

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

In the Matter of the Reduction in Force of
Certain Employees of the Fontana Unified
School District Identified in Appendix A.

OAH No. 2010030123

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 19, 2010, in Fontana, California.

Melanie Petersen, Fagen, Friedman, & Fulfroost, LLP, represented Fontana Unified School District.

Marianne Reinhold, Reich, Adell & Cvitan, represented many of the respondents identified in Appendix A.

Cristina Reyes, Tina Rivera and Richard Roth appeared and represented themselves.

No appearance was made by or on behalf of respondents Elizabeth Esquivias, Colleen Gerke, Ken Hoong, Anne Johnson, Alphonso Jones, Eriberto Leon, James Logan, Reid Luszeck, Cheri Mabrie, Carla Martin, Christopher Persky, Amanda Pierce, and Emily Votruba who filed notices of defense¹ and requested a hearing.

Before the hearing the accusations served on Jessica Cifelli, Andrea Connolly, Keya Criswell-Fisher, Jacob Deem, Tracy Espinosa, Christopher Leach, George Mendoza, Irene Sanchez, Melissa Vazquez, and Angela Viencek were withdrawn and their layoff notices rescinded.

The matter was submitted on April 19, 2010.

¹ The parties stipulated that all respondents were entitled to a hearing regardless of whether or not they filed a notice of defense.

FACTUAL FINDINGS

1. Yolanda Mendoza made and filed the accusation in her official capacity as Associate Superintendent, Human Resources of the Fontana Unified School District.
2. Respondents are identified in Appendix A, attached hereto and by this reference are incorporated herein. Each respondent is a certificated employee of the district.
3. On March 3, 2010, the Governing Board adopted Resolution No. 10-18 reducing particular kinds of services and directing the superintendent to give appropriate notices to certificated employees whose positions would be affected by the action. The resolution identified 257 FTEs to be reduced.
4. The district established tie-breaking criteria to determine the order of termination for those employees who shared the same seniority dates.
5. On and before March 5, 2010, Associate Superintendent Mendoza gave written notice to certificated employees of the recommendation that their services would not be required for the 2010-11 school year. The reasons for the recommendation were set forth in these preliminary layoff notices.
6. An accusation was served on each respondent. All prehearing jurisdictional requirements were met.
7. Before issuing the preliminary layoff notices, the district took into account all positively assured attrition. The district must issue final layoff notices before May 15, and when it does so the district will take into account any additional attrition that has occurred. After that, further attrition will allow the district to rehire laid off employees.
8. The layoffs will not reduce any of the district's offerings in code mandated courses below the level required by law.
9. The decision to reduce or discontinue a particular kind of service is matter reserved to the district's discretion and is not subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.) A school district's decision to reduce a particular kind of service must not be fraudulent, arbitrary or capricious. (*San Jose Teachers Association v. Allen* (1983) 144 Cal. App. 3d 627, 637.)
10. Education Code section 44955, subdivisions (b) and (c), set forth a general rule requiring school districts to retain senior employees over more junior employees and to retain permanent employees over temporary employees. Any exception to this general rule must be based on statute. Education Code section 44955, subdivision (d) provides:

“(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.”

11. The district implemented a bump analysis to determine which employees could bump into a position being held by a junior employee. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or 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, 473-474.)

12. Under subdivision (d)(1), the District may skip a junior teacher being retained for specified reasons. (*Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 131.) Junior teachers may be given retention priority over senior teachers only if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.) A junior employee possessing special competence can be retained over a senior employee lacking such competence. (*Alexander v. Delano Joint Union High School District* (1983) 139 Cal.App.3d 567.)

13. The district skipped two employees, a counselor at the adult school and a female physical education teacher, pursuant to Education Code section 44955(d)(1).² The district was required to implement the governing board’s resolution in a manner that was consistent with the board’s policies and the district’s efforts to offer certain services to its students. There is no legal requirement mandating that skipping criteria be contained in a governing board’s resolution.

14. Several respondents who were counselors testified that they possessed the requisite Pupil Personnel Services (PPS) Credential which allowed them to provide counseling services to adults. They argued that they were able to perform the same services as the junior employee who had been skipped. In fact, one senior employee had performed the skipped employee’s job during two previous school years before the skipped employee was hired by the district. The district maintained that it had skipped the junior employee, with a November 16, 2009, seniority date, because he possessed superior skills which included the fact that the junior employee had interviewed and been selected for the position, that he traveled to college campuses, that he was a military liaison, and that he counseled

² The counselor was not listed on the seniority list introduced at hearing and the district alleged this was because he had been skipped.

adults, all tasks which the senior employees with PPS credentials were competent to perform. As such, the district's decision to skip that employee appeared arbitrary and capricious and it is recommended that the most senior counselor with a PPS credential be permitted to "bump" the junior counselor who was skipped.

15. Although the evidence was unclear, apparently the district skipped the female physical education (PE) teacher because female PE teachers were needed "district wide" to assist with locker room monitoring of the girl's locker rooms. However, several witnesses testified that many schools have a greater male to female PE teacher ratio and that they are able to arrange their respective schedules so as to provide appropriate female locker room monitoring. Moreover, Alejandro Alvarez, Director, Certificated Human Resources, acknowledged that the skipped female PE teacher had not yet been assigned, calling into question the district's decision to skip her. The evidence did not establish that the female PE teacher had been properly skipped and the decision to skip that employee appeared arbitrary and capricious. It is recommended that the most senior PE teacher be permitted to "bump" the junior PE teacher who was skipped.

16. Respondent Carol Sams, with an October 19, 1978, seniority date and a Designated Subjects Vocational Education Teaching Credential, testified that she was competent to "bump" a junior employee with a similar credential. However, the district demonstrated that the employees Sams believed she could "bump" were actually teaching under another credential, one which Sams did not possess. As such, she could not "bump" those employees. The evidence established that Sams was employed in a service which the district reduced. The decision to reduce or discontinue a particular kind of service is matter reserved to the district's discretion and is not subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.) However, respondent Sams testified that she noted several positions she believed she could "bump" but was not able to recall them at the hearing. In order to ensure an accurate determination that Sams cannot "bump" another employee, it is recommended that the district review the seniority list with Sams to verify that there are no positions she can bump.

17. Respondents, Julie Cox, Ajaa Jones, Jennifer Allen, and Michele Ness, worked as long term substitute teachers before they were retained as probationary I teachers. They alleged that their seniority dates should be changed to reflect their time as substitutes. The district argued that these respondents could not contest their seniority dates in this proceeding as they had agreed to those dates in the past, but the teachers credibly testified that they were unaware until this hearing that they could contest those dates. The evidence established that these teachers were working prior to the dates they signed their contracts and that the district delayed in executing their contracts. It is without question that it would be patently unfair to place these teachers in a worse position than long term substitutes who sign contracts at the start of the school year merely because the district delayed until after the school year began to have them sign their contracts. Although Education Code section 44918, subdivision (d), provides that time incurred as a day to day substitute teacher in the district may not be used when determining seniority, if these teachers worked more than 75 percent of the number of days in the year prior to being offered a probationary position, their temporary or substitute year is deemed to be a probationary year per Education Code section

44918. It is recommended the district review the files of these respondents to determine if any of them served for at least 75 percent of the number of days, and if they did, to correct their seniority dates accordingly. Thereafter, it is recommended the district determine whether any of these teachers, based upon these new seniority dates, have the seniority and qualifications necessary to rescind the preliminary notices issued to them.

18. Respondent Jose Diaz testified that his August 3, 2006, seniority date was inaccurate because his principal required him to attend a mandatory orientation program in July 2006. Diaz admitted he did not receive additional compensation for attending the training as he was told it was included as part of his contractual pay from the district. The district argued that the orientation was offered throughout the year and that Diaz could have taken it later. However, that argument was insufficient to rebut Diaz' testimony that his principal required him to attend the July 2006 program. The preponderance of the evidence established that Diaz was required to attend the orientation in July 2006. Diaz reasonably relied on the statements made by his principal and attended the orientation under the reasonable belief that his attendance was required. He forwent his summer vacation in order to attend this orientation.

A valid claim of equitable estoppel consists of the following elements: (a) A representation or concealment of material facts; (b) made with knowledge, actual or virtual, of the facts; (c) to a party ignorant, actually and permissibly, of the truth; (d) with the intention, actual or virtual, that the ignorant party act on it; and (e) that party was induced to act on it. (See *California Milling Corp. v. White* (1964) 229 Cal.App.2d 469; 479; *Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.)

In *Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496, the California Supreme Court observed that the doctrine of estoppel may be applied against the government "where justice and right require it;" but it will not be applied where this would nullify a strong rule of policy adopted for the benefit of the public; and "[t]he tension between these twin principles makes up the doctrinal context in which concrete cases are decided." (3 Cal.3d 493.)

"The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (3 Cal.3d 496.)

Accordingly, given the principal's statements to Diaz and his reasonable reliance on them, the district is estopped from asserting that he has a different seniority date than the first day of attendance at this orientation for which he was paid. It is recommended that the district review Diaz' personnel file, and in light of this new seniority date, determine if Diaz has sufficient seniority to permit him to retain his employment.

19. Richard Roth, an administrator with the district for over 20 years testified about the impropriety and unfairness of Education Code section 44956.5.³ He testified that several years ago during a fiscal crisis he was required to teach classes, and thereafter, he was listed on two separate district documents as having 20 years' seniority. The district conceded that past documents had incorrectly listed Roth's seniority, but argued that this error did not give Roth more seniority rights than those to which he was entitled under the Education Code. Roth admitted he was hired into the district as an administrator and did not refute the district's contention that administrators may be required to teach. While Roth's situation, as with all of the long-serving administrators being released in this proceeding, was profoundly troubling, the evidence did not establish a basis for him to circumvent the plain language of Section 44956.5.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to sections 44949 and 44955, and all notices and other requirements of those sections have been provided as required.

2. A 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. Because of the reduction of particular kinds of services, cause exists pursuant to Education Code section 44955 to give notice to respondents that their services will not be required for the 2010-2011 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949. The district has identified the certificated employees who are providing the particular kinds of services that the Governing Board directed be reduced or discontinued. It is recommended that the Governing Board give respondents notice before May 15, 2009, that their services will not be required by the District for the school year 2010-11.

4. A preponderance of the evidence sustained the charges set forth in the accusation subject to the recommendations listed in the factual findings. This determination is based on all factual findings and on all legal conclusions.

³ Education Code section 44956.5 provides that for certificated employees initially employed in an administrative position after July 1, 1983, who transfer to a teaching position, the period of employment as an administrator shall not be included in determining seniority for purposes of section 44955, except for school site administrators who shall earn up to a maximum of three years seniority while serving as site administrators.

RECOMMENDATION

It is recommended that the governing board give notice to the respondents whose names are set forth below except for those respondents identified above in the Findings of Fact Nos. 14, 15, 17, and 18, that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2010-2011 school year.

DATED: _____

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings

Appendix A

Last Name	First Name
ABREGO	ANA
AGUILAR	CRIS
ALLEN	JENNIFER
ALTAMIRANO	MARTHA
ANDERSEN	ADAM
AVINA	CARLOS
BARTELS	KEVIN
BASULTO	MINNIE
BELMONTEZ	MARY
BELMORE	DAVI
BENNETT	AMY
BENO	CAROLINE
BRADSHAW	JESSICA
BREWER	KARLA
BRISENO	RICHARD
BROWN	CAROLYN
BUTORAC	CHRISTOPHER
CALLANTA	ANNA
CARDOSI	WILLIAM
CHIEK	TESSA
CONRAD	TRISHA
CORDERO	ALICE FAYE
COX	JULIE
CRANE	JONATHAN
DANGANAN	MICHELLE
DAVIS	ERIC
DAVIS-FOX	BRITTNEY
DAWSON	MARAJHA
DOLVAN	TIFFANY
DEL CASTILLO	ANEL
DENNIS	KELLY
DIAZ	JOSE
DIN	EDUARDO
DOMINGUEZ	MARICELA
DOUGAN	BRENDA
DUNN	SHAVON
DZAMA	DAVID
EDWARDS	JESSICA
ESQUIVEL	JENNIFER

Last Name	First Name
ESQUIVIAS	ELIZABETH
FELTON	LANA
FIGUEIREDO	CYNTHIA
FLORES	JENNIFER
FRESQUEZ JR.	ARMANDO
GAXIOLA	REUBEN
GERKE	COLLEEN
GONZALES	CHRISTINA
GONZALEZ	ROSA
GUGGISBERG	KERI
HASENAUER-LOPEZ	REBECCA
HASTON	CHRISTINE
HERNANDEZ	DESEREA
HERNANDEZ	PRISCILLA
HERNANDEZ	BEATRIZ
HERNANDEZ	DIANE
HERNANDEZ	TAMARA
HOONG	KEN
HOWRY	TEVA
HUTCHINGS	JENNY
JOHNSON	ANNE
JONES	AJAA
JONES	ALPHONSO
JUBACK	ALEXANDER
KANANEN	AMY
KEELING	AMY
KIM	DAVID
KNAPP	LINDSEY
KONKEL	AUDREY
LANCE	HEIDI
LEON	ERIBERTO
LOBO JR.	CHARLES
LOGAN	JAMES
LOGIUDICE	SHENEE'
LOPEZ	NICK
LUSZECK	REID
MABRIE	CHERI
MACMILLAN	CRISTY
MARCHAN-GREINER	VALENTINE
MARTIN	CARLA
MATTHEWS	VERNON
MORA	ARMANDO
MORIN	ELIZABETH
MURILLO	ALBERT

Last Name	First Name
NAVA	OLGA
NESS	MICHELE
NORTHROP	CHRISTOPHER
OWENS	NIKIA
PARKER	ANNETTE
PASCUAL	EDWARD
PEREZ ZAMORA	NADINE
PERSKY	CHRISTOPHER
PIERCE	AMANDA
PORRITT	SULEIKA
PRECIADO	NANCY
PRIETO	MARLENE
PRITCHARD	LOIS
PROCTOR	ROBIN
PUCHALSKI	SARAH
PUFF	JACQUELYNE
REASER	JACQUELINE
REYES	CRISTINA
RIVERA	JUDITH
RIVERA	TINA
ROTH	RICHARD
RUSSO	ROSE
SALAZAR	ROSALIE
SALCIDO	VICTORIA
SAMS	CAROL
SANCHEZ	ARGELIA
SARREAL-DAM	RACHEL
SCATES	JULIE
SCHOENHERR	DIANA
SCHUCK	DARRIN
SERVELLO	KIMBERLY
SHARP	LAURA
SIMNJANOVSKI	RISTE
SIMPSON	SAMANTHA
SJOL	DIANA
SORIANO	ROBERT
SOTO	LOUISE
STUHRMANN	SHARON
SULLIVAN	PAMELA
TAKEMOTO	CONNIE
TATUM JR.	MICHAEL
TEMPLE	NANCY
TIBBETTS	AMY
URIBE	SANDRA

Last Name	First Name
URIBE	PAMELA
VALDEZ	DURAN
VOTRUBA	EMILY
WATSON-RODGERS	LEAH
WILLARD	DONNA
WILLIAMS	YVETTE
WILSON	LORI
YAMARONE	MELINA