

BEFORE THE  
GOVERNING BOARD OF THE  
ST. HELENA UNIFIED SCHOOL DISTRICT  
NAPA COUNTY, STATE OF CALIFORNIA

In the Matter of the District Statement of  
Reduction in Force Against Certificated  
Employee:

ELIZABETH “LIBBY” STETSON.

Respondent.

OAH No. 2016031245

**PROPOSED DECISION**

Administrative Law Judge Perry O. Johnson, Office of Administrative Hearings, State of California, heard this matter on April 27, 2016, in St. Helena, California.

Attorneys at Law Frank Zotter, Jr., of School and College Legal Services of California, represented the Marylou Wilson, Ed.D., Superintendent, St. Helena Unified School District (the district).

Attorney at Law Sara H. Sandford-Smith of the law office of Beeson, Tayer & Bodine, APC, represented respondent Elizabeth “Libby” Stetson.

On April 27, 2016, the parties submitted the matter for decision.

**ISSUE**

The sole issue to be decided is whether the district may retain two teachers who are junior to respondent on the rationale that those employees possess special training and experience necessary to teach a course of study that respondent does not possess.

**FACTUAL FINDINGS**

1. Marylou Wilson, Superintendent for the district made and filed the district’s Statement of Reduction in Force, dated March 10, 2016, while acting in her official capacity.
2. Elizabeth “Libby” Stetson (respondent) is a certificated employee of the district.

## *Background*

3. On March 10, 2016, the district's Governing Board (the board) adopted Resolution No. 15-26, which determined that it would be necessary to reduce or discontinue a particular kind of service at the end of the current school year due to staffing and financial considerations. The board determined that the following particular kind of service, which reflects one full time equivalent (FTE) positions, must be reduced or discontinued for the ensuing school year:

|                              |      |        |
|------------------------------|------|--------|
| English                      | 1.00 | F.T.E. |
| TOTAL CERTIFICATED POSITIONS | 1.00 | F.T.E. |

4. The service listed in Finding Number 3 is a particular kind of service that may be reduced or discontinued within the meaning of Education Code section 44955.

5. Resolution No. 15-26 directed the district's superintendent or her designee to initiate and pursue procedures necessary not to reemploy the employee whose services would not be required after the 2015-2016 school year as a result of the elimination of the particular kind of service, namely 1.0 F.T.E. English.

6. Approximately two months before the board adopted Resolution No. 15-26, the district's governing body adopted Resolution No. 15-23, which was dated January 21, 2016. That board resolution's formal preamble includes four qualifying or introductory statements that: (i) the district "requires certificated personnel with appropriate credentials, certificates, training and experience to meet the need of the students and the [d]istrict"; (ii) the district "requires certificated personnel who are competent to teach the particular kinds of instructional services offered by the district in grades TK [kindergarten] through [high school's grade] 12; (iii) the district "has determined that successful experiences teaching a particular instructional service demonstrates competence in that service"; and, (iv) the board "desires to establish objective criteria to make effective, fair, and equitable employment decisions."

Resolution No. 15-23 provides that, under the authority of Education Code section 44955, subdivision (d),<sup>1