

BEFORE THE
BOARD OF TRUSTEES OF THE
GILROY UNIFIED SCHOOL DISTRICT
SANTA CLARA COUNTY, CALIFORNIA

In the Matter of the Accusation Against:

BILLY AGUILAR, et al.,

Respondents.

OAH No. 2011031403

CORRECTED PROPOSED DECISION

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter, on April 29, 2011, in Gilroy, California.

James R. Lynch, Attorney at Law, GCR LLP represented the Gilroy Unified School District.

Michelle A. Welsh, Attorney at Law, Stoner, Welsh & Schmidt, represented all respondents with the exception of Joy Urtnowski. There was no appearance by or on behalf of respondent Urtnowski.

The matter was submitted for decision on April 29, 2011.

FACTUAL FINDINGS

1. Deborah A. Flores, Ph.D., filed the accusation in her official capacity as Superintendent of the Gilroy Unified School District.

2. All respondents are certificated employees of the District. A list of the Respondents is attached as Exhibit 1.

3. On March 10, 2011, the Board of Trustees of the Gilroy Unified School District adopted Resolution Number 10/11-36, in which the board resolved to reduce particular kinds of services no later than the beginning of the 2011-2012 school year. The board directed the superintendent or her designee to send notice to affected certificated employees.

4. On March 11, 2011, written notice was served on respondents that their services would not be required for the 2011-2012 school year. Each respondent filed a

timely request for hearing. An accusation was served on all respondents. Each respondent filed a timely notice of defense.

5. All prehearing jurisdictional requirements have been met.

6. In its resolution, the board took action to reduce or eliminate the following particular kinds of services for the school year:

<u>Services</u>	<u>FTE¹ Reduction</u>
Kindergarten – 8th Grade Teachers	31.00
District Librarian (Gilroy High School)	.40
Teacher – Independent Study Program	.40
9th to 12th Grade Teachers – Vocational Education (ROP Funded)	1.20
Total	33.00

7. Superintendent Flores testified that her recommendation and the board's PKS resolution were caused by the financial circumstances facing the district. This is the third year of significant budgetary cuts in the district. At present, the district faces a \$61 million budget shortfall for the 2011-2012 school year, and that number may increase depending on the level of state funding received this year. Superintendent Flores considered all attrition (resignations, retirements, and non-reelects) and released all temporary teachers before she made the recommendation to reduce positions. Had she not done so, she would have recommended a much larger number for reduction. The district has made other significant cost-saving changes including reducing the school year by five days, imposing furloughs, and increasing class sizes.

Challenges to Skipping

8. Pursuant to Education Code section 44955, subdivision (d)(1), the governing board of the district resolved to deviate from terminating employees in the order of seniority, i.e., the board resolved to skip over teachers with a particular qualification and terminate more senior teachers who do not possess that qualification. A district may skip a junior employee only if employees with more seniority do not possess the special training and experience necessary to teach a specific course or course of study (specific course).

9. The board's skipping criteria (attached to the resolution as Exhibit A) are as follows:

1. Any employee who possesses a BCLAD (Spanish) or equivalent authorization, whose experience includes teaching

¹ Full-time equivalent positions.

dual immersion classes in English/Spanish for the District in the 2010-2011 school year, and who is expected to continue teaching such classes for the District in the 2011-2012 school year.

2. Any employee who possesses a single subject credential or subject matter authorization, authorizing the teaching of Math, whose experience includes teaching Math for the District in the 2010-2011 school year, and who is expected to continue teaching such classes for the District in the 2011-2012 school year.

3. Any employee who possesses a single subject credential or subject matter authorization, authorizing the teaching of Science (any form), whose experience includes teaching Science for the District in the 2010-2011 school year, and who is expected to continue teaching such classes for the District in the 2011-2012 school year.

4. Any employee who possesses an Educational Specialist credential, whose experience includes teaching Special Education classes for the District in the 2010-2011 school year, and who is expected to continue teaching such classes for the District in the 2011-2012 school year.

5. Any employee who possesses a certificate of completion of a Gifted & Talented Education (GATE) program offered by an accredited institution of higher education, whose experience includes teaching in GATE courses of study for the District in the 2010-2011 school year, and who is expected to continue teaching such classes for the District in 2011-2012 school year.

6. An employee who the Superintendent determines to retain because he/she possesses special skills, training, and/or education that is needed to teach a specific course or course of study in the 2011-2012 school year, that more senior employees do not possess.

In addition, the resolution contains the following language:

The Superintendent or designee is authorized to determine which employees qualify to be “skipped” for the Reduction in Force and to determine the manner in which the foregoing criteria shall be applied to each employee.

10. The first skipping criterion relates to the district's dual immersion program. The District has a very successful dual-immersion program at two of its elementary schools (Las Animas and Rod Kelley) where students are taught all subjects in two languages. A BCLAD is required to teach these classes. In applying the skipping criterion, Superintendent Flores identified 13 teachers to be skipped based on assignments to the dual immersion program, and did not issue March 15 notices to them.

11. At hearing, the district conceded that four probationary teachers were incorrectly identified as falling with the first skipping criterion. One teacher, Sarah Sathianation, teaches in the dual immersion program but only in English. She is therefore not within the skipping criterion. Three teachers, Deanna Macias-Cortez, Concepcion Mendoza, and Stephanie Davis, do not teach in the dual immersion program. These teachers are therefore not within the skipping criterion.

12. The District also has a successful GATE program at various schools in the district. The district is looking to create a GATE program with teachers who are highly trained and experienced in working with GATE students so as to develop consistency in the program and stability in the program. Based on the fifth skipping criterion, the district elected to skip two GATE teachers at Brownell Middle School, Amy Carman and Jackie Stevens.

13. At hearing, the superintendent admitted that she had erred when she skipped Amy Carman, as Carman does not contain a current GATE certification.

14. Jackie Stevens does have a current GATE certification and otherwise meets the requirements of the GATE skipping criterion. Stevens is a probationary employee with a seniority date of August 13, 2009.

15. There are three other permanent employees in the district who are senior to Stevens (they share the seniority date of August 16, 2007) who were not skipped. (Tabitha Romero, Desiree Almanzor Cataluna, and Crystal Ann Lozano.) In order to skip Stevens, the district must show that none of these teachers possess special training or experience that Stevens has which is necessary to teach GATE. (Ed. Code, § 44955, subd. (d)(1); *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567.) The district failed to meet this burden. Crystal Ann Lozano obtained a GATE certification from the district in 2008. She taught third grade GATE students in the district for school years 2007-2008, and 2008-2009. The district has not shown that Lozano does not possess the same training and experience as does Stevens. The district has thus not established cause to skip Stevens pursuant to Education Code section 44955, subdivision (d)(1).

16. The district did not issue a March 15 notice to Perlene Lake. Lake holds a multiple subject credential, and Supplemental Authorizations in English and Business. Her seniority date is August 13, 2009. Lake is a probationary employee of the district, and is assigned to the Opportunity Program at Brownell Middle School. Teachers in the Opportunity Program work with difficult students, students who have disciplinary problems

and students who are being expelled. Lake will be assigned to the Opportunity Program next year.²

17. Superintendent Flores proposes to skip Lake based on the sixth skipping criterion, namely that Lake possesses special training and experience that other more senior teachers do not possess which are necessary to teach in the Opportunity Program. Superintendent Flores testified that the district is retaining Lake because she has three years of experience in the Opportunity Program at Brownell. Superintendent Flores admitted, however, that another teacher who is returning from leave for the 2011-2012 school will be assigned to the Opportunity Program. This teacher has no training or experience in the Opportunity Program. Based on this evidence, the district has failed to establish that the experience Lake has is necessary to teach in the Opportunity Program. The district has therefore failed to establish cause to skip Lake.

18. The district did not issue a March 15 notice to Marwa Yousofzoy. Yousofzoy is a permanent employee of the district. She holds a multiple subject credential, and has a seniority date of August 29, 2007. Yousofzoy is a Facilitator at Eliot Elementary School. As a Facilitator, Yousofzoy is not assigned a classroom. Instead, she models and instructs teachers on the district's elementary school educational initiatives, of which there are six components. She also facilitates discussions between the principals and teachers both at Eliot and other elementary schools in the district. Yousofzoy will be assigned this position for ensuing school year.

19. Superintendent Flores proposes to skip Yousofzoy based on the sixth skipping criterion, namely that she possesses special training and skills that other more senior teachers do not possess which are necessary for a Facilitator.

It was not established that Yousofzoy has undergone special training that teachers more senior to her do not have. The training referenced by Superintendent Flores (Sixth Street School in Victorville, and Whole Grain) were trainings that were available to all district employees, and were taken by many of the respondents. Yousofzoy has experience in the Facilitator position, however, which other teachers more senior to her do not have. This position provides her with special experience other than that of a classroom teacher. As such, it is concluded that the district has therefore established cause to skip this teacher.

20. As set forth above, the district has invalidly skipped seven multiple subject teachers. The appropriate remedy, which will be ordered, is to direct the district to take the necessary steps to identify the most senior teacher who was prejudiced by the decision skip each of these teachers. If there is such a teacher, the district may not lay off that teacher. (See *Alexander v. Board of Trustees*, *supra*, 139 Cal.App.3d at p. 576.)

² The seniority list is in error when it recites that Lake will be assigned to teach English in the 2011-2012 school year.

Seniority Date/Tie-Breaking Matters

21. The resolution also contains criteria (attached to the resolution as Exhibit B) to be used to determine the order of termination of certificated employees with the same first date of paid service. These criteria are commonly referred to as the tie-breaking criteria. They are as follows:

Criterion	Points
Possession of credential(s) authorizing services for the District	3 for each professional clear 2 for each preliminary 1 for each for any other credential
Subject matter authorizations, including supplemental authorizations, on credentials authorizing service for the District	1 per authorization
Column placement on salary schedule	1 per applicable column
Service on a school site level committee: “SSC” - School Site Council “DSLTL” – District Site Leadership Team	1 per SSC 1 per DSLTL
Service on a District Level Committee	1 per District Level Committee
Service as a BTSA Mentor Teacher	3
Possession of Bilingual Cross Cultural Language Development Certificate	1

Further, the resolution provides:

Employees with a greater number of points shall be considered more senior than employees with a fewer number of points, for purposes of determining order of layoff and order of reemployment.

If application of the foregoing criteria fails to resolve a tie among two or more employees, among the employees who remain tied the employee with the earliest date of issuance of a preliminary or professional clear credential shall be considered the more senior employee. As among employees who remain tied who have never obtained a preliminary or professional clear credential, the employee with the earliest date of issuance of an intern credential shall be considered the more senior employee. As among employees who remain tied who have never obtained an intern, preliminary, or professional clear credential, the employee with the earliest date of issuance of an emergency or pre-intern credential, or short-term staff permit shall be considered the more senior employee.

The Superintendent is authorized to determine the number of tiebreaking points to be awarded to each employee and to determine the manner in which the tiebreaking criteria shall be applied to each employee.

If application of all of the foregoing criteria fails to resolve a tie among two or more employees, the Superintendent or designee will use a device or program that randomly selects numbers. The employee with the highest number will be the most senior among those remaining tied, with other employees being appropriately ranked in descending numerical order.

22. The district was required to apply these criteria to a group of teachers who share the seniority date of August 16, 2007. The parties stipulated at hearing that the points which had been allotted to respondent Nathan Lober should be increased to 11, which makes him tied with Robert McClelland under the Primary Tiebreaker criteria. McClelland retains the most senior position in the group however, following application of the Supplemental Tiebreaker criteria. The change was made on the district's seniority list in evidence. The district shall make this change on its records as well.

23. Kimberly Larner is a permanent employee of the district. She holds a multiple subject credential and the district has given her a seniority date of August 16, 2007. Larner correctly requests that her seniority date be changed to August 24, 2006.

During the 2006-2007 school year, Larner was employed by the district to teach Migrant Education Support, a credentialed position. While she was initially hired as a day-to-day substitute, her position was converted to long-term substitute. During the school year Larner worked a total of 171 days, which is more than 75 percent of the 180-day school year. Her first date of paid service that year was August 24, 2006.

Pursuant to Education Code section 44918, subdivision (a), a probationary teacher is entitled to have one year of prior service under a temporary contract counted as one year of probationary service if the teacher worked at least 75 percent of the regular days of the school year in a certificated position. This provision provides:

Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee, if employed as a probationary employee for the following school year.

Respondent Lerner meets all the requirements of Education Code section 44918, subdivision (a), and she is entitled to have her prior year of service counted as one year of probationary service. This correspondingly affects her seniority date with the district, which should be August 24, 2006, not August 16, 2007. This now makes Lerner senior to all multiple subject teachers with a seniority date of August 16, 2007.

24. Debra Hopf is a probationary employee of the district. She holds a preliminary multiple subject credential, and the district has assigned her a seniority date of January 14, 2008. Respondent Hopf argues that her seniority date should be August 20, 2007.

Respondent Hopf testified that she has worked as a substitute for the district since 1999. During the 2007-2008 school year she was employed as a substitute teacher with an Emergency Credential. She apparently worked in that capacity until she was given a probationary contract on January 14, 2008. As January 14, 2008, is her first date of paid service to the district in a probationary position, the district has given her the correct seniority date. (Ed. Code, § 44845.) There is no provision in the law which requires the district to advance her seniority date to August 20, 2007, based on her employment as a substitute teacher. It is a matter within the discretion of the district. (Ed. Code, § 44914.) It was not established that the district abused its discretion in assigning respondent Hopf a seniority date in accordance with her first date of paid service to the district in a probationary position.

Seniority/Bumping Matters

25. Pursuant to Education Code section 44955, subdivision (b), the district may not terminate the services of a permanent employee while any probationary employee or other employee with less seniority is retained to render a service which the permanent employee is certificated and competent to render. In identifying the teachers to be given the March 15 notices, the district determined that no respondent was entitled to bump a more junior teacher who was being retained.

26. The district did not issue a March 15 notice to Kyra Lewis-Pevere. Lewis-Pevere holds a Single Subject Intern Credential (Social Science) and is a probationary employee of the district with a seniority date of August 16, 2007. Lewis-Pevere's current teaching assignment is Language Arts CORE at Brownell Middle School. The district is not purporting to skip Lewis-Pevere. It appears that the district simply erred in failing to issue a her a March 15 notice.

It is not disputed that any respondent with a multiple subject credential is credentialed and competent to teach Language Arts CORE. There are numerous respondents, including but not limited to Heather Elyse Gold, who are senior to Lewis-Pevere. The most senior multiple subject teacher who is prejudiced by this error may not be given a final notice.

27. The district did not issue a March 15 notice to three probationary employees who teach at the district's continuation high school, Mt. Madonna Continuation High School. These teachers hold single subject credentials and teach English (Cynthia Gonzalez), Math (Rashonda Butler) and Science (Daniel Kaplan). The district has proposed to skip Ms. Butler under the second skipping criterion (possession of a single subject math credential, currently teaching Math and is expected to teach Math in the 2011-2012 school year). The district proposes to skip Mr. Kaplan under the third skipping criterion (possession of a single subject Science credential, experience teaching Science in the district this year, and is expected to teach Science in the next school year). The district has not offered a basis to skip Ms. Gonzalez.

28. All respondents are willing to be assigned to teach at Mt. Madonna Continuation High School. They seek to bump into the position held by Ms. Gonzales.

Superintendent Flores testified that respondents are not credentialed and competent to teach at the continuation high school as these teachers do not have a single subject credential. Pursuant to Education Code section 44865, as interpreted by the court in *Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.3d 127, respondent teachers are permitted to be assigned to teach at a continuation high school, with their consent, even though his or her credential would not otherwise be sufficient. (See also *California Teachers' Assn. v. Governing Board* (1983) 141 Cal.App.3d 606.) The Court in *Bledsoe* is clear that it is the district's responsibility to consider this potential reassignment when it determined which teachers were to be given a March 15 notice. The effect of this error is that a probationary teacher is being retained where there are more senior teachers who are credentialed and competent to teach in her position. The most senior teacher who is prejudiced by this error may not be given a final notice.

29. Respondent Billy Aguilar holds a multiple subject credential and his seniority date is January 15, 2008. He is a permanent employee of the district and teaches Sixth Grade CORE (Math/Science) at Brownell Middle School. Aguilar is bilingual in English and Spanish. He is working toward obtaining a BCLAD, but has one more examination to complete. The examination is scheduled for the first week in May.

Respondent Aguilar asserts that because he is so close to obtaining a BCLAD that he should be retained to teach in the dual immersion program over more junior teachers who possess a BCLAD and were skipped. Respondent Aguilar also asserts that he should be retained over Maria Hossain, who is junior to Aguilar, with a seniority date of August 31, 2009. Hossain holds a multiple subject credential, a Supplemental Authorization in Spanish, and an emergency BCLAD, which is valid until December 2011. Each of Aguilar's contentions is found to be unpersuasive. These junior teachers were properly skipped pursuant to Education Code section 44955, subdivision (d)(1).

30. All respondents have indicated their willingness to be assigned to teach at Gilroy High School. They seek to bump Bria DeLorenzo, a probationary employee who is assigned to On-Campus Suspension at the high school. DeLorenzo has a Single Subject

Intern Credential in Physical Education and has a seniority date of August 16, 2010. Superintendent Flores testified that teachers with a multiple subject credential cannot serve in this assignment because the students involved in On-Campus Suspension ranges in ages from grades 9 through 12. A teacher with a multiple subject credential is not authorized to teach students above grade 9.

Attrition

31. Respondents argue that the district has over-noticed the layoffs. In their view in reducing the 33 FTE positions, the district must take into account all retirements, resignations, and nonrelects and then only issue notices to teachers holding the corresponding number of remaining positions. The contention is without merit. Superintendent Flores took into consideration all known attrition before she recommended to the board that it should reduce services by 33 FTE positions. She has thus complied with the requirements of Education Code section 44949 and 44955. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 327.)

Other Matters

32. Respondents contend that the proposed reduction in services will be detrimental to the District, and that it therefore cannot be found, as required by Education Code section 44949, that “the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof.” It is true that service reductions will likely be detrimental to students in the District, but the District is required to operate in a fiscally sound manner. Without fiscal integrity, the District cannot adequately serve its schools or its pupils. In circumstances such as these, where a District is facing a multi-million dollar loss of funding, and in the absence of proof that the District acted in an arbitrary or capricious manner, it is necessarily concluded that the service reductions are related to the welfare of the schools and pupils.

33. All contentions made by respondents not specifically addressed above are found to be without merit and are rejected.

34. Except as set forth above, no permanent or probationary employee with less seniority is being retained to render a service which any respondent is certificated and competent to render.

LEGAL CONCLUSIONS

1. All notices and other requirements of Education Code sections 44949 and 44955 have been provided as required. The District established jurisdiction for this proceeding as to each Respondent.

2. Cause was established as required by Education Code section 44955 to reduce the number of certificated employees of the District due to the reduction of particular kinds of services.

3. As set forth in Finding 22, the district shall change the seniority status of respondent Nathan Lober based on the application of the tie-breaking criteria.

4. As set forth in Finding 23, the district must change the seniority date of respondent Kimberly Lerner to August 24, 2006.

5. By reason of the matters set forth in Findings 11, 13, 15, 17, 20, 26 and 28, the district violated Education Code section 44955 with respect to retaining nine junior certificated employees. The district shall identify whether any employee has been prejudiced by the district's invalid actions. If employees have been prejudiced, there is no cause to provide notice to the nine most senior of them.

6. Except as set forth above, cause exists because of the reduction of particular kinds of services pursuant to Education Code section 44955 to give notice to respondents their services will not be required for the 2011-2012 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

ORDER

1. The District shall make corrections to its Seniority List and other records as necessary to conform to Legal Conclusions 3 and 4.

2. Prior to issuing the final layoff notices to certificated employees, the district shall identify whether any employees were prejudiced by the district's invalid retention of nine junior certificated employees. If there are such employees, the district may not issue a layoff notice to the nine most senior employees.

3. Except as set forth above, notice may be given to the remaining respondents that their services will not be required for the 2011-2012 school year because of the reduction of particular kinds of services.

DATED: _____

MELISSA G. CROWELL
Administrative Law Judge
Office of Administrative Hearings