that any Respondent who is more senior and received a layoff notice is competent to perform the services for which the more junior employees are being retained.



The skipped teachers must be assigned to positions for which they were retained. (*Alexander v. Board of Trustees of the Delano Joint Union High School District* (1983) 139 Cal.App.3d 567) The District established that the teachers skipped to provide special education services and the teachers skipped to teach in programs with BCLAD Certificates will be assigned to such positions during the ensuing school year. Therefore the District properly skipped and retained these teachers was proper.

However, there is insufficient evidence in the record regarding the assignment of Quan or some or all math teachers for the 2008 – 2009 school year. If the District assigns Quan to teach Community Day School for the ensuing school year, the skip and his retention was appropriate. If the math teachers are assigned to teach classes for which math competency is required, the District properly skipped and retained these teachers. If Quan and/or any math teacher is not assigned to a position for which he/she was skipped, retention was inappropriate.

18. In Resolution No. 2007-08-18, the Board adopted tie-breaker criteria to determine the order of termination of employees with the same seniority date, which provided, in pertinent part:

“The following rating system shall be applied in determining the order of termination of certificated employees:

- A. Number of teaching and/or special service credentials.  
Rating +1 per credential
- B. Number of supplementary authorizations.  
Rating +1 per supplementary authorization
- C. Earned degrees beyond the BA/BS level.  
Rating +1 per degree
- D. Meets Highly Qualified requirements for credential/assignment under No Child Left Behind.  
Rating+1 per credential

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#### TIE-BREAKING PROCEDURE

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In the event that common day hires have equal qualifications based on application of the above criteria, the District will then break ties by utilizing a lottery.”

19. As it pertained to Respondents, it was necessary to apply the tie-breaking criteria.

Jennifer Steres and Respondent Robert Riebel had the same first date of paid service with the District of August 23, 2006. In order to determine the order of termination of these employees, the District applied the point values appropriate for each of them. As these employees had the same point values, the District did a random selection between the two; this resulted in retention of Jennifer Steres and Respondent Robert Reibel receiving a preliminary layoff notice.

20. Between the employees who first rendered paid service to the District on the same date, the Board determined their order of termination solely on the basis of needs of the District and the students. The Board adopted specific criteria and provided clear instructions for implementation of the criteria. The tie-breaker criteria were fairly applied to rank employees hired on the same date. The order of termination was based on program or subject matter requirements, the needs of the District and its students.

21. The services that the District proposed to reduce were "particular kinds of services" that could be reduced or discontinued within the meaning of Education Code section 44955. The Board's decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

22. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

23. Except as provided in Finding 17, no certificated employee junior to any Respondent was retained to perform any services which any Respondent was certificated and competent to render.

### LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in these sections are satisfied.

2. A District may reduce services within the meaning of Education Code section 44955, subdivision (b), "either by determining that a certain type of service to students shall not 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 Trustee*) (1976) 64 Cal.App.3d 167, 178-179.)

3. Cause exists under Education Code sections 44949 and 44955 for the Escondido Union School District to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuance of particular kinds of services is related solely to the welfare of the schools and the pupils thereof.

4. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he/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. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.)

5. Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts



lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831.)

6. Except as provided in Findings 17, no employee with less seniority than any Respondent was retained to render a service which any Respondent is certificated and competent to render.

#### ORDER

1. The Accusation served on Respondents Dawn Ayles-Challman, Carrie Erdos, Marisa Palmquist, Donna Sellier, Audrey Taylor, Talene Dodd, Robyn Solomich, Jennifer Lucas, Shadlee Moyneur, Wendy Zeugschmidt, Kay Mitchell, Maria Hernandez and Kristina Medina shall be dismissed. These Respondents shall be retained.

2. If Kathy Smith, Michael De Neve, Rochell Bernsdorf and/or Robin Flynn are not assigned to teach math in departmentalized classes, Escondido Union School District shall dismiss the Accusation against the most senior teacher who holds a Multiple Subject Credential, and the teacher shall be retained.

3. If Alex Quan is not assigned to teach Community Day School for the 2008 – 2009 school year, the Accusation against the most senior teacher who holds a Multiple Subject Credential shall be dismissed, and the teacher shall be retained.

4. Except as provided in Paragraphs 1, 2 and 3 of this Order, the Accusation served on Respondents listed in **Exhibit "A"** are sustained. Except as provided in Paragraphs 1, 2 and 3 of this Order, notice shall be given to Respondents before May 15, 2008 that their services will not be required for the 2008-2009 school year because of the reduction or discontinuance of particular kinds of services.

3. Notice shall be given in inverse order of seniority.

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

5/6/08



VALLERA J. JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings

## EXHIBIT A

Rachel Allan  
Kaitlin Alto  
Dawn Ayles-Challman  
Alma Baires  
Asa Barbani  
Joseph Benson  
Christy Blake  
Kim Bloodgood  
Kyra Bowers  
Veronica Carrillo  
Maria Cervantes  
Kristine Christensen  
Daniel Cleary  
Hisame Dame  
Sharilyn Daniels  
Christine Davis  
Lindsay Demler  
Diane DeWindt  
Talene Dodd  
Michael Dwyer  
Mary Elliott  
Carrie Erdos  
Amy Erickson  
Paul Erickson  
Sarah Escalona  
Robin Estrada  
Molly Francis  
Mark Gale  
Karen Grissom  
Veronica Jeannette Gonzalez-  
Cortez  
Meredith Hammond-Miller  
Maria Hernandez  
Jennifer Hill  
Karina Johnson  
Heather Jovin  
Tiffany Kalick  
Chris Kaminski  
Kim Klockenteger  
Maren Knauf  
Lynsey Kogan  
Celena Lopes  
Jennifer Lucas  
Krystyna Maiorano  
Sherry McPhillips  
Kristina Medina  
Cristina Meglich  
Alejandra Mendoza  
Krystle Miller  
Kay Mitchell  
Jacqueline Monroe

Lena Morales  
Frances Morales  
Kimberly Morrow  
Shadlee Moyneur  
Katherine Nichols  
Kelly O'Brien  
Elaine Olson  
Nathalie Olsson  
Kim Ontiveros  
Brandi Ortiz  
Marisa Palmquist  
Julie Park  
Erin Peet  
Carrie Purcell  
Francis Quogue  
Robert Riebel  
Mark Roberts  
Yadira Rodriguez  
Charlotte Rolls  
Maria Santoyo  
Julie Schafer  
Donna Sellier  
Kelly Solie  
Robyn Solomich  
Nancy Sotello  
Scott Soucy  
Robert Steward  
Alexis Tate  
Michelle Taylor  
Audrey Taylor  
Carrie Toorop  
Maria Topolovac  
Monica Trujillo  
Silvia Valles  
Vanessa Vittek  
Jennifer Wade  
Jamie Washington  
Tamara Whitney  
Wendy Zeugschmidt