

**BEFORE THE
GOVERNING BOARD
OF THE CONEJO VALLEY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Non-Re-Employment of
23 Full Time Equivalent Certificated
Employees, Erin Atkins, et al.,

OAH Case No. 2012040035

Respondents.

PROPOSED DECISION

The hearing in the above-captioned matter was held on May 1, 2012, at Thousand Oaks, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by Mary L. Dowell and Danielle G. Eanet, Liebert, Cassidy, Whitmore. All Respondents were represented by Tareq M. Hishmeh, Hathaway, Perret, Webster, Powers, Chrisman & Gutierrez. Respondents Jennifer Banuelos-Jade, Stephanie Blanehard, Carolyn Booser, Hilary Calce, Jennifer Drucker, Amanda Esterly, Catherine Hocutt, and Brynn Hutchinson were in attendance at the hearing.

Oral and documentary evidence was received, argument was heard, and the matter submitted for decision on the hearing date. However, the ALJ held the record open so that the parties could file briefs on two issues. Each party timely filed a brief. Complainant's brief is identified as Exhibit 15. Respondents' brief shall be identified as Exhibit I.

At the hearing, the parties stipulated that because the case had been continued, the ALJ would have until May 18, 2012, to issue the proposed decision, and that the District would have until May 25, 2012, to act on the proposed decision.

The ALJ hereby makes his factual findings, legal conclusions, and order, as follows.

FACTUAL FINDINGS

1. Complainant Jeffry Baarstad filed and maintained the Accusation¹ in the above-captioned matter while acting in his official capacity as Superintendent of the Conejo Valley Unified School District (District).

¹ The term "accusation" refers to a type of pleading utilized under the Administrative Procedure Act, Government Code sections 11500 and 11503; that statutory scheme governs the hearing procedures in this case. The Respondents are not "accused" in the everyday sense of that word; they have done nothing wrong, and all appear to be dedicated professionals. It might be said that they are simply accused of not having enough seniority

2. The following persons are certificated employees of the District and are the Respondents in this case: Erin Atkins, Jamie Ayers, Jennifer Bafielos-Jade, Melanie Berman, Stephanie Blahard, Carolyn Booser, Hilary Calce, Euan Davidson, Jennifer Drucker, Amanda Easterly, Brandon Fausset, Kim Fontanilla, Heather Hamilton, Catherine Hocutt, Brynn Hutchison, Gloria Kinberg, Victoria Krock, Stephanie Lopez, Heather Marien, Claudia Ortega, Shawna Randolph, Staci Roth, and Leah Wallace.

3. (A) On February 21, 2012, the Governing Board of the District (Board) adopted Resolution number 11/12-17, which pertained to the reduction or discontinuance of particular kinds of services for the 2012-2013 school year. (Hereafter Reduction Resolution.) The purpose of the Reduction Resolution was to reduce and discontinue particular kinds of certificated services no later than the beginning of the 2012-2013 school year. Specifically, the resolution requires the reduction of 49 “FTE”—Full Time Equivalents—by reducing various types of services. This decision was based on financial concerns as the District faces a budget shortfall of considerable size.

(B) The FTEs that the Board determined to reduce are described in the Reduction Resolution, as follows:

Multiple Subject Credential K-6 Teaching Services	38
Math (middle & high school)	2
English (middle & high school)	4
World Languages (Spanish-high school)	2
Science: Biological Sciences (middle & high school)	1
Art (high school)	2
Total FTE to be reduced:	49

(C) The Reduction Resolution contained “skip criteria,” which defined which teachers in the District would be exempt from layoff or displacement by senior teachers. Such criteria will be detailed below.

4. At the time that the Reduction Resolution was adopted, the Board adopted resolution 11/12-19, which established “tie breaking” criteria for determining seniority in cases where two or more certificated employees share the same seniority date. The tie-breaking criteria were based solely on the needs of the District and its students.

5. A third resolution was adopted by the Board on February 21, 2012, number 11/12-18, which pertained to determination of competency among employees possessing the same credential. By the text of the resolution, the Board established competency criteria.

or other qualifications to retain their positions with the District in the face of a resolution to reduce positions.

6. The services which the District seeks to discontinue or reduce are particular kinds of services that may be reduced or discontinued under Education Code section 44955.²

7. The decision by the Board to reduce or discontinue services was neither arbitrary nor capricious, but rather was a proper exercise of the District's discretion given the uncertainty regarding the state budget and the District's financial resources.

8. The reduction and discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Board.

9. (A) On March 5, each Respondent and other certificated teachers were given written notice that pursuant to sections 44949 and 44955, their services would not be required in the 2012-2013 school year (hereafter the preliminary notices). Thereafter, Respondents requested a hearing, and each was then served with an Accusation and other documents pertaining to the hearing process. Each Respondent filed a notice of defense in a timely manner.

(B) All jurisdictional requirements have been met.

10. To implement the reduction in force, the District created a seniority list. That seniority list took into account a number of factors, including first date of paid service and the information used in the tie-breaking criteria, such as credential types and post-graduate degrees. Five Respondents challenged the seniority list on the grounds that they should have been classified as probationary teachers in prior years, which contention, if established, would alter their seniority dates. The issues raised by those Respondents shall be detailed below.

11. The District retained some junior employees, exempting or "skipping" them from lay off, based on the skip criteria found in the Reduction Resolution. Respondents raised issues regarding the skip criteria, discussed further below.

12. In determining who would receive final lay off notices, the District staff evaluated whether any senior teacher could displace or "bump" a junior teacher. In various cases such senior teachers did displace junior teachers.

The Disputed Seniority Dates

13. The five teachers who dispute their seniority dates are Carolyn Booser (Booser), Brandon Fausset (Fausset), Kimerberly Fontanilla (Fontanilia), Catherine Hocutt (Hocutt), and Gloria Kinberg (Kinberg). Booser and Fontanilla carry seniority dates of August 31,

² All further statutory references are to the Education Code.

2010, on the District's seniority list. The others, Fausset, Hocutt, and Kinberg have a seniority date of August 27, 2007.

14. (A) All five of the aforementioned Respondents were treated by the District as temporary employees for a period of years. Notwithstanding that treatment, the five teachers assert that they were hired on contracts that did not clearly delineate them as temporary employees, and that they must therefore be deemed probationary teachers, that being the classification that teachers default to if their status is not properly spelled out. The District counters that all five knew that they were being hired as temporary employees, and that if the contracts were not clear, subsequent correspondence made clear that the teachers were temporary. The District asserts, further, that if these instructors' contentions are credited, they will still be exposed to lay off, although different seniority dates may affect rehire rights.

(B) The seniority dates asserted by these Respondents are as follows: Booser, August 24, 2007; Fausset, November 29, 2006, Fontanilla, September 22, 2008; Hocutt and Kinberg, the first day of the 2006-2007 school year.

15. (A) Respondent Kinberg entered into a written contract with the District on July 12, 2006. The contract was titled "Offer of Employment," Kinberg accepted the offer on that date. The first paragraph of the document states that Kinberg was being offered a "position to serve as a certificated non-permanent teacher for the 2006-2007 school year as outlined below subject to the following terms and conditions." (Ex. D.)

(B) In term number 3, it states that "you [Kinberg] will be required to render service for such length of time during the school year as the governing board of the school district may direct. Length of Service: 2006-2007 School year." (*Id.*)

(C) Term number 5 states: "You are classified as a certificated non-permanent teacher and are terminable at any time at the sole discretion of the District." (*Id.*)

(D) On February 22, 2007, Ms. Jo Ann Yoos (Yoos), then Assistant Superintendent for Personnel Services, wrote to Kinberg. In her letter, Ms. Yoos stated (in part): your service during the 2006-2007 school year as a temporary teacher . . . has been appreciated by . . . [the] District." The letter goes on to state that Kinberg's employment will end on June 15, 2007, and that if an opening occurs, she will be given consideration for a future position. A similar letter was sent to Kinberg on February 4, 2008, again referring to her work as a temporary teacher, but for the 2007-2008 school year.

16. Contracts signed by Fausset, Hocutt, Booser and Fontanilla are on the same form, using the same language, as that used in Kinberg's contract. Those other employees received letters from Yoos that referred to their status as temporary teachers.

17. (A) Fausset signed a contract as a certificated non-permanent teacher on March 6, 2007, whereby he was employed until June 15, 2007. However, the contract identified his

term of service as starting in the previous November, on the 29th of that month. The contract states he had been paid for some of that time as a substitute.

(B) Fausset executed another contract as a certificated non-permanent teacher on August 23, 2007, with a teaching term of a school year, beginning on August 24, 2007, and ending on June 13, 2008.

