

BEFORE THE
COUNTY SUPERINTENDENT OF SCHOOLS
SAN LUIS OBISPO COUNTY OFFICE OF EDUCATION
COUNTY OF SAN LUIS OBISPO
STATE OF CALIFORNIA

In the Matter of the Statement of Reduction Of:

DENISE PALERMO-BLAKELY,

Respondent.

Case No. 2017020705

PROPOSED DECISION

Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 3, 2017, in San Luis Obispo, California.

Roman J. Muñoz, Attorney at Law, represented Thomas Alvarez (Alvarez), Chief Human Resource Officer, San Luis Obispo County Office of Education (SLOCOE), County of San Luis Obispo, State of California.

Cindy Heller, California Teachers Association Staff, represented Denise Palermo-Blakely (Respondent).

The SLOCOE has decided to reduce or discontinue certain educational services and has given Respondent and other certificated employees of the SLOCOE notice of its intent not to reemploy them for the 2017-2018 school year. Respondent requested a hearing for a determination of whether cause exists for not reemploying her for the 2017-2018 school year.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision on April 3, 2017.

FACTUAL FINDINGS

1. Chief Alvarez filed the Statement of Reduction in Force in his official capacity.
2. Respondent is a certificated employee of the SLOCOE.

3. On January 18, 2017, James J. Brescia, Superintendent of the SLOCOE (Superintendent), adopted a Resolution To Reduce or Eliminate Particular Kinds of Services, Establishing Tie-Breaking Criteria and Establishing Criteria for Assignments (Resolution), reducing or discontinuing the following services for the 2017-2018 school year:

<u>Service</u>	<u>FTE¹ Positions</u>
Grades 7-12 Community School Teacher	5.0
Resource Specialist, Community School	1.5161
School Nurse	1.0
Counselor	<u>1.0</u>
Total	8.5161

4. On February 15, 2017, the SLOCOE provided notice to Respondent that her services will not be required for the 2017-2018 school year due to the reduction of particular kinds of services.

5. Also on February 15, 2017, the SLOCOE issued the Statement of Reduction in Force, and on the same date served it and other required documents on Respondent.

6. On February 16, 2012, Respondent timely filed a Notice of Participation in the Reduction in Force Hearing, requesting a hearing and challenging the decision of the SLOCOE not to reemploy her for the 2017-2018 school year.

7. All prehearing jurisdictional requirements have been met.

8. The services set forth in factual finding number 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code² section 44955.

9. The decision to reduce or discontinue the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the Superintendent's discretion.

10. The reduction or discontinuance of services set forth in factual finding number 3, in the context of the SLOCOE's having the financial resources to fund other necessary 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 Superintendent.

¹ Full-time equivalent.

² All further statutory references are to the Education Code.

11. The Resolution sets forth the criteria to determine seniority among employees who first rendered paid service in a probationary position on the same date (tie-breaking criteria). Points were awarded for possession of a valid preliminary or clear teaching credential, possession of multiple credentials, having a greater total number of years teaching in California public schools, possession of supplemental teaching authorizations, possession of post-graduate degrees, and possession of undergraduate major or minor in specified subject matter areas. The criteria are reasonable as they relate to the skills and qualifications of certificated employees. The SLOCOE did not need to apply the criteria to determine the order of termination of Respondent.

12. The Resolution also contained the following competency criteria: "[C]ompetency," for the purposes of [section 44955], shall be determined solely upon current possession of a preliminary or clear credential for the subject matter (i.e., Special Education), grade level or County Office program, and at least one (1) year of experience within the preceding five (5) school years in the subject matter, grade level or County Office program to which the employee seeks to displace a junior employee for the 2017-2018 school year. . . ." (Exh. 1, at p. 10.)

13. The SLOCOE provides alternative education services to students in San Luis Obispo County. It operates community schools and programs for students with special education needs. One of the programs, the Vicente School-Linked Intensive Program (Vicente), serves severely emotionally disturbed students by providing mental health services as an integral part of the students' educational services. Mental health professionals work alongside teachers to provide services during the school day. Students with less severe emotional problems or other special education needs attend other community schools, including Loma Vista School. The SLOCOE also operates a Juvenile Court School in the County Juvenile Hall to provide instruction to students who are incarcerated.

14. Respondent has a seniority date of August 9, 2012. She holds a clear Education Specialist Instruction Credential, Mild/Moderate Disabilities, with an added Autism authorization. She also holds a clear Single Subject (English) and a clear Specialist Instruction Credential (Agriculture). She provided instruction in Juvenile Court School during the 1989 to 1994 period. Respondent has not worked at Vicente.

15. For the past five years, Respondent has worked as a Resource Specialist, Alternative Education. She works in the Loma Vista School, one of the community schools run by the SLOCOE. As a resource specialist, Respondent does not provide core instruction or issue grades in a self-contained classroom. Rather, she provides special education support to students assigned to other teachers. For instance, she works with students unable to stay in a regular classroom for an entire day or those who needed extra time or extra support to complete assignments. If necessary, Respondent provides instruction to the students. Some of the students stay with her for the entire school day, some for a significant portion of the school

year. She consults with other teachers and with members of planning teams about matters of special education eligibility or services.

16. Respondent asserts she is certificated and competent to teach the assignment a less senior employee, Lara Mattson (Mattson), was retained to perform. In support of her assertion, Respondent testified that her entire career with the SLOCOE has been in alternative education, and she has extensive experience in the area. She can perform the duties of a special education teacher in a self-contained classroom. Some of Respondent's students are emotionally disturbed and she has consulted with mental health professionals about the students' readiness for instruction. Some of Respondent's students have been transferred to Vicente once space became available. She has received training in subjects that would assist in providing services to students at Vicente, such as those in functional behavior assessment, anxiety disorders in children, and nonviolent crisis intervention.

17. Mattson has a seniority date of August 14, 2013, and holds a clear Education Specialist Instruction Credential, Mild/Moderate Disabilities, with an added Autism authorization. Mattson has worked with severely emotionally disturbed students in a self-contained classroom at Vicente for the past four years. She works a special year-round, extended school schedule and has received special training to teach these students. As required only of those working at Vicente, Mattson has completed yearly training and obtained a certification in Restraint and Nonviolent Crisis Intervention.

18. Respondent is credentialed to teach at Vicente, and has in the past worked with some of the students served at the school. However, despite her credential and experience, Respondent has not worked at Vicente, which is a distinct County Office program for at least one year within the preceding five school years, as required by the SLOCOE competency criteria. Therefore, she has not fully met the competency criteria to be retained to teach the assignment.

19. No certificated employee junior to Respondent was retained to render a service which Respondent is certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 7.

2. The services listed in factual finding number 3 are particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 3 and 8.

3. Cause exists under sections 44949 and 44955 for the District to reduce or discontinue the particular kinds of services set forth in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 10.

4. Section 44955, subdivision (b), provides, in pertinent part: "[t]he 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." (Emphasis added.) "Certificated" is defined by the provisions of the Education Code pertaining to credentials, but "competent" is not specifically defined. In *Forker v. Board of Trustees* (1994) 160 Cal.App.3d 13, 19, the Court defined the term in a reemployment proceeding under section 44956, a statute that contains the same "certificated and competent" requirement, in terms of the teachers' skills and qualifications, specifically, as "relating to special qualifications for a vacant position, rather than relating to the on-the-job performance of the laid-off permanent employee." In doing so, the Court noted that courts in reduction in force cases, namely *Brough v. Governing Board* (1981) 118 Cal.App.3d 702, 714-15, and *Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, 654-55, had interpreted the term in a similar manner.

As the *Forker* court recognized, school districts have the discretion to define competency, as had been permitted in earlier reemployment cases, *King v. Berkeley Unified School District* (1979) 89 Cal.App.3d 1016 (*King*) and *Martin v. Kentfield School District* (1983) 35 Cal.3d. 294 (*Martin*). In *King*, the court upheld a district's requirement that laid off teachers have prior teaching experience in the open jobs in which they claimed competency, namely, mathematics and physical education. In *Martin*, a district was permitted to require prior teaching experience in middle school before deeming laid off elementary school teachers competent to teach in middle school, if such requirement was equally applied to all certificated employees, not just those on a preferential rehire list.

In *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 565 (*Duax*), a case arising under the community college reduction in force statute, now section 87743, the governing board had established a standard of competency that required one year of full-time teaching in the subject area within the last ten years. After acknowledging the discretion afforded to school districts, and set forth in *King* and *Martin*, the court stated: "While these decisions stress the discretion reposed in a school board in defining the term 'competent,' the court in *Forker* . . . added further assistance in stating, '[a]s interpreted by the *Martin* court, the term 'competent' as used in section 44956 relates to specific skills or qualifications required of the applicant. Decisions prior to *Martin* have interpreted that term in a similar manner.' (*Id.* at p. 9. See also *Moreland Teachers Assn. v. Kurze* (1980) 109 Cal. App.3d 648, 654-655; Ozsogomonyan, *Teacher layoffs in California: An Update* (1979) 30 Hastings L.J. 1727, 1749-1751.) Hence, from these authorities we conclude that a board's definition of competency is reasonable when it considers the skills and qualifications of the teacher threatened with layoff."

The *Duax* court upheld the governing board's definition of competence as a reasonable exercise of the governing board's discretion. In this regard, the court stated: "[T]he mandate is that the governing board establish a standard of competency that relates to the skills and qualifications of the teacher. That standard was established by resolution of the governing board, and since it requires only one year of teaching in the last ten, not one in the last two or three, we are not persuaded that it too narrowly defines competency. . . ." (*Duax*, supra, 196 Cal.App.3d at 567.)

In *Bledsoe v. Biggs Unified School District* (2009) 170 Cal.App.4th 127 (*Bledsoe*), a reduction in force case, the court accepted a competency rule that defined competency, in part, as "at least one semester actual teaching experience in alternative education within the last five years." (*Bledsoe*, supra, 170 Cal.App.4th 125, at 135.)

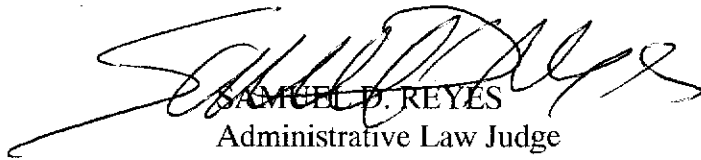
Therefore, as the foregoing authorities demonstrate, a school board or other public education employer may define competence to determine the selection of teachers for economic layoff or reinstatement. Competence, in turn, must be defined in terms of the skills and qualifications of the certificated employee. The SLOCOE requires that teachers seeking to bump into a position have at least one complete school year actual teaching experience within the past five school years in the in the subject matter, grade level or County Office program to which the employee seeks to displace a junior employee. The SLOCOE's competency rule relates to the skills and qualifications of its certificated employees in terms of training and experience, and a similar rule was upheld in *Bledsoe*. The SLOCOE competency rule is reasonable and SLOCOE may therefore use it in implementing the layoffs.

Respondent has not worked in the Vicente Program, which is a distinct County Office Program, and does not satisfy the competency criteria established by the SLOCOE. While she does have experience working with the emotionally disturbed students taught at Vicente, she has not worked as the teacher of record in a self-contained classroom at Vicente for an entire year, which is what the competency criteria requires. Accordingly, she is not competent to displace Mattson.

ORDER

The Accusation is sustained and the District may notify Respondent Denise Palermo-Blakely that her services will not be needed during the 2017-2018 school year due to the reduction of particular kinds of services.

DATED: 4/11/17


SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings