

BEFORE THE
ORANGE COUNTY SUPERINTENDENT OF SCHOOLS
STATE OF CALIFORNIA

In the Matter of the Accusations Against:

Certificated Employees

By

Orange County Department of Education.

OAH Case No. 2010020986

PROPOSED DECISION

This matter was heard by David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, on April 21, 2010, at Costa Mesa, California. Oral, documentary, and stipulated evidence and written arguments were received and oral arguments heard, and the matter was submitted for decision on April 21, 2010.

Parties and Representation

Complainant Orange County Superintendent of Schools was represented by Anthony P. De Marco and Cathie L. Fields, Attorneys at Law.

Respondents Julie Lynn Ames, Michael A. Kashdan, Cheryl Ann Stoltz and John M. Wells (who is a licensed attorney), were present and represented themselves. Respondent Christine Hall was present and was represented by Dean W. Hall, Attorney at Law.

Twenty-one employees, including some who are Respondents, were represented by Carlos R. Perez, Attorney at Law. Complainant objected to the inclusion of any employees who did not submit a Notice of Defense, but allowed such employees to offer evidence on the subject of why no Notice of Defense was submitted. No such evidence was offered. The objection was sustained before the conclusion of the hearing.

However, upon further review of the evidence, it is found that Complainant did not submit evidence of which Respondents of the thirty identified in the Accusation (Exhibit 5) had submitted Notices of Defense. (Although a document was prepared with this information, it was neither marked for identification nor received in evidence.) Therefore, the order sustaining the objection is not supported by the evidence and IS HEREBY VACATED. The objection is OVERRULED.

Mr. Perez represented the following employees, determined to be Respondents (“*” indicates those employees present at the hearing): Adams, James*; Clark, Adriana Angulo; Garten, Marcia E.*; Gramling, Sharon A.; Gruber, Linda F.*; Juarez, Martin*; Keir, Susan S.*; Kriskey, Jacqueline Anderson; Lester, Lewis Lee*; Mahoney, Jennifer Lynn; Nguyen, Raphael H.*; Rainis, Michael J.*; Ramirez, Monica*; Roman, Michael Danny; Salio, Elizabeth Anne*; Schegetz, Mary F.*; Springston, Julie Lowell*; and Walsh, Judith M.*

Mr. Perez also purported to represent Barrientos, Eric*; Francis, Dina*; and Ramirez, Ruth*. However, the evidence supports the inference that these employees did not submit a Request for Hearing after being served with the preliminary layoff notice.¹ Under Education Code section 44949, subdivision (b), if an employee served with a preliminary layoff notice does not submit a request for a hearing, the “failure to do so shall constitute his or her waiver of his or her right to a hearing.” Therefore, these three employees are not Respondents in this matter.

Other Respondents who were not represented by Mr. Perez are: Adams, Tanya G.*; Alvarez, Erica; Newkirk, Jose James*; Schiller, Shanti Sioux; Shelley, Dawn Dilberto; Vorck, Charles Kurt; and Wellikson, Noah D.

FACTUAL FINDINGS

1. On March 17, 2010, the Accusation was made and filed by Nina Boyd in her official capacity as Assistant Superintendent for Human Resources and Support Services (Assistant Superintendent) of the Orange County Department of Education (Department) and as a designee of the Orange County Superintendent of Schools.

2. Respondents are permanent, probationary or temporary certificated employees of the Department.

3. Through its Special Schools Division, the Department provides special education and services to students with special needs, including students who are severely disabled, deaf and hard-of-hearing, visually impaired, and autistic. School districts in Orange County refer their students to the Department when the school districts choose not to provide services to them. The Department bills the school districts for its services for the students. Through its ACCESS Division (Alternative, Community, and Correctional Education Schools and Services), the Department provides alternative educational programs to students in the county juvenile detention center and camps, group homes, and day homes. These students are referred to the Department by schools, courts, and the juvenile justice system. The Department employs teachers for both the Special Schools Division and ACCESS Division; teachers may be assigned to teach at county and regional sites as well at school

¹ Thirty Respondents are identified in the Accusation. It is inferred that these Respondents each submitted a Request for Hearing after being served with the preliminary layoff notice. Neither Barrientos, Francis nor Ramirez is included.

districts. The Department receives funding for its services from the State of California, and also from other school Districts with which it contracts to provide educational services.

4. For the 2010-2011 school year, the Department projects that it will have a budget shortfall of approximately \$10.3 million in the Special Schools and ACCESS Divisions. The budget shortfall is a result, in part, of uncertainty in enrollment due to decisions or plans of school districts not to refer students to the Department's Special Schools and ACCESS Divisions. In addition, the Department anticipates that it will receive less state funding in the future due to the budget problems of the government of the State of California. Due to these budget shortfalls for the next school year, the Department has determined that it must reduce expenditures in the Special Schools and ACCESS Divisions and must do so by terminating the employment of administrative personnel, temporary teachers, and permanent and probationary employees.

5. On February 16, 2010, pursuant to Education Code sections 1294, 44949, and 44955, the Deputy Superintendent as an authorized designee of the Orange County Superintendent of Schools (Superintendent) determined that, because the Department has or will have insufficient revenue to maintain the current levels of its programs, it is necessary to reduce or discontinue particular kinds of services which are now being rendered by certificated personnel no later than the beginning of the 2010-2011 school year. The Superintendent also found that the reduction or discontinuance of these particular kinds of services will result in the termination, reassignment, and displacement of probationary and/or permanent certificated employees.

6. On February 16, 2010, the Superintendent resolved that particular kinds of services must be discontinued or reduced by the following 35.00 full-time equivalent (FTE) positions:

TYPE OF PROGRAM	FTE
<u>Administrative</u>	
Principal	2.0
Assistant Principal	3.0
Psychologist	1.0
 <u>Classroom Teaching - Special Schools</u>	
SDC/Severely Handicapped	9.0
SDC/Deaf & Hard of Hearing	1.0
SDC/Oral Deaf	1.0
 <u>Classroom Teaching — ACCESS</u>	
Contract Learning Classes	12.0
Day School Classes	6.0
Institutions Day School	2.0
Special Education	2.0
U.C.I.	2.0

The Superintendent further resolved that, because of the reduction or discontinuance in particular kinds of services, it is necessary to terminate no later than the beginning of the 2010-2011 school year, probationary and/or permanent certificated employees equal in number to the positions affected and services reduced or discontinued. The Superintendent resolved that his designated representative send appropriate notices to all employees “possibly affected by virtue of the reduction and elimination of particular kinds of service.” The Superintendent also adopted tiebreaking criteria to be used in determining the order of termination or layoff of certificated employees who first rendered paid service to the Department on the same date or have the same first date of service.

7. On February 22, 2010, the Superintendent further found that the Department has employed temporary certificated employees or teachers and that the resolution to reduce or discontinue particular kinds of services is related to the justifications for employing temporary employees. The Superintendent determined that the resolution to reduce or discontinue particular kinds of services “is related to the loss or potential loss of revenue limit funding and of certain categorical or specially-funded programs, the possibility of probationary and permanent employees returning from leaves of absence, and other considerations that relate directly to the justifications for employment of temporary certificated employees.” The Superintendent thus determined that one temporary certificated employee must be released from his temporary assignment to effectuate the reduction or discontinuance of particular kinds of services.

8. On March 1, 2010, pursuant to the resolutions of the Superintendent and the provisions of Education Code sections 1294, 44949, and 44955, written notices were given by the Assistant Superintendent as designee of the Superintendent by personal service or certified mail to Respondents, who are permanent or probationary employees of the Department, that the Superintendent had recommended that their services will not be required for the ensuing 2010-2011 school year and the reasons for this action. The written notices included the resolutions of the Superintendent to reduce and/or discontinue certain services or programs in the Department, the list of particular certificated services to be reduced or eliminated, tie-breaking criteria, pertinent sections of the California Education Code, and a request for hearing. Respondents requested a hearing to determine if there is cause for not re-employing them for the ensuing school year.

9. On March 1, 2010, pursuant to the resolutions of the Superintendent and the provisions of Education Code sections 1294, 44949, and 44955, written notice was given by the Assistant Superintendent as designee of the Superintendent to Respondent James Lee Adams who is a temporary certificated employee, that the Superintendent had recommended that his services will not be required for the ensuing 2010-2011 school year and that, as a temporary certificated employee, he may be released from employment without a hearing. The written notice included the resolutions of the Superintendent to reduce and/or discontinue certain services or programs of the Department, the list of particular certificated services to be reduced or eliminated, tie-breaking criteria, pertinent sections of the California Education Code, and a request for hearing. The Department further notified Respondent James Lee Adams that if he claimed that he could not be released from employment without

a hearing, he was required to submit a request for hearing, attend the layoff proceeding, and present evidence at the hearing that he was entitled to participate in the hearing. Respondent James Lee Adams requested a hearing to determine if there is cause for not re-employing him for the ensuing school year.

10. The Department's notices dated March 1, 2010, were sufficient in providing notice to Respondents under Education Code sections 44949 and 44955. Respondents were not prejudiced by errors in the notice, if any, with respect to the description of their current assignments, home addresses, or any other matters. No claims were raised in the hearing that the notices were, in fact, deficient in any respect.

11. On or about March 17, 2010, the Department served Respondents with an Accusation, Statement to Respondent, copies of Education Code sections 1294, 44949, and 44955, Government Code sections 11500, 11505, 11506, 11507.5-11507.7, 11509, and 11520, Notice of Defense form, and Notice of Hearing. The evidence was that nineteen Respondents filed notices of defense, requesting a hearing to determine if there is cause not to employ them for the ensuing school year, but did not establish the names of those nineteen Respondents. It is inferred that some of the Respondents filed notices of defense. In addition, the Department invited any Respondents who did not file notices of defense to participate in the noticed hearing. All prehearing jurisdictional requirements have been met by the parties.

12. The services set forth in Finding 6 above are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. The determination of the Superintendent of the Department to reduce or discontinue these services is within the sound discretion of the Department, related to the welfare of the Department and its students, and not arbitrary or capricious. The Department will continue to provide services mandated by law although in a different manner in some areas and plans to re-employ Respondents whose services are reduced or discontinued in the event that services or programs are reinstated due to sufficient funding. The Department will terminate temporary certificated employees before permanent or probationary certificated employees and plans to terminate the employment of classified employees as well.

13. The Department considered all known personnel changes due to resignations, death, temporary attrition, and/or reassignment of individual employees within the Department. Further, the Department implemented retirement incentives to mitigate the layoff of certificated employees.

14. The Department prepared a Seniority Report of Certificated Employees (Exhibit 6) that contains information about seniority and hire dates, credentials, assignments, and job locations. Said information was obtained from the Department's database and personnel files, and was updated after soliciting additional information from certificated employees. The Department also prepared a Certificated Layoff Analysis (Exhibit 7) using personnel information and documentation verified by the Human Resources office. Thereupon, the Department used the Seniority List and Certificated Layoff Analysis to develop a proposed

layoff list (Exhibit 8) of the least senior certificated employees assigned to the services being reduced or discontinued and developed a bumping chart as well (Exhibit 9).

Individual Respondents

15. Certain Respondents have had adjustments made to their seniority dates. Other Respondents have raised claims in the proceeding. Also, the Department has determined to remove or “skip” certain certificated employees, presently employed in specific identified programs, from the reduction or discontinuance of particular kinds of services.

16. Cora B. Lee, the sole teacher in the visually-handicapped program for elementary students, has a seniority date of October 24, 2005. She has specialty training and experience and will be skipped inasmuch as she is needed to teach due to the expected enrollment of students next year in the visually-handicapped program.

17. Elizabeth M. Desloge will be skipped for the benefit of the PIES program, an interagency support program for parents and their infants and toddlers. Desloge, who has a seniority date of August 1, 2006, has specialty training as well as experience working with infants and she is the most senior of certificated employees for the program.

18. Julie Lowell Springston is a permanent certificated employee with a seniority date of January 10, 2005, who teaches in the ACCESS Division in a contract learning position at Pacific Coast High School. This program is designed to meet the requirements of the University of California regarding non-site-based independent study schools (Exhibit 12), including that the teacher has been certified as a Highly Qualified Teacher under the federal No Child Left Behind Act (20 U.S.C. sections 6311(g)(2) and 6319). Springston is Highly Qualified to teach English, German and Spanish and she is the most senior of certificated employees with the experience required for the program.

19. Marcia Garten is a permanent certificated employee with a seniority date of April 27, 2004, who also teaches in the ACCESS Division in a contract learning position at Pacific Coast High School. She is a Highly Qualified Teacher who teaches earth science and biological science. There is no more senior certificated employee with the experience required for the program.

20. Shanti Sioux Schiller is a permanent certificated employee with a seniority date of June 3, 2003, who also teaches in the ACCESS Division in a contract learning position at Pacific Coast High School. She is a Highly Qualified Teacher who teaches social science and introductory science. There is no more senior certificated employee with the experience required for the program.

21. Julie Lynn Ames is a contract learning teacher in the ACCESS Division and holds a clear multiple subject teaching credential. She started with the Department as a secretary in 1996 and later became a para-educator. She started working as a substitute teacher in 2001. The Department changed her seniority date of March 15, 2004, to January

8, 2004. She asserts that her seniority date should be no later than July 1, 2003, when she worked as a long-term substitute. Ames worked as a long term substitute for the months of July and August 2003, then worked as a day-to-day substitute from September 2003 until January 2004, when she began working in a vacant position and was offered, and accepted, a probationary contract. Also in the period from September 2003 until January 2004, she worked one hour per day as a classified employee. Ames contends that, as she was a substitute for more than 75 percent of the 2003/2004 school year, she is entitled to credit towards her seniority dating from her first day in that position. However, the evidence is that she was a long term substitute for two of the six months preceding her acceptance of her probationary contract. Under these circumstances, there is insufficient evidence to further adjust her seniority date. Ames' other contentions, set forth in her brief (Exhibit A), are either not supported by the evidence or the law, and are rejected.

22. The Department proposes to skip the following employees assigned to the Sunburst Academy: Carol Jean Drellack, seniority date January 21, 2004; Judith M. Walsh, seniority date January 20, 2004; Raphael H. Nguyen, seniority date December 15, 2003; Mary F. Shegetz, seniority date September 2, 2003; and Tanya G. Adams, seniority date January 27, 2003. The Sunburst Academy is a program for the National Guard in which candidates for service, who shortly later become cadets, are involved in a program on base that consists of educational "cycles." Each cycle has a two-week orientation at the beginning and two 10-week semesters. The teachers undertake special training before each cycle, some of which is one week long and sometimes longer, sometimes on base and sometimes in Washington, D.C., or other remote locales. The teacher training before each cycle builds upon the training given in the prior cycle. There are presently nine teachers in the program. Nguyen has been in the program for two years and has undergone training for four cycles. Walsh started at Sunburst in September 2009 and received one week of training to start, and another week in October. In January 2010 she took a two-week training course. The program has experienced a high turnover in teachers, up to 80 percent in the last few years, in part as a result of prior layoffs. The U.S. Military Department complained to the Department (Exhibit 14) about the turnover, as it increased its costs of training teachers and endangered the status of the program.

23. Three Respondents testified that they each had taught at Sunburst Academy in the past for a period of three months (one of the two semesters in a cycle) and had taken the first required teacher training course. They are: Michael J. Rainis, seniority date March 17, 2003; Martin Juarez, seniority date March 17, 2003; and Ruth Ann Ramirez, seniority date May 7, 2003. Each testified that they were willing to be reassigned to Sunburst Academy for the period of time (thirty-nine months) covering the rehire rights of more senior employees who would be laid off in this proceeding.

24. Although the experience of these three Respondents would lessen the training costs for teachers in the program, it would nevertheless require them to attend additional training that many of the present employees have already received. Further, if they were reassigned there would be an increase in the very teacher turnover that was the subject of concern by the Military Department. The evidence supports the Department's decision to

skip Carol Jean Drelack, Judith M. Walsh, Raphael H. Nguyen, Mary F. Shegetz and Tanya G. Adams.

25. Respondent Christine Hall is an ACCESS Division teacher at the Juvenile Court School. She holds a professional clear single subject teaching credential. The Department has determined her seniority date to be January 20, 2004, and proposes to displace, or bump, her with Craig P. Wilson, seniority date November 16, 2001, whose position as a contract learning alternative education teacher is being eliminated. For the present school year Hall has served as a Teacher on Special Assignment (TOSA), an assignment outside of the classroom providing services needed by the Department. A TOSA assignment is not considered a course or course of instruction and is filled by the Department based upon need, interview and assignment. Further, Hall has served as School Improvement Coordinator, a position paid for by federal Title 1 funds. Among her duties are participation in the School Site Counsel and management of the requirements of WASC, the Western Accreditation of Schools and Colleges. Hall was also involved in programs relating to standardized testing such as the California High School Exit Exam (CAHSEE) and other mandated testing. In her brief (Exhibit B), Hall contends, among other things, that her special training, experience and skills should cause the Department to skip her in this proceeding. Skipping is a process, under Education Code section 44955, subdivision (d)(1), wherein a school district may choose to demonstrate a specific need and that an employee has the special training and experience to meet that need. However, the statute does not require a school district to do so. Rather, it is within the school district's discretion to determine if it wishes to skip a service and an employee. As applied here, Hall cannot force the Department to skip her. Hall's other contentions, set forth in her brief, are either not supported by the evidence or the law, and are rejected. Hall may receive notice that her services will not be required for the ensuing school year pursuant to the current reduction of particular kinds of services.