(C) Between the time Fausset signed the first contract, and the second, he received a letter from Ms. Yoos, which was substantially similar to the letters sent to Kinberg. Hence, in the April 3, 2007 letter, Ms. Yoos stated that Fausset's service during the 2006-2007 school year "as a temporary teacher" had been appreciated by the District and others. The letter goes on to state that Fausset's employment will end on June 15, 2007, and that if an opening occurs, he would be given consideration for a future position. A similar letter was sent to Fausset on February 4, 2008, referring to his work as a temporary teacher in the 2007-2008 school year, and stating that he might be considered for a position during the next school year.

(D) On June 23, 2008, Fausset signed a third contract as a certificated non-permanent teacher. It had the same provisions as the prior contracts, i.e., stating at paragraph 5 that he was classified as a non-permanent employee terminable at any time.

18. Ms. Hocutt's history is similar to Fausset's and Kinberg's. She signed a contract as a certificated non-permanent teacher on July 19, 2006, for the 2006-2007 school year. On February 22, 2007, she received a letter with the same text as that sent to Kinberg, thanking Hocutt for her service as a temporary teacher, and reminding her that her contract would terminate on June 15, 2007. Hocutt signed another contract as a certificated non-permanent employee on July 13, 2007, for the 2007-2008 school year, and on February 4, 2008, she received another thank you letter from Yoos, which again referred to Hocutt's employment as a temporary teacher. And, like her colleague, Fausset, in June 2008 Hocutt signed an agreement as a certificated non-permanent employee for the 2008-2009 school year.

19. On August 22, 2007, Booser signed a contract classifying her as a non-permanent certificated employee for the 2007-2008 school year, with a start date of August 24, 2007. She signed another such contract on August 22, 2008, for the 2008-2009 school year. In March 2009, she received one of Ms. Yoos's letters, in appreciation for Booser's work as a temporary teacher in the 2008-2009 school year. Thereafter, in January 2010, Booser signed a contract that referred to her as a temporary teacher.

20. (A) Ms. Fontanilla signed her first contract as a "non-permanent" teacher on October 3, 2008, whereby she was employed for the 2008-2009 school year; the contract stated that she her length of service was September 22, 2008 through June 12, 2009. Like Ms. Booser, Fontanilla received a letter from Yoos in March 2009 thanking Fontanilla for her work as a temporary teacher during the 2008-2009 school year, and reminding her that her contract would terminate in June 2009.

(B) In November 2009, Fontanilla signed a contract that clearly denominated her as a temporary teacher for the period August 25, 2009, through December 18, 2009. On January 12, 2010, she signed a similar contract for the period January 11 through June 11, 2010. Finally, on August 12, 2010, she signed a contract that identified her as a temporary employee for the 2010-2011 school year.

21. During the same time period—2006 through 2009—the contracts utilized by the District for probationary teachers carried the same language as term number 5, quoted above, from the “non-permanent employee” contracts. District witnesses acknowledged that the contracts for the probationary and temporary teachers during the period were identical in form.

22. (A) The District’s Closing Brief makes assertions about the job history of each of these five Respondents that, at times, are difficult to support from the record. For example, it is asserted that Kinberg was employed as a temporary employee in 2006-2007, and subsequently granted probationary status for the 2008-2009 school year, and that the 2006-2007 year provided her credit as a year of probationary service under section 44918. However, there was no documentation of the probationary term in Exhibit D.

(B) The District states that Hocutt was a temporary employee in the 2006-2007 and then the 2007-2008 school years, and granted probationary status for 2008-2009. Because of that, she received credit for the 2007-2008 school year pursuant to section 44918. However, as noted in Factual Finding 18, and as acknowledged by the District in their brief, the language of Hocutt’s 2008-2009 contract—what the District calls a probationary contract—and that of her 2007-2008 contract—what the District denominates as a temporary contract—are identical. This is illustrative of the admission made by the District and described in Factual Finding 21.

The Objection to the Skip Criteria and Its Application

23. The skip criteria set forth in the Reduction Resolution cover a number of areas, seven in total. It includes teachers assigned to the continuation high school, English Language Learner teachers on special assignment, and Junior Kindergarten Teachers. Further, the skip criteria would exempt teachers assigned at two “academies,” the Discover Academy and the Century Academy, as well as two “magnet” programs, the EARTHs Magnet School and the program referenced as the Open Classroom Leadership Magnet School. During the hearing the District asserted that it had issued some precautionary notices to teachers at the continuation school, Conejo Valley High School, which would be rescinded if that skip criteria were upheld. By the end of the case, the objection to the skipping focused mainly on Respondents Drucker and Esterly.

24. The skip criteria stated that the teachers assigned to the seven skipped programs were all selected through a “competitive selection process.” (Ex. 9, p. 2.) Most, but not all, referred to the skipped teachers as having been provided “extensive training.” (*Id.*) The two categories not referencing extensive training were ELL Teachers on Special Assignment and

Junior Kindergarten Teachers; each spoke only to the competitive selection process. However, since no teachers were skipped in these programs, the issue is moot.

25. Conejo Valley High School is the District's continuation school. It was established by the evidence that special training has been provided to the teachers there to enable them to teach the students there more effectively. It must also be found that the continuation program, though it teaches the same subjects as the other high schools, constitutes a course of study for the high school students placed there, and that special training and experience is necessary to teach there.

26. The EARTHs Magnet School, Open Classroom Leadership Magnet School and the two academies, Discover and Century, use different curricula and teaching methods than the other schools in the District. Testimony from more than one witness for the District supported a finding that the course of study is different from the District's other schools, and that special training and experience is necessary to teach the courses at these four academies or magnet programs. The teachers presently assigned to these sites have received special training to assist them in teaching there.

27. None of the Respondent's had the training that is required to teach in Conejo Valley High School, the two academies, or the two magnet programs.

28. Ms. Drucker and Ms. Esterly object because they have attempted to apply for positions at the magnet schools, but were told they could not apply in past years because teachers who were subject to lay off—which they had been in prior years—were not eligible to apply, even though they have the necessary credentials to move into the positions.

Other Findings

29. The Respondents all appear as well educated and qualified teachers. All were obviously dedicated to their profession.

30. As set out further in the Legal Conclusions, it must be found that no junior certificated employee is being retained in a position which a senior employee is certificated and competent to fill.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to sections 44949 and 44955, based on Factual Findings 1 through 9.

2. (A) A District may reduce particular kind of services (PKS) 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.) The Court of Appeal has made clear that a PKS reduction does not have to lead to fewer classrooms or classes; laying off some teachers amounts to a proper reduction. (*Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 853-85; see also *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 631, 637 [reduction of classroom teaching can be a reduction of a PKS; as long as there is a change in the method of teaching or in a particular kind of service in teaching a particular subject any amount in excess of the statutory minimum may be reduced]; *California Teachers Assn. v. Board of Trustees* (1982) 132 Cal.App.3d 32.)

(B) The services to be discontinued are particular kinds of services within the meaning of section 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949. This Legal Conclusion is based on Factual Findings 3, 5, 6, 7, and 8 and the foregoing authorities.

3. (A) A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated 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.) At the same time, a junior teacher may be given retention priority over one or more senior teachers—may be "skipped" in favor of senior employees—if the junior teacher possesses superior skills or capabilities not possessed by more senior colleagues which must be necessary to teach a course or course of study that is specifically needed in the District. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Governing Bd. of Santa Clara Unified School Dist.* (1981) 116 Cal.App.3d 831.)

4. (A) As generally discussed in Legal Conclusion 3, one way that a school district may deviate from seniority is through skipping, which is governed by Section 44955, subdivision (d). That subdivision states:

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.

(B) Thus, the Legislature established four justifications for a skipping over a junior employee and terminating a senior employee instead. First, a district may skip over a junior teacher and terminate a senior teacher if "the district demonstrates a specific need for personnel to teach a specific course or course of study." Second, a district may skip if "the district demonstrates a specific need for personnel . . . to provide the services authorized by a services credential with a specialization in . . . pupil personnel services." Third, a district

may skip if “the district demonstrates a specific need for personnel . . . to provide the services authorized by a services credential with a specialization in . . . health for a school nurse.” Fourth, a district may skip to maintain or achieve “compliance with constitutional requirements related to equal protection” (§44955, subd. (d).)

(C) Furthermore, a district must demonstrate that the certificated employee who would be skipped has special training and experience necessary to provide the instruction or service in question.

5. In this case, the District has demonstrated a specific need for specific personnel to teach certain course of study, including the continuation program, and the courses at the magnets and at the academies. And, it has demonstrated that the skipped employees have both experience and training needed to provide the instruction in question. Based on Legal Conclusions 3 and 4, and Factual Findings 4, 11, and 23 through 28, Respondents’ objections to the skipping of junior employees can not be sustained.

6. (A) Respondents Booser, Fausset, Hocutt, Fontanilla, and Kinberg’s seniority dates should be changed. The District did not clearly classify them as temporary teachers; the contracts created, at best, an ambiguity in that probationary contract forms were used in each case.

(B) The Court of Appeal revisited the issue of classification very recently, in *Stockton Teachers Assn. CTA/NEA v. Stockton Unified School District*, (2012) 204 Cal.App.4th 446 (*Stockton*). The court’s discussion of the issue of classification started with familiar touchstones, i.e., that there are four teacher classifications—permanent, probationary, temporary, and substitute—and that probationary status is the default classification if the Education Code does not specify another classification. (*Stockton, supra*, 204 Cal.App.4th 455-456.)

(C) The court then pointed out that there are few examples of temporary status, and described them, as follows:

As stated, the Education Code specifically authorizes a temporary classification in only a few instances. Section 44919 allows an employee to be classified as temporary who is employed for the first three school months of any term to teach temporary classes that will not exist after the first three school months, or to perform other duties which do not last longer than the first three school months of any term. If the classes or duties continue beyond the first three months, the employee must be classified as probationary.^{FN5} Additionally, employees may be classified as temporary who serve in a limited assignment supervising athletic activities, or who are hired up to a period of 20 days to prevent the stoppage of school business when an emergency arises and there are no probationary employees available. (§ 44919, subds. (b) and (c).) Also, a teacher may be hired and classified

as temporary for a complete school year, but not less than one semester, to replace a certificated employee who has been granted leave for a semester or year, or is experiencing long-term illness. (§ 44920.) Finally, an employee may be hired as a temporary employee for the first semester only, if the school district expects a reduction in student enrollment during the second semester due to students graduating at midyear. (§ 44921.)

(*Stockton, supra*, 204 Cal.App.4th at 456.)

(D) Nothing in the record establishes that the teachers allegedly serving as temporary for an entire year had been so hired to replace a certificated employee who was on leave or experiencing a long-term illness, i.e., they can not be found to fit within the ambit of section 44920. Thus, for example, Kinberg was hired for the entire 2006-2007 school year without any evidence she was filling in for a teacher on leave or out ill. (Factual Finding 15(A).) The same can be said for Fausset's year of service in the 2007-2008 school year. (Factual Finding 17(B).) Hocutt served for three years on such contracts, beginning with the 2006-2007 school year (Factual Finding 18) while Booser began the first of two straight years of full time duty on August 24, 2007. (Factual Finding 19.)

(E) As further noted by the *Stockton* court, citing prior cases, the temporary classification is strictly construed so as to prevent the benefits of tenure security from the administrative needs of a district. (*Stockton, supra*, 204 Cal.App.4th at 456-457.) Even where the teacher agrees in writing to serve as a temporary employee, that is not determinative unless the classification is authorized by statute; "if the employee does not satisfy one of the statutory grounds for classification as a temporary employee, the default provision of section 44915 mandates classification as a probationary employee. [citations omitted.]" (*Id.*, at p. 457.)

(F) Based on the foregoing, the fact that Fontanilla received a contract labeling her as temporary for the period August 25 to December 18, 2009, is not controlling of her status. Likewise, Ms. Yoos's letters to Respondents could not make them temporary employees if the contract itself could not. There not being justification for classifying these Respondents as temporary, their two years of probationary service entitled them not only to an earlier seniority date, but permanent status if they do not already hold it. (§§44845, 44917, 44918.)

(G) Fausset and Booser should be assigned seniority dates of August 24, 2007 based on Factual Findings 17(B) and 19. Fontanilla should have a seniority date of September 22, 2008. (Factual Finding 20(A).) Kinberg and Hocutt should have seniority dates equal to the first day of school in the 2006-2007 school year, a date readily accessible to District staff. (Factual Findings 15(A) & (B), 18.)

7. No Respondent established that he or she had the right to bump a junior employee or that he or she should have been skipped, based on all the foregoing.

ORDER

1. The seniority dates of Respondents Fausset, Booser, Fontanilla, Kinberg, and Hocutt shall be changed to comply with Legal Conclusion 6(G).

2. The following Respondents may receive final layoff notices, in inverse order of seniority, after the changes to the seniority list: Erin Atkins, Jamie Ayers, Jennifer Bafielos-Jade, Melanie Berman, Stephanie Blanahard, Carolyn Booser, Hilary Calce, Euan Davidson, Jennifer Drucker, Amanda Easterly, Brandon Fausset, Kim Fontanilla, Heather Hamilton, Catherine Hocutt, Brynn Hutchison, Gloria Kinberg, Victoria Krock, Stephanie Lopez, Heather Marien, Claudia Ortega, Shawna Randolph, Staci Roth, and Leah Wallace.

May 18, 2012

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings