

BEFORE THE
GOVERNING BOARD OF THE
DOWNEY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusations Against:

LAURIE BERLYN,
DOMENICA COWAN, and
SOLEDAD NOBUMOTO,

Respondents.

OAH No. 2010011286

PROPOSED DECISION

Administrative Law Judge, Sophie C. Agopian, Office of Administrative Hearings, State of California, heard this matter on April 26, 2010, in Downey, California.

Eric Bathen, Attorney at Law, represented Stanley Hanstad (Hanstad), Assistant Superintendent, Personnel Services, of the Downey Unified School District (District).

Carlos R. Perez, Attorney at Law, represented three certificated employees of the District, Laurie Berlyn, Domenica Cowan (a.k.a. Domenica Cowen), and Soledad Nobumoto (a.k.a. Soledad Zermeno), (Respondents). Respondents Berlyn and Nobumoto were present at the hearing. Respondent Cowan was not present.

The matter was submitted for decision on April 26, 2010.

ISSUES

The issues to be determined in this matter are: (1) Whether the District properly relied upon terms in a collective bargaining agreement to establish Respondents' seniority dates; and (2) Whether Respondents established that they are entitled to earlier seniority dates as a result of substitute and/or part-time employment with the District prior to earning "probationary" status.

FACTUAL FINDINGS

Jurisdiction

1. District Superintendent Wendy L. Doty, Ed.D. (Doty) filed the Accusations against Respondents in her official capacity. Respondents are certificated employees in the District's Adult Education program.

2. On February 16, 2010, the Governing Board of the District (Board) adopted Resolution No. 200910-06 (Resolution) and determined to reduce and discontinue particular kinds of certificated services (PKS) for the 2010-2011 school year by three full-time equivalent (FTE) positions, as follows:

1.	Adult Education—Facility Teacher	2.0 FTE
2.	Adult Education—ARC ¹ Teacher	<u>1.0 FTE</u>
Total		3.0 FTE

3. The Board further determined that the reduction and elimination of such services made it necessary to decrease the number of certificated employees of the District by a corresponding number of FTE positions prior to the ensuing school year.

4. In determining the amount of service to be reduced, the board properly considered all assured attrition known at the time it adopted the Resolution. As of the date of the hearing, there was no attrition at the adult school that would cause the Board to decrease the number of certificated employees to notify regarding the proposed reductions.

5. The Board directed Superintendent Doty, or a designee, to implement the procedures required for a reduction in force. Dr. Doty timely and properly notified the Board and Respondents of the recommendation that Respondents' services will not be required for the 2010-2011 school year, and stating the reasons therefor. The notices recommending their lay-off are hereinafter referred to as "lay-off" notices. The lay-off notices were hand-delivered to Respondents Cowan and Nobumoto, and notice was sent by certified mail to Respondent Berlyn. The notices contained a copy of the Board's Resolution.

6. All three Respondents timely requested a hearing and filed a notice of defense in response to the Accusation.

7. The parties stipulated that all pre-hearing jurisdictional requirements were met.

¹ "ARC" is the Association of Retarded Citizens, and is used herein to refer to instruction provided to disabled adults.

Board's Discretion Regarding "Particular Kinds of Service"

8. The Board's decision to reduce and discontinue the services set forth in Factual Finding 2 was not arbitrary or capricious and constitutes a proper exercise of the Board's discretion. The certificated services identified in Factual Finding 3 are "particular kinds of services" that may be reduced or discontinued within the meaning of Education Code section 44955.²

9a. The Board's decision to reduce and discontinue adult school services was related to the needs and welfare of the District and its pupils. The District operates 21 schools for kindergarten through grade 12, including an adult school, and serves approximately 22,000 students. The District has been impacted by a \$9.5 million budget reduction and is expected to reduce its budget an additional \$5 million for 2010-2011 school year. The District decided to eliminate the services provided by adult school facility teachers and to reduce the services provided by adult school ARC teachers because the services, unlike other adult school services, are provided on a "non-fee" basis, meaning that the District does not collect a fee to recover the cost of providing the service.

b. The adult school facility teachers provide instructional services at community centers for seniors. Only two positions existed at the time the Board adopted the Resolution and both positions were eliminated.

c. The ARC teachers provide instruction to disabled adults. When the Board adopted the Resolution, the District employed four ARC teachers. The Board decided to reduce ARC instruction by one FTE because the remaining ARC services will be funded, in part, by non-District resources during the 2010-2011.

Implementation of the Lay-Off

10a. Because the PKS to be reduced or eliminated were exclusively adult school services, and because no adult school teacher affected by the lay-off possessed a credential that would permit him or her to teach in the K-12 schools, the District properly developed a seniority list consisting only of certificated adult school teachers. Although the District's Board adopted tie-breaking criteria to break ties among certificated teachers with the same seniority dates, no ties existed among the certificated adult school teachers. Therefore, the tie-breaking criteria was not necessary nor utilized in this process.

² All further statutory references are to the Education Code.

b. All but one of the 24 adult school teachers identified on the seniority list possess either a life, clear, or preliminary “designated subjects” credential authorizing them to teach in an adult education program. The adult school credential does not authorize the holder to teach in K-12 schools.³

c. The seniority list is in inverse order and contains the employees’ “seniority dates,” tenure status, and the type of credentials held. The adult school teachers are credentialed in one or more of a number of subject areas, including but not limited to, computer application, nursing services, court reporting, cosmetology, dental services, self-maintenance skills for adults with disabilities, food preparation, Spanish, English as a Second Language (ESL), and/or home economics. The designated subjects credential authorizes the holder to teach specific subjects in which the holder has demonstrated experience, and that are identified on the credential.

The Parties’ Contentions

11a. Respondents do not dispute their tenure status or the credentials held as indicated on the seniority list.

b. Berlyn and Nobumoto are permanent employees and are, respectively, ranked numbers 12 and 13 on the seniority list, with the most senior employee ranked number 24. Berlyn is credentialed to teach instructional aide training and vocational skills for handicapped. Nobumoto is credentialed to teach self-maintenance skills for adults with disabilities. According to the District, Berlyn and Nobumoto are the only two adult school facility teachers in the District. They are subject to lay-off because their positions are being eliminated. Although the District did not establish the correlation between their credentials and their assignments as facility teachers at senior centers, Respondents Berlyn and Nobumoto did not present evidence to establish that their credential and competency would permit them to “bump” or displace a less senior or probationary adult school teacher who is being retained. As such, there are no less senior or probationary certificated adult school teachers that are being retained to provide a service that either Berlyn or Nobumoto are credentialed to teach.

c. Cowan is a probationary teacher who is ranked number 4 on the seniority list. She is credentialed to teach self-maintenance skills for older adults, clothing construction, small business, food preparation, arts and crafts, “deco arts,” and interior design. According to the District, Cowan currently provides food preparation instruction in the ARC program to disabled adults. Because she is the least senior ARC teacher, as the others are ranked numbers 19, 20, 23 and 24 on the seniority list, Cowan has been identified for lay-off. The three adult school teachers who are ranked below Cowan on the seniority list did not receive lay-off notices, and possess designated subject credentials in the areas of cosmetology, dental

³ The exception is James Turnbough, who possesses a clear multiple subject credential. His position is not affected by the lay-off.

services/medical services, and health education/health occupations. These are areas in which Cowan is neither credentialed or competent to teach. Consequently, no less senior or probationary certificated adult school teacher is being retained to render a service that Cowan is credentialed and competent to teach.

12. Respondents dispute the seniority dates assigned to them by the District. Respondents contend that the District miscalculated their seniority dates because it impermissibly relied on the teachers' collective bargaining contract (contract) to determine the dates in which Respondents first became probationary employees with the District.

13a. The District established the manner in which it determined Respondents' seniority dates as set forth below.

b. The District assigned Respondents their seniority dates based upon the District's review of their payroll records and information obtained about their status toward permanency. According to the District, adult school teachers are generally hourly employees, whose employment status is "at will," and therefore, they have not historically been provided with a contract. It was not until the 2009-2010 school year, that the District provided adult school teachers with an "employment status agreement" notifying them of their tenure status. The notices were first provided to Respondents in September 2009, in anticipation of lay-offs. The notices identified each Respondent as probationary or permanent, and identified their date of "first hire in probationary status," and "date of [acquiring] permanent status" if applicable. In response to the notices, each Respondent stated that she agreed with the dates indicated therein.

c. The District also reviewed payroll records and the employees' personnel files to determine if there were any Board memoranda identifying an employee as probationary or permanent. The District did not observe any such memoranda for Respondents.

d. The District contends that in determining seniority dates, it properly relied on the following contract provision regarding how adult school teachers obtain permanency to determine Respondents' first date of paid service in a probationary position:

Article XX, section B, of the contract sets forth criteria by which certificated adult education teachers become "probationary" employees, and thereafter, how they become "permanent." Article XX, Section B, states in relevant part:

Permanency

1. Thirty-four and three quarter (34.75) hours a week is considered a full time assignment at the Adult School. Twenty-one (21) hours or more per week must be worked in order to receive permanency.

2. To attain permanency, an Adult School teacher must teach a minimum of 75% of the regular school year for two (2) consecutive years.

The contract is in effect for the period of September 1, 2009, through August 31, 2012. It was not established whether the relevant provision was in effect prior to September 1, 2009.

e. The District followed the contract and determined Respondents' first date of paid service in a probationary position is the date that each began to work "21 hours or more per week." By this calculation, the District determined that Cowan's seniority date is September 1, 2008, Nobumoto's seniority date is October 1, 2001, and Berlyn's seniority date is September 11, 2000. If the District properly relied on the contract language, its calculation of their seniority dates is correct.

14. The parties stipulated that Berlyn held a series of substitute and/or part-time positions with the District, ranging from 6 to 20 hours per week, from April 16, 1986 through September 10, 2000, prior to her assigned seniority date.

15. Nobumoto has worked for the District since November 1993 in various substitute and/or part-time positions for 10 hours or less each week. The payroll records establish that Nobumoto participated in training on September 24 and 25, 2001, for a period of, at most, 15.5 hours that week and was paid for the training. However, she was assigned a seniority date of October 1, 2001.

LEGAL CONCLUSIONS

1. Jurisdiction for this matter was established pursuant to sections 44949 and 44955, by reason of Finding Findings 1 through 7.

2. A school 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.)

3. Cause exists to reduce the number of certificated employees of the District under sections 44949 and 44955 because the services identified in the Board's Resolution are particular kinds of services that can be reduced or eliminated within the meaning of section 44955, and because the District established that the reduction of such services is related to the welfare of its schools and students pursuant to section 44949, subdivision (c)(3). (Factual Findings 8 and 9.)

4. Section 44955, subdivision (b), further provides that:

[T]he services of 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.

[¶]...[¶]

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof.

5. The District complied with the requirements of section 44955, subdivision (b), with respect to Respondents, as set forth in Factual Findings 10 through 12, because it established that no junior certificated employee, or probationary employee, will be retained to render a service which a more senior Respondent is certificated and competent to render. This conclusion depends, in part, on whether the District properly determined Respondents' seniority dates, and if not, whether Respondents established that they are entitled to earlier seniority dates as a result of them becoming probationary employees by default prior to their assigned seniority dates.

Whether the District Assigned Proper Seniority Dates to Respondents

6. The seniority date of a certificated employee is defined as the date the employee "first rendered paid service in a probationary capacity." (Educ. Code § 44845.) If the date on which the employee first rendered paid service in a probationary capacity is incorrect, the employee's seniority date must be adjusted to reflect the earlier first date of probationary service. (*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1273.)

7. Respondents contend that the District should adjust their seniority dates to earlier dates because the District did not properly determine their first date of service in a probationary position.

Reliance on the Contract

8. Respondents specifically contend that it was improper for the District to rely on the contract provision to determine that they did not achieve probationary status until they worked 21 or more hours per week. Respondents assert that the Education Code, and not an employee contract, is determinative regarding how employees acquire tenure. While Respondents are correct that tenure is established by statute, and not by contract, the contract was considered for the limited purpose of establishing how the District determined

employees' first date of probationary status.⁴ For example, the contract established that a full-time adult school assignment consisted of 34.75 hours per week. As noted in *Steinberg v. Los Angeles City Unified School District* (1979) 95 Cal.App.3d 437, school boards have broad discretion in determining what constitutes a "full-time" position. Here, the District relied on the negotiated agreement with the teachers to establish what constitutes a full-time adult school position. That is within its discretion. Respondents did not refute that a full-time assignment is 34.75 hours per week.

In addition, as set forth below, the District's reliance on the contract to determine the minimum number of hours that adult school teachers must work each week to be deemed "probationary" was not improper or prejudicial because it sets a standard that is similar to what is provided in the Education Code.⁵

Classification

9a. Respondents contend that the District misclassified and/or failed to classify them prior to their assigned seniority dates. They contend that they should have become probationary prior to such dates, and therefore their and seniority dates should be adjusted.

b. As established in *Bakersfield Elementary Teachers' Ass'n v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1278, the Education Code permits certificated employees to be classified in one of four ways: permanent, probationary, substitute, or temporary. It also authorizes school boards to hire, classify, promote and dismiss certificated employees under a "complex and somewhat rigid scheme to govern a board's exercise of its decision-making power." (*Id.*) In this case, the District established that Respondents did not achieve probationary status prior to their assigned seniority dates, under the more liberal contract, or under the relevant statute, because they did not work a sufficient number of hours per week to achieve such status.

c. The Education Code is strictly interpreted regarding the terms by which employees may be classified as "temporary." (*California Teachers Ass'n v. Vallejo Unified School District* (2007) 149 Cal.App. 4th 135.) Two sections establish how adult school teachers become temporary employees. Section 44919, subdivision (a), states:

⁴ It is established that the tenure statutes under the Education Code cannot be amended by agreement or otherwise. *Fleice v. Chualar Union Elementary School* (1988) 206 Cal.App.3d 886 [tenure statutes may not be altered by agreement, mistake or estoppel]; *Board of Education vs. Round Valley Teachers Ass'n* (1996) 13 Cal.4th 269, 281 [parties may not negotiate greater protections than afforded by statute].)

⁵ In this case, the District correctly contended that the contract provides Respondents with greater rights than what is provided in the Education Code because the contract grants them "probationary" status when they meet the statutory requirements to become "temporary."

Governing boards of school districts shall classify as temporary employees those persons requiring certification qualifications, other than substitute employees, who are employed to serve from day to day during the first three school months of any school term to teach temporary classes not to exist after the first three months of any school term or to perform any other duties which do not last longer than the first three months of any school term, or to teach in special day class and evening classes for adults or in schools of migratory population for not more than four school months of any school term. If the classes or duties continue beyond the first three school months of any school term or four school months for special day and evening classes for adults, or schools for migratory population, the certificated employee, unless a permanent employee, shall be classified as a probationary employee. The school year may be divided into not more than two school terms for the purposes of this section.

A special provision in the code applies to adult school teachers. Section 44929.25 provides:

Notwithstanding any other provision to the contrary, any person who is employed to teach adults for more than 60 percent of the hours per week considered a full-time assignment for permanent employees having comparable duties ***shall be classified as a temporary employee, and shall not become a probationary employee***, under the provisions of Section 44954.⁶ (Emphasis added.)

In *Kettering v. Los Angeles Unified School District* (2009) 167 Cal.App.4th 507, 516, adult school teachers who met the “60 percent rule” were classified as temporary employees regardless of whether they would qualify as temporary teachers under section 44919. (*Id.* citing *Peralta Federation of Teachers v. Peralta Community College District* (1979) 24 Cal.3d 369.)

d. For Respondents to meet the 60 percent rule, they would have to establish that they worked more than 20.85 hours per week, which is 60 percent of a full-time position, i.e. 34.75 hours, as set forth in the contract. Because Respondents failed to establish that they met the 60 percent rule prior to their seniority dates, they are not entitled to adjusted dates. The evidence did not establish that Respondents worked more than 20.85 hours per week during the time before they were assigned a seniority date.

⁶ Section 44954 provides for the release of temporary teachers at the discretion of a governing board prior to serving at least 75 percent of the school year, and at the end of completing one school year, for the next succeeding year, upon timely notice.

i. Berlyn was assigned a seniority date of September 11, 2000, because that was the first day she began to work 21 or more hours per week. As set forth in Factual Finding 14, the parties stipulated that Berlyn held a series of substitute and/or part-time positions with the District, ranging from 6 to 20 hours per week, from April 16, 1986 through September 10, 2000. The stipulation, however, is insufficient to establish that Berlyn met either the statutory or contractual threshold to become temporary or probationary because it does not establish the number of hours she worked each week during that time.⁷

ii. Nobumoto was assigned a seniority date of October 1, 2001, because that was the first day she taught in a position consisting of 21 or more hours per week (21-plus position). As set forth in Factual Finding 15, she has worked for the District since November 1993 in various substitute and/or part-time positions for 10 hours or less each week. Nobumoto did not testify at the hearing and did not dispute such facts. She contends, however, that her 21-plus assignment for the 2001-2002 school year began on the date that she participated in training for the position. However, the payroll records establish that the week of the training, Nobumoto worked, at most, 15.5 hours. This does not amount to 60 percent of a full-time position. Even if Nobumoto's seniority date is amended to the first date of the training, on September 24, 2001, her credential will not allow her to bump another adult school teacher with a later seniority date. (See Factual Finding 11b.)

iii. Cowan was assigned a seniority date of September 1, 2008, because that was the first day in which she rendered service to the District in a probationary position. Cowan did not produce evidence to establish that she should have another seniority date, or that she is entitled to bump any other employee, and remain employed for the 2010-2011 school year.

e. As Respondents did not establish that they were anything other than substitute teachers or part-time adult school teachers, who are statutorily excluded from temporary classification, prior to their assigned seniority dates, they are not entitled to adjusted seniority dates.

Lack of Notice of Classification

10a. Because Respondents did not establish that they were misclassified prior to their seniority dates, Respondents contention that they were entitled to notice of their classification under section 44916, and became probationary by default, is not persuasive.

⁷ Assuming arguendo that Berlyn's seniority date should be amended to April 16, 1986, Berlyn would be entitled to bump or displace a more junior teacher, who did not receive a lay-off notice, and therefore both teachers would be retained the following year. However, Berlyn did not establish that her seniority date should be adjusted.

b. Respondents rely on Education Code sections⁸ 44915 and 44916, and the Supreme Court's interpretation in *Kavanaugh v. West Sonoma County Union High School* (2003), 29 Cal. 4th 911.

Section 44915 states:

Governing boards of school districts shall classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees.

Section 44916 provides that:

The classification shall be made at the time of employment and thereafter in the month of July of each school year. At the time of initial employment during each academic year, each new certificated employee of the school district shall receive a written statement indicating his employment status and the salary that he is to be paid. If a school district hires a certificated person as a temporary employee, the written statement shall clearly indicate the temporary nature of the employment and the length of time for which the person is being employed. If a written statement does not indicate the temporary nature of the employment, the certificated employee shall be deemed to be a probationary employee of the district, unless employed with permanent status.

c. *Kavanaugh* applied the default principle set forth in section 44916 to elevate a temporary teacher to probationary status due to the school district's failure to provide her with timely notice of her temporary status. Unlike *Kavanaugh*, Respondents are not entitled to earlier seniority dates because they did not establish that they were temporary or probationary employees prior to their assigned seniority date. Their service as substitutes excluded them from the notice requirement set forth in section 44916.

11. Accordingly, cause exists to sustain the Accusations against Respondents because the District complied with the requirements of section 44955, subdivision (b), and ensured that no junior certificated employee will be retained to render a service which a more senior Respondent is certificated and competent to render. (Factual Finding 10.)

⁸ As previously noted, all statutory references are to the Education Code unless otherwise indicated.

ORDER

Notice may be given to Laurie Berlyn, Domenica Cowan, and Soledad Nobumoto that their services will not be required for the 2010-2011 school year.

Dated: May 6, 2010

SOPHIE C. AGOPIAN
Administrative Law Judge
Office of Administrative Hearings