

**BEFORE THE
GOVERNING BOARD
OF THE BALDWIN PARK UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:
Wenddy Aguayo and other Certificated Staff
of the Baldwin Park Unified School District,

OAH Case No. 2012031028

Respondents.

PROPOSED DECISION

The hearing in the above-captioned matter was held on May 7, 2012, at Baldwin Park, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by Jeff C. Marderosian, Esq. All Respondents were represented by Richard Schwab, Trygstaad, Schwab & Trygstaad. All Respondents, identified below, were present for the hearing.

Shortly after the hearing commenced, Respondents' counsel provided a handwritten list of the Respondents in attendance. That document will be marked as Exhibit B and made part of the record.

Oral and documentary evidence was received, argument was heard, and the matter submitted for decision on the hearing date.¹ Following the hearing, on May 9, 2012, Complainant's counsel submitted a letter brief, citing a case that he contended was controlling on one of the issues in the case, the seniority date of Ms. Witty. Although no briefing was scheduled, the ALJ deemed it prudent to review the brief, and to identify it for the record as Exhibit 12. Respondents' counsel, who had been copied with Exhibit 12 by Mr. Marderosian, was contacted and allowed until May 14, 2012, to make any reply he deemed appropriate. He did so, and Respondents' letter brief was reviewed, and is marked as Exhibit C for identification. The record is deemed reopened during the period May 9 to May 14, 2012, to obtain the two briefs.

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

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¹ The parties stipulated that in light of the prior continuance of the matter, this Proposed Decision is due on June 1, 2012, and that the Board must act on it by June 8, 2012.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Complainant Mark M. Skvarna filed and maintained the Accusation² in the above-captioned matter while acting in his official capacity as Superintendent of the Baldwin Park Unified School District (District).

2. The following persons are certificated employees of the District and are the Respondents in this case: Wenddy L. Aguayo, Jacqueline Arias, Jane Bocanegra, Alejandra Covarrubias, Marcy Duenas (Nateras), Francisco J. Espinoza, Janet Flores, Rae Lynn Gomez, Angela M. Hita, Judy E. Legaspi, Veronica R. Madere, Cynthia Milian, Yvonne Milian (Castroena), Magdalena Padilla, Maricela Perez, Ofelia Romero, William Sullivan, Erika Valenzuela, and Carmen E. Villegas.³

3. (A) On March 13, 2012, the Governing Board of the District (Board) adopted Resolution number 27, 2011-2012, entitled “Authorization to Decrease the Number of Certificated Employees Due to a Reduction In Particular Kinds of Services” (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 reductions of 35 “FTE”—Full Time Equivalent positions—by reducing various types of services. This decision was based on financial concerns as the District faces a budget shortfall; the District is grappling with a multi-million dollar deficit for the upcoming school year.

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

Elementary School Teacher (Multiple Subject)	26
Middle School Teacher (Multiple Subject)	2
Middle School English	2
Middle School Science—Biological Sciences	2

² 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 accused of not having enough seniority or requisite qualifications to retain their positions with the District in the face of a resolution to reduce positions.

³ Ms. Villegas is identified on Exhibit 5 with the middle initial “F,” but she signed in on Exhibit B using the middle initial “E.”

Middle School Social Sciences	1
Middle School Physical Education	1
Total to be reduced:	35

4. (A) As part of the Reduction Resolution, the Board adopted “tie breaking” criteria for determining seniority in cases where two or more certificated employees share the same seniority date. The tie-breaking criteria, set forth on Exhibit A to the Reduction Resolution, were based solely on the needs of the District and its students.

(B) The Board also adopted competency criteria, which is set out in Exhibit B to the Reduction Resolution, to be utilized in determining if a teacher subject to lay off could “bump” into another position. In summary, the criteria includes a requirement that a teacher have taught the class that he or she seeks for one year in the past ten years. The teacher must also possess a CLAD, BCLAD, or other English Learner qualifications, and finally, the teacher must be “highly qualified” under the No Child Left Behind federal statute.

(C) The Reduction Resolution also established “skip criteria” so that a junior employee could be retained to teach English Language Development (ELD) at the high school level.

5. 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 44955.⁴

6. 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, which are otherwise insufficient to avoid a multi-million dollar budget deficit.

7. 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.

8. (A) On March 14, 2012, 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). A total of 33 teachers received preliminary notices. Four of those persons did not request a hearing, but Respondents and others did. Thereafter, Respondents and those other teachers who requested a hearing were served with an Accusation and other documents pertaining to the hearing process. Each Respondent filed a notice of defense in a timely manner.

⁴ All further statutory references are to the Education Code.

(B) Following the service of the Accusations and prior to the hearing, the District rescinded the preliminary notices and withdrew the Accusations against eight teachers. Those persons are identified on Exhibit 5. That action left 19 teachers subject to these proceedings, that is, the persons identified in Factual Finding 2.

(C) All jurisdictional requirements have been met.

9. 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. However, the District had to resort to the last tie-breaking criteria, a lottery, in several instances.

Respondents' Assertions

10. In determining who would receive final layoff notices, the District staff evaluated whether any senior teacher could displace or “bump” a junior teacher. The District staff concluded that none of the Respondents could bump a junior teacher from that junior person’s position. The District asserts it properly skipped Mr. Gutierrez and any other junior teacher that it retained.

11. Notwithstanding the District’s action, Respondents Jacqueline Arias, Cynthia Milian, and Rae Lynn Gomez asserted that they are certificated and competent to teach in assignments held by more junior employees. Respondent Angela Hita contested her seniority date, asserting that she should have a seniority date of August 25, 2005, rather than August 29, 2005. All Respondents asserted that another teacher who had been retained had been credited with too many years of seniority because the District had counted her time as a classified employee as certificated service.

Ms. Hita’s Seniority Date

12. Ms. Hita testified that she had worked as a temporary teacher during the second semester of the 2004-2005 school year. She was then hired for the 2005-2006 school year. She testified that the principal of her school during that spring semester, as well as the next principal assigned to the school site, directed her to attend the “new teachers academy” for three days, beginning on August 25, 2005. Further asserting that she was paid for that time, Hita asserts that she should have a seniority date of August 25, 2005, which she would share with a number of other Respondents.

13. Complainant produced a copy of Ms Hita’s employment contract for the 2005-2006 school year. That agreement, dated July 5, 2005, was executed by Ms. Hita on July 17,

2005. It identifies her position as temporary teacher.⁵ It also identifies her contract year as “184 days commencing August 29, 2005 and ending June 30, 2006.” (Ex. 11.) Further, at paragraph number 4, it states that “the first week’s activities for returning teachers will take place on August 29, 30, and 31, 2005.” (*Id.*) There was credible testimony that a returning teacher such as Hita were not obligated by the District to attend the new teacher training.

14. On cross-examination Respondent Hita acknowledged that she received a paycheck at the end of September 2005, but she could not say positively that it covered the three days when she attended the training, which was for new teachers, not returning teachers such as herself.

The Skipping of Mr. Gutierrez

15. As noted in Factual Finding 4(C), the Board’s Reduction Resolution provided skipping criteria. That criteria states:

Currently assigned to teach high school English Language Development (ELD) and have undergone special training for the position which includes, but is not limited to, the Writing Reform Institute for Teaching Excellence (WRITE) Model, the PROMISE Initiative Program, and specialized training for the long-term EL Level 3 students using the Hampton Brown Edge Program.

(Ex. 1, p. 3.)

16. There is only one high school ELD instructor at this time, Mr. Gutierrez, and he was skipped by the District in this layoff procedure. He is junior to many of the Respondents, as his seniority date is August 24, 2006.⁶

17. Mr. Gutierrez is teaching a special course of instruction—high school ELD—and he has special training and qualifications to do so, of the type set out in the skip criteria. He has approximately 100 hours of specialized training to teach high school ELD, and specifically the training set out in the criteria. While a number of Respondents have ELD training, it is in programs different than those used to train Mr. Gutierrez.

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⁵ It is inferred that Ms. Hita was hired as a probationary teacher in 2006-2007, allowing her full year as a temporary teacher to provide an extra year of probationary credit pursuant to section 44917.

⁶ Fourteen of the nineteen respondents are senior to Mr. Gutierrez. (See Ex. 8A.)

The Seniority Date of Elizabeth Witty

18. Respondents objected to the seniority date assigned to Elizabeth Witty, a teacher who did not receive a preliminary notice. Ms. Witty, number 498 on the seniority list, was assigned a seniority date of September 1, 1998, which makes her senior, by seven years, to the most senior Respondent.

19. Respondents assert, however, that Ms. Witty was employed from September 1, 1998, until August 25, 2005, in a classified position, and that therefore, seven years of seniority should be deducted from her current standing, leaving her tied with a number of other respondents. When the District asserted that in any event Ms. Witty would be most senior of the group holding the August 25, 2005 seniority date based on tie-breaking criteria, Respondents countered that she would not be entitled to seven points for the years she served in a classified position, and in fact would not top several other teachers holding the August 25, 2005 seniority date.

20. Prior to August 2005, Ms. Witty was an Early Childhood Education (ECE) teacher with the District. Respondents offered Exhibit A, titled “Notice of Vacancy,” advertising an ECE position for the balance of the 2011-2012 school year.⁷ The Notice describes the ECE assignment as a classified position. It further states that such employees must be members of the California School Employees Association, rather than the bargaining unit that represents the Respondents and other certificated employees. An ECE instructor is described in the Notice as one who “plans and implements a developmentally appropriate educational program for preschool-age children.” While a bachelor’s degree is preferred, it is not required if the teacher has the appropriate associate’s degree. According to the announcement, a teacher applying for the position must hold a Children’s Center Instructional Permit or Child Development Teacher Permit.

23. Under section 44002, a permit is a credential.

24. No teachers currently assigned to an ECE position are shown on the seniority list.

Respondents’ Claim to Bumping Rights

25. Besides skipping Mr. Gutierrez, the District retained or skipped another junior teacher. That teacher, Ms. Boyle, is a permanent teacher with a seniority date of February 3, 2008. Ms. Boyle is currently assigned to teach middle school. She is teaching math at the middle school, along with two other subjects. More than one Respondent asserted that they are certificated and competent to teach math at the middle school level, or the high school ELD, or that they could take the place of some other junior teacher retained by the District.

⁷ The document bears a date of February 23, 2012, but speaks to a position that will be open for the 2011-2012 school year.

26. (A) Respondent Rae Lynn Gomez asserted that she could bump into the positions held by Ms. Maggie Velasco (number 132 on the seniority list) or Ms. Salazar, number 142, as well as the ELD position held by Mr. Gutierrez. Ms. Gomez has a seniority date of August 24, 2006 and is senior to the other three teachers. She is currently teaching sixth graders, and she teaches English to them. She holds a clear multiple subject credential and supplemental authorization for Introductory English and a CLAD equivalent; she could therefore teach single subject English with her credential. She has not taught middle school or high school in the District.

(B) Ms. Salazar and Ms. Velasco hold clear multiple subject credentials, and CLAD or BCLAD certificates. Ms. Velasco holds a supplemental authorization for grade nine and below English instruction, and Ms. Salazar holds supplemental authorizations for Introductory English and Introductory Math. Ms. Salazar is assigned to teach high school, while Ms. Velasco is assigned to teach in the middle school.

(C) Ms. Gomez is a probationary teacher. The teachers she seeks to bump are permanent teachers.

27. (A) Respondent Cynthia Milian, who has a seniority date of August 25, 2005, asserted that she would be able to bump junior teachers, including Ms. Boyle, Jose Arias, and Ms. Salazar, mentioned previously. Mr. Arias holds a supplemental authorization allowing him to teach math to students in the ninth grade and below. Like Ms. Boyle, he is assigned to a high school position.

(B) Ms. Milian holds a supplemental authorization for introductory math. Her supplemental authorization, like those held by Boyle, Arias, and Salazar, would authorize her to teach math as a single subject.

(C) Ms. Milian is currently teaching second graders, and has previously taught first, fourth, and fifth graders. She has not taught at the middle school or high school level.

28. (A) Respondent Jacqueline Arias also has a seniority date of August 25, 2005, and she holds a clear multiple subject credential, a BCLAD (Spanish), and a supplemental authorization for Introductory Spanish. She currently teaches first grade, and has done so for the last four years. She has not taught high school or middle school Spanish for a school year.

(B) Ms. Arias asserts she could teach the high school ELD course currently assigned to Mr. Gutierrez, citing the fact that she has been teaching dual immersion, teaches ELD, and has ELD training. She acknowledged that her ELD training is not quite the same as that used by Mr. Gutierrez, but noted that previously the staff had had Hampton Brown training, one of the trainings mentioned in the skip criteria.

(C) Ms. Arias asserts she should be able to bump Jacob Saravia, whose seniority date is August 24, 2006, and Alejandro Wuence, who has a seniority date of August

23, 2007. The latter holds a clear single subject language credential for Spanish, and he is assigned to a high school. Mr. Saravia has similar credentials, and he is also assigned to a high school. It should be noted that neither high school teacher appears to hold a CLAD or BCLAD.

Other Findings

29. The Respondents all appear as well educated and qualified teachers. All but one of the Respondents hold a masters degree, and one of them, Ms. Perez, holds two masters degrees. All hold CLADs, BCLADs, or CLAD equivalents. Many hold one or more supplemental authorizations from the Credentialing Commission. 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. As discussed below, competency in this context is a legal term based on a specific provision of the Education Code.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to sections 44949 and 44955, based on Factual Findings 1 through 8(C).

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 (*San Jose Teachers*) [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 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.) 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) The District in this case established competency criteria, to be utilized to determine if a teacher who was otherwise certificated to bump into another position was competent to do so. The District’s criteria, found on Exhibit B to the Reduction Resolution, required the senior teacher to demonstrate that they had performed the service, for the District, for at least one year in the last ten. That is, the criteria requires some experience in teaching the class that a respondent would bump into.