26. Respondent John M. Wells is a certificated teacher at the Department's Juvenile Court School. His seniority date is August 16, 2004, and he holds a professional clear multiple subject credential in cross-cultural language and academic development and general subjects. Wells' contentions, set forth in his brief (Exhibit C), are either not supported by the evidence or the law, and are rejected. His employment may be terminated pursuant to the present reduction or discontinuance of particular kinds of services.

27. Respondent Cheryl Ann Stoltz is a teacher in the ACCESS alternative education program at the Juvenile Court School. She holds a clear single subject credential in music and the Department has assigned her a seniority date of August 11, 2003. She contends that, if the Department counts day-to-day substitute teaching towards seniority, she worked at least two years prior with no time off. She also contends that her seniority date should be July 1, 2003, based on being in a long term substitute position for a year before she was offered a probationary position on July 1, 2004. Her claim is not persuasive, for she did not establish the specific details of her employment. Under these circumstances, her seniority date will remain as determined by the Department and she may be given notice that her services will not be needed for the ensuing school year.

28. Respondent Lewis Lester, IV, was initially assigned a seniority date of August 27, 2007. The Department agrees that this should be corrected to October 16, 2006, when he moved from being a day-to-day substitute into a vacant position. As a result, Lester's status would change from probationary to permanent. Based on his increased seniority, he should not have received a layoff notice and he will be retained by the Department. Also, Respondent Linda Gruber would move into Lester's place and would be laid off as one of the FTE reductions in the ACCESS special education program.

LEGAL CONCLUSIONS AND DISCUSSION

Pursuant to the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

1. Education Code² section 44949, subdivision (a), states in pertinent part:

"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 . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor."

2. Section 44955 provides, in pertinent part:

"(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

"(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, . . . and 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. . . .

"As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish . . . a statement of the

² All citations are to the Education Code.

specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. . . .

“(c) [S]ervices of such employees shall be shall be terminated in the reverse order in which they were employed, as determined by the board in accordance with Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

“The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. . . .

“(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

“(1) 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 teach that course or course of study or to provide those services, which others with more seniority do not possess.”

3. Sections 44949 and 44955 establish jurisdiction for this proceeding, and the notice and jurisdictional requirements set forth therein were met. (Factual Findings 1 through 11.)

4. 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.)

5. Cause exists to reduce the number of certificated employees of the Department due to the reduction and discontinuation of particular kinds of services. Cause for the reduction or discontinuation of services relates solely to the welfare of the Department’s schools and students within the meaning of section 44949. (Factual Findings 1 through 14.)

6. The services at issue are particular kinds of services subject to layoff proceedings. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627; *Campbell v. Abbott* (1978) Cal.App.3d 796; *Zalac v. Governing Board of the Ferndale Unified School District* (2002) 98 Cal.App.4th 838.)

7. 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.) Junior teachers may be

given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.)

8. Cause exists pursuant to sections 44949 and 44955 to reduce by 35.00 full-time equivalent positions the concomitant number of certificated employees of the Department due to the reduction or discontinuance of particular kinds of services. With respect to those Respondents whose employment have been found to be terminable by the Department and any other certificated employees who received notices but did not request a hearing, the causes set forth in the Accusations relate solely to the welfare of the Department's schools and students within the meaning of section 44949.

9. There is no certificated probationary or permanent employee with less seniority than any one of Respondents who is being retained by the Department for the 2010-2011 school year to render services which any one of Respondents is certificated and competent to render.

10. Cause does not exist to release Respondent Lewis Lester from employment with the Department, based on Finding 28 above.

ORDER

WHEREFORE, the Administrative Law Judge makes the following Order:

1. The Department may give notice to Respondents, and each of them, including temporary certificated employees and certificated employees who did not request a hearing, except for Lewis Lester, IV, in the inverse order of seniority that their services will not be required for the ensuing 2010-2011 school year because of the reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955.

2. Before giving notice to Respondents and the other certificated employees who did not request a hearing, the Department shall determine and take into account positively assured attrition among certificated employees in deciding how many and when certificated employees should be terminated before the ensuing 2010-2011 school year.

Dated: April 26, 2010.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings