

BEFORE THE LOS ANGELES COUNTY
SUPERINTENDENT OF SCHOOLS

In the Matter of the Reduction in Force of:

CERTIFICATED STAFF OF THE LOS
ANGELES COUNTY OFFICE OF
EDUCATION,

Respondents.

OAH Case No. 2010030098

PROPOSED DECISION

Administrative Law Judge Ralph B. Dash heard this matter on April 29 and 30, 2010, in Downey, California.

Aaron V. O'Donnell, Attorney at Law, represented the Los Angeles County Superintendent of Schools (referred to herein as the Los Angeles County Office of Education (LACOE)).

Richard J. Schwab, Attorney at Law, represented all Respondents identified on Exhibit A attached hereto and made a part hereof.

The matter was continued until May 28, 2010, for the purpose of permitting the parties to file closing and reply briefs. All briefs were timely submitted. LACOE's closing and reply briefs were marked as Exhibits 45 and 46, respectively. Respondents' closing and reply briefs were marked as Exhibits H and I, respectively.¹ The record was closed on May 28, 2010.

Evidence having been received and the matter having been submitted, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Carolina H. Pavia, LACOE's Assistant Superintendent of Human Resources, filed the Accusations in her official capacity. LACOE timely served the Accusations on all Respondents.

¹ The parties were permitted to attach exhibits to their briefs, which would be received in evidence. At the hearing 16 exhibits were identified and admitted in evidence on behalf of LACOE, whose hearing brief was marked Exhibit 17 for identification. In its briefs, LACOE submitted additional exhibits, marked 18 through 45, were admitted. Respondents' attached additional exhibits as well, some of which were duplicative of those already received. The new/additional exhibits were marked J through M and admitted.

2. Respondents are employed as probationary or permanent certificated employees of LACOE.

3. On February 23, 2010, by Resolution 18, LACOE determined to reduce and/or discontinue certain services within the school district, by a total of 243 full time equivalent (FTE) positions, and directed the Assistant Superintendent of Human Resources to give notice to certificated employees that their services would not be needed for the 2010-2011 school year.

4. LACOE further determined that it was necessary by reason of said reductions or discontinuance of services to decrease the number of certificated employees at the close of the present school year, by a corresponding number of FTE and directed the Assistant Superintendent, Human Resource Services, or her designees to proceed accordingly by notifying the appropriate employees to implement the Resolution. The Assistant Superintendent acted in accordance with this directive and prepared a recommendation that Respondents be given notice that their services would not be required for the ensuing school year.

5. On or before March 15, 2010, pursuant to Education Code² sections 44949 and 44955, LACOE served each Respondent with the Accusation and notice that a hearing must be requested, in writing, by March 29, 2010, and that failure to request a hearing would constitute a waiver of the right to a hearing.

6. Respondents requested administrative hearings to determine if there was cause for not reemploying them for the 2010-2011 school year.

7. All Respondents, as identified on Exhibit A, timely requested a hearing and all jurisdictional requirements have been met.

8. The recommendation that Respondents be terminated from employment was not related to their competency as teachers.

9. The services at issue are “particular kinds of services” that could be reduced or discontinued within the meaning of section 44955. LACOE’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

10. The reduction or discontinuation of those particular kinds of services related to the welfare of LACOE and its pupils. The reduction or discontinuation of those particular kinds of services was necessary to decrease the number of certificated employees of LACOE.

11. LACOE maintains a seniority list that contains employees’ seniority dates (first date of paid service), current assignments and locations, credentials, and authorizations.

² Unless otherwise specified, all further statutory references are to the Education Code.

LACOE used the seniority list to determine who would be laid off for each kind of service reduced or eliminated. LACOE then checked all Respondents' credentials to determine whether they could "bump" other employees.

12. In their closing and reply briefs, the parties set forth their arguments as to why certain specified employees should or should not have been retained.

A. Bon Larsonsilva

Mr. Larsonsilva is a permanent employee with a seniority date of August 28, 2009, teaching in a special education assignment. Notwithstanding that the usual period of service required to obtain permanent status is two years, Mr. Larsonsilva is classified as permanent because he was formerly employed by LACOE as a permanent certificated employee, resigned, and then returned to certificated employment with LACOE within 39 months of his resignation. Mr. Larsonsilva is presently employed in a special education teaching assignment, working as a teacher of emotionally disturbed students. At the time of initial preparation of LACOE's seniority list, Mr. Larsonsilva was employed pursuant to a district intern credential authorizing him to serve in the special education assignment. Subsequent to initial preparation of the seniority list, however, on February 4, 2010, Mr. Larsonsilva registered with LACOE a preliminary education specialist teaching credential authorizing instruction of students with moderate/severe disabilities issued by the California Commission on Teacher Credentialing on November 1, 2009. [Exhibit 20]

Counsel for Respondents argue that Mr. Larsonsilva's retention was improper because when Mr. Larsonsilva returned to employment with LACOE in August, 2009, it was pursuant to an intern credential. Respondents' position in this regard is based upon *Smith v. Governing Board of Elk Grove Unified School District* (2004) 120 Cal.App.4th 563.

Section 44931 requires that if a permanent employee resigns and is reemployed within 39 months of the date of his resignation, the employee must be restored to all of the "rights, benefits, and burdens of a permanent employee, except as otherwise provided in this code." Section 44848 requires that the date of employment of a certificated employee who resigns and returns to employment be deemed to be the date on which the employee first rendered paid service after reemployment. In accordance with the requirements of Sections 44848 and 44931, Mr. Larsonsilva was restored to permanent status, but with a new seniority date upon his return to employment with LACOE following his resignation.

Respondents contend that it was improper for LACOE to retain Mr. Larsonsilva while laying off other employees whose seniority dates run from January 22, 2008 through November 6, 2008. However, all of the employees claimed by Respondents to be entitled to bump into Mr. Larsonsilva's position are probationary.

It is axiomatic in a certificated layoff that probationary employees must be laid off before permanent employees. Section 44955 unambiguously provides, in pertinent part, "the services of no permanent employee may be terminated ...while any probationary employee,

or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.” LACOE was therefore required to retain Mr. Laronsilva over any probationary employees, and no probationary employee, regardless of seniority date, could be retained in Mr. Laronsilva’s present assignment while Mr. Laronsilva was laid off. Thus, none of the Respondents identified was entitled to “bump” Mr. Laronsilva.

The *Elk Grove* case relied upon by Respondents considered the application of section 44911 to an employee who was initially hired pursuant to an emergency permit. Section 44911 provides that service “under a provisional credential shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district.” In that case, Smith, who held a social studies teaching credential, was hired as a special education teacher and taught for two years in that capacity pursuant to an emergency permit authorizing that service. The court held that her service in the special education assignment under the emergency permit did not count towards the acquisition of permanent status, notwithstanding that Smith also possessed a social studies credential while serving under the emergency permit.

Elk Grove addressed only the tenure status of an employee initially hired pursuant to a provisional credential, and did not consider the circumstance of an employee such as Mr. Laronsilva, who was permanent, resigned, and then returned within 39 months. Section 44911 concerns only “service required as a prerequisite to attainment of, or eligibility to” classification as permanent. Nothing in *Elk Grove* authorized or required LACOE to disregard the mandate of section 44931 that Mr. Laronsilva, having already fulfilled the service requirements for tenure, be restored to permanent status upon his reemployment after resignation. No probationary Respondent was or could have been entitled to bump Mr. Laronsilva. (Educ. Code § 44955(b).)

B. Araceli Torres

Respondents contend it was improper to retain Peter Labarba over Araceli Torres. Ms. Torres is not certificated and competent to render the service provided by Mr. Labarba, as demonstrated by their credentials and the personnel requisitions for their current positions. Mr. Labarba has a district intern credential authorizing instruction of K-12 and also adult students with moderate to severe disabilities. [Exhibit 21] He is presently in an assignment working with 18 to 22 year-olds. The personnel requisition for this assignment indicates "this position for the low functioning, non-ambulatory 18 to 22 year-old students." [Exhibit 22] Ms. Torres, however, has only an early childhood special education credential, authorizing instruction of students from age birth through pre-kindergarten. [Exhibit 23] Consistent with this credential, Ms. Torres’ present assignment is in a pre-school setting. The personnel requisition for her assignment indicates “Potrero Heights Elem. - Grade PS-K.” [Exhibit 24] Ms. Torres’ credential does not authorize her to provide instruction to 18 to 22 year-olds, and LACOE’s retention of Mr. Labarba therefore does not invalidate Ms. Torres’ layoff.

C. Joy Aeschbocker

Ms. Aeschbocker testified at the hearing that there were two employees junior to her, Stephanie Pirojnikoff and Robin Simmons, who were being retained and whose assignments she is certificated and competent to perform.

Ms. Aeschbocker holds a multiple subject teaching credential. She also holds a learning handicapped teaching credential issued in 1996. [Exhibit 25]. Ms. Pirojnikoff is a tenured employee who is presently serving as an administrator. Because she is being bumped by another administrator with greater seniority as an administrator, Ms. Pirojnikoff is bumping into a vacant special education teaching position teaching students with moderate to severe disabilities - a "special day class" as indicated by the coding "SDC" on the personnel requisition for the position. [Exhibit 26] Denise Anaya, LACOE's credentials analyst, testified without contradiction that LACOE's special day classes are for emotionally disturbed students. As Ms. Anaya testified, however, and as indicated by the CTC Administrator's Assignment Manual, a learning handicapped credential authorizes instruction of students whose primary disability is emotional disturbance only if the holder of the credential has "taught full time for at least one year prior to September 1, 1991, in a special day class in which the primary disability was (serious) emotional disturbance." [Exhibit 16, p. F-3] Ms. Aeschbocker does not have such experience, and indeed could not, since her learning handicapped credential was not issued until 1996.

Ms. Simmons presently serves as a "pool teacher," but as indicated by the seniority list and impact report, her present position is being eliminated. She is being retained, however, because she is bumping into a vacancy created by the voluntary separation of DeFarge Hanson. [Exhibit 13, p. 20] Ms. Hanson's present assignment is also that of an SDC teacher. [Exhibit 27]

Ms. Aeschbocker is not credentialed to serve in an SDC position teaching emotionally disturbed students. Her layoff therefore is proper.

D. Jacqueline Levine

Respondents argue Ms. Levine should have been retained. Ms. Levine's only contention at the hearing was that she was credentialed to perform the assignment of another employee, Phyllis Allen, who was being retained. Ms. Levine asserted that Ms. Allen is not properly credentialed for her present assignment. Although there was some dispute as to the exact nature of Ms. Allen's present assignment, there was no dispute that Ms. Allen, whose seniority date is September 1, 1973, is senior to Ms. Levine, whose seniority date is October 10, 2007. Thus, Ms. Allen's retention is simply irrelevant to the only issue to be decided, whether any employee with less seniority than Ms. Levine was retained to render a service that Ms. Levine was certificated and competent to render. There is no such employee, and Ms. Levine's layoff therefore was correct.

E. Diana Hernandez

Respondents assert that Ms. Hernandez should have been retained. Although Ms. Hernandez testified that she had received various training, and there is no dispute as to her dedication as a teacher, she identified no junior employee being retained whose assignment she believes she is certificated and competent to perform. There is thus no basis for the invalidation of her layoff notice.

F. James Kern

Respondents assert that Mr. Kern should have been retained. Mr. Kern holds a special education credential authorizing instruction of students with mild/moderate disabilities. He did not identify any junior employee being retained whose assignment he believes he is certificated and competent to perform. Moreover, he conceded that his credential does not authorize service in any of the following assignments: deaf and hard of hearing, visually handicapped, adaptive physical education, autism teacher, language speech specialist. He was unsure whether his credential would authorize service in an assignment teaching students identified as trainable mentally retarded, but he made no contention that it does. Ms. Anaya, referring to page F-2 of the Assignment Manual, testified without contradiction that it does not. Thus, Mr. Kern was identified correctly for layoff.

G. Eddie Oliphant

Respondents assert that Mr. Oliphant should have been retained. Mr. Oliphant did not identify any junior employee being retained whose assignment he believes he is certificated and competent to perform. Rather, made only vague assertions that he believed it was possible that a mistake had been made by LACOE in identifying him for layoff. The impact report demonstrates that Mr. Oliphant received a layoff notice not through mistake, but because his position was identified for elimination, and there was no employee with less seniority whom he was eligible to bump. [Exhibit 13, p. 18] No evidence to the contrary was presented. Mr. Oliphant correctly was identified for layoff.

H. Lola Skelton

Respondents assert that Ms. Skelton should have been retained due to alleged untimely service of the Accusation. The evidence demonstrated that Ms. Skelton's layoff notice was timely. Like the other Respondents identified in the March 12, 2010, Accusation, LACOE served Ms. Skelton with a preliminary layoff notice via certified mail, return receipt requested, on March 12, 2010. [Exhibit 5, p. 141] Ms. Skelton admitted that the notice was sent to the correct address, and that she received it in the mail on March 16, 2010. There is no way the notice could have been mailed any later than March 15, 2010, which would have been timely, in order for Ms. Skelton to have received it on March 16, 2010. Education Code Section 44949 requires only that the preliminary notice be sent by March 15, 2010.

Nor can there be any question that Ms. Skelton was properly identified for layoff. She identified no specific junior employee who had been retained whose assignment she

believes she is certificated and competent to perform. She asserted, however, that her seniority date should have been August, 2005, i.e., earlier than the October 21, 2005 date assigned by LACOE, and that there were employees with seniority dates between August, 2005 and October 21, 2005, who are being retained to render services that she is certificated and competent to render. There were no such employees. Ms. Skelton admitted that her credential does not authorize service in any of the assignments for which junior employees with seniority dates in this timeframe are being retained. Ms. Skelton admitted that her credential does not authorize service as a teacher of emotionally disturbed students, as a teacher of developmentally handicapped students, as a language speech specialist, as a Spanish teacher, as a teacher of the trainable mentally retarded, as a high school physical education teacher in a departmentalized setting, as a teacher of visually handicapped students, as an adaptive physical education teacher, or as a teacher of students with multiple disabilities. Ms. Skelton identified no employee with less seniority being retained for an assignment she is credentialed to fill. Her layoff was proper.

I. Luis Corrales

Mr. Corrales presently serves as a juvenile court school (JCS) teacher and has been identified for layoff because his position has been eliminated and he is ineligible to bump any junior employee. [Exhibit 13, p. 18] Mr. Corrales argued, however, that he should have been permitted to bump other employees with less seniority because he is credentialed to teach virtually any subject in any setting. Mr. Corrales claimed this was so by virtue of his lifetime secondary credential. He identified various employees in single-subject teaching assignments junior to him, whose assignments he asserted he is credentialed to fill.

However, Mr. Corrales' standard secondary credential is limited in the assignments it authorizes at the secondary level in a departmentalized setting. At the hearing, it was established that the partial copy of this credential that Mr. Corrales printed from the CTC website and brought with him identified only music as the subject that he was authorized to teach in a departmentalized setting. He claimed, however, that the back of the original document established that he was credentialed to teach other subjects.

Contrary to Mr. Corrales' testimony, the reverse of the document [Exhibit 28] does not identify any subject other than music that Mr. Corrales is credentialed to teach in a secondary departmentalized setting. The document does indicate as a general matter that other subjects in which Mr. Corrales has sufficient coursework units may be taught with local board authorization. However, it was not established at the hearing that he had sufficient units in any other subject to meet this requirement. In any event, even if it had been established that he had sufficient coursework, he has not been given local authorization to teach outside of his music major.

As Ms. Anaya explained in her testimony, Mr. Corrales is authorized to teach subjects other than music as a JCS teacher, but only because this is a self-contained setting to which he can be assigned with his consent. Educ. Code §44956(e). This authorization, however, is inapplicable to single-subject teaching assignments in departmentalized high schools. Mr.

Corrales made various assertions that he has been certified as “highly qualified” in various subjects within the meaning of the federal No Child Left Behind Act; however, this is irrelevant, as NCLB certification and credentialing are two completely different things. While it might have bearing on whether he can meet the requirements of NCLB when teaching those subjects in a JCS setting, it has no bearing on whether he is credentialed to teach in a departmentalized high school.

There was no evidence of any employee junior to Mr. Corrales whose assignment Mr. Corrales is actually credentialed to perform. Mr. Corrales was correctly identified for layoff.

J. Robyn Brown

Ms. Brown did not testify, apparently due to illness, nor was there any documentary evidence other than LACOE’s exhibits or testimony adduced regarding her at the hearing. In Respondents’ briefs, Ms. Brown asserts that her seniority date should have been earlier than that assigned by LACOE, October 25, 2005. Ms. Brown’s seniority date is correct. Ms. Brown signed a contract of employment as a first-year probationary employee effective October 25, 2005. [Exhibit 29] Prior to that, Ms. Brown had worked as a temporary employee under a “limited term contract” that expired June 30, 2004, at which time she requested to continue working for LACOE as a day-to-day substitute employee. [Exhibit 30] She did work in that capacity prior to her retention as a probationary employee. [Exhibit 31] Her first date of paid probationary service, however, was October 25, 2005. Her seniority date is therefore correct.

K. Bonnie Garcia

Ms. Garcia contends that her layoff was improper. This contention is based on LACOE’s retention of Mr. Laronsilva, and the discussion as to him presented above are dispositive. Ms. Garcia, whose seniority date is September 1, 2008, is a probationary employee, and therefore could not have bumped Mr. Laronsilva. Insofar as this contention may be based on the retention of any other employee, LACOE reserves the right to respond it is reply brief.

LEGAL CONCLUSIONS

1. The parties met all notice and jurisdictional requirements set forth in sections 44949 and 44955.

2. Cause exists to sustain LACOE’s action to reduce or discontinue 243 full-time equivalent positions, as set forth by resolution, for the 2010-2011 school year, pursuant to sections 44949 and 44955, as set forth in Factual Findings 1-12, and Legal Conclusions 3-7.

3. Section 44955 states, in pertinent part:

[¶] . . . [¶]

(b) whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or . . . when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

4. Section 44949 states, in pertinent part:

(a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

[¶] . . . [¶]

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

[¶] . . . [¶]

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision

prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced.

5. The services identified in LACOE's Resolution number 18 are particular kinds of services that it can reduce or discontinue under Section 44955. LACOE's decision to reduce or discontinue the identified services was not arbitrary or capricious; it was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of LACOE's schools and pupils within the meaning of sections 44949 and 44955. LACOE correctly identified the certificated employees providing the particular kinds of services that it directed to be reduced or discontinued.

6. A school district may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

7. No junior certificated employee is scheduled to be retained to perform services that a more senior employee is certificated and competent to render.

ORDER

LACOE may serve final notices to all Respondents identified on Exhibit A that their services will not be required for the 2010-2011 school year.

Dated: _____

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT A

1.	Aeschbocker, Joy
2.	Anyia, Fidelia
3.	Arbuckle, RuthAnn
4.	Arellanes, Geraldine
5.	Armijo, Javier
6.	Atkinson, Stephanie
7.	Avilas, Julie
8.	Avognon, Florence
9.	Barrera, Jennifer
10.	Brown, Robyn
11.	Brown, William
12.	Cali, Ronald
13.	Cho, Kimberly
14.	Clayton, John
15.	Colburn, Sarah
16.	Collier, Karen
17.	Corrales, Luis
18.	Cruces, Sylvia
19.	Doyle, Troy
20.	Eadens, Caroline
21.	Earl, Robert
22.	Ferrell, Margaret
23.	Fisher, Steven
24.	Flores, Gerardo
25.	Garcia, Bonnie
26.	Garcia, Valeria
27.	George, Saji
28.	Givens, Marvis
29.	Harris, Loretta
30.	Hastings, Gina
31.	Hernandez, Alexandra
32.	Hernandez, Diana
33.	Hernandez, Karl
34.	Hill, James
35.	Hira, Harbhajan
36.	Hossum, Cheryl
37.	Jimenez, Hady
38.	Kang, Eunsik
39.	Kern, James
40.	Kirby, Bob

41.	Leveron, Thomas
42.	Levine, Jacqueline
43.	Lizardo, DeAnn
44.	Loell-Hull, Bettina
45.	Macias, Laura
46.	Madrigal, Teresa
47.	Maldonado, Jeanette
48.	Mason, Zan
49.	McCloud, Richard
50.	McConnell, Michelle
51.	Mejia, Miriam
52.	Miller, Anthony
53.	Mizrahi, Lara
54.	Murray, Irene
55.	Navaroli, Martin
56.	Norman, Vernon
57.	Obiako, Harry
58.	Okunna, Gloria
59.	Okwuokei, Jude
60.	Oliphant, Eddie
61.	Olivares, David
62.	Olivas, Raymond
63.	Ortiz, Mark
64.	Owens, Tiffany
65.	Ozor, Ethelbert
66.	Palomo, Ramiro
67.	Pellegrini, Anna
68.	Phelps, Charlie
69.	Piggott, Darryl
70.	Pinelo, Celinna
71.	Portillo, Norma
72.	Pullens, Reginald
73.	Purther, Carlo
74.	Ransome, Astral
75.	Reed, Jessica
76.	Rusk, Timothy
77.	Sandoval, Teresa
78.	Satterwhite, Angela
79.	Scepan, Patricia
80.	Scott, Kimberly
81.	Shafer, James
82.	Skelton, Lola
83.	Spivery, Rudy

84.	Stevens, Robin
85.	Strand, Shawn
86.	Stump, Gail
87.	Tomlin, Patricia
88.	Torres, Araceli
89.	Torres, Arcelia
90.	Umukoro, Patricia
91.	Vinski, Sonia
92.	Walker, Kenneth
93.	Warner, Judy
94.	Williams, Anthony
95.	Winitsky, Marvin
96.	Wong, Vivian
97.	Woods, Gayle