(B) Although Respondents objected to the competency criteria, case law supports the District’s action. The Court of Appeal in *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, upheld a community college’s right to define “competence” by resolution. The college was relying on a statute that was virtually identical to the pertinent provisions of section 44955, and in doing so passed a resolution that defined competency for purposes of bumping to include one year of teaching the subject within the past ten years. Although there are factual differences between this case and the scenario set out in *Duax*, the basic principle, that some relatively recent experience performing the particular service may be required, stands. It must be concluded that the competency criteria adopted by the District is not drawn in too narrow a manner, and it must be upheld.

(C) As noted in Findings 29 and 30, the Respondents are highly educated teachers, and they are not, in the usual sense, lacking in competency. They lack that very specific type of competency required by the Board for bumping purposes—one year of teaching in the particular assignment during the past 10 years—but they are otherwise qualified to carry out their current assignments, and could, absent the competency criteria, be assigned by the Board in the future to some of the positions they now seek.

(D) Based on the foregoing, Respondents Arias, Milian, and Gomez may not bump into another position because they lack competency within the meaning of section 44955, subdivision (b), and the Board’s criteria, based on Factual Findings 4(B), 26(A), 27(C), and 28(A).

5. Respondent Gomez’s status as a probationary teacher (Factual Finding 26(C)) is a further ground for not allowing her to bump a junior teacher. Under the law, permanent status is given precedence over probationary status. The governing statute states that “no permanent employee may be laid off if a probationary employee, or any other employee of

less seniority” occupies a position that the permanent employee can take. (§ 49555, subd. (c).) Thus, for practical purposes all of the probationary class of a school’s certificated employees must be eliminated before any permanent employee is terminated, although if a probationary teacher could be properly skipped, then they might survive where other permanent teachers without the particular qualifications would be laid off. To allow a probationary teacher to bump an equally qualified permanent teacher would do violence to one of the most basic provisions of section 44955.

6. The skipping criteria comports with the law, and the skipping of Mr. Gutierrez must be upheld. A district may skip if “the district demonstrates a specific need for personnel to teach a specific course or course of study . . . and that the certificated employee has special training and experience necessary to that course or course of study” (§ 44955, subd. (d).) Plainly, the high school EL class is a specific course or course of study, and a need has been demonstrated for personnel to teach it. Here, such personnel—Mr. Gutierrez—has been skipped, and that was within the District’s discretion. At the same time, none of the Respondents can demonstrate either that they come within the skip criteria, or that they meet the criteria, are senior, and should bump into the position. This Conclusion is based on Legal Conclusions 3 and 4 and their factual predicates, section 44955, subdivision (d), and Factual Findings 4(C) and 15 through 17.

7. Ms. Witty’s seniority date must be upheld, despite the fact that the District labels ECE positions as classified. As noted by Complainant’s counsel, the Court of Appeal in *San Jose Teachers, supra*, 144 Cal.App.3d 627, spoke to this issue, concluding that teachers holding permits such as those required of ECE teachers were in fact certificated personnel, whose seniority dates would be analyzed in the same way as other certificated employees. The fact that one of the statutes referenced by the court in that decision has been repealed is not dispositive; its basic terms have migrated to a new statute, section 44929.1. At bottom, to hold her position, Ms. Witty had to have a permit, which by statute is a type of credential. Being credentialed, and being in an instructional position, brings her into the class of persons covered by the layoff statutes, i.e., certificated personnel. This Conclusion is based on Factual Findings 18 through 23.

8. Ms. Hita’s seniority date is accurate based on this record and statutory authority. It is fundamental that a certificated teacher’s seniority date is the first paid date of service in a probationary position. (§44845.) Ms. Hita’s contract was clear that her first day of work was August 29, not August 25, 2005. The District’s position was supported by Ms. Cuevas’s testimony that the training attended by Respondent was not mandatory. At the same time, Ms. Hita could not be clear that she was actually paid for the training; her recollection of what her paycheck said created an ambiguity: she could have been paid from August 29 forward, or from August 25. Without more, Respondent can not carry her burden of proving something contrary to the written contract, and the District’s finding, which should be cloaked with a presumption that it is correct. (Evid. Code, § 664.)

9. Under the circumstances, it must be concluded that no junior teacher is being retained to perform a service that any respondent is certificated and competent to perform,

based on Legal Conclusions 1 through 9, and their factual predicates. Therefore, the District may issue final lay off notices to the Respondents.

ORDER

The following respondents may be served with final lay off notices: Wenddy L. Aguayo, Jacqueline Arias, Jane Bocanegra, Alejandra Covarrubias, Marcy Duenas (Nateras), Francisco J. Espinoza, Janet Flores, Rae Lynn Gomez, Angela M. Hita, Judy E. Legaspi, Veronica R. Madere, Cynthia Milian, Yvonne Milian (Castroena), Magdalena Padilla, Maricela Perez, Ofelia Romero, William Sullivan, Erika Valenzuela, and Carmen E. Villegas.

May 21, 2012

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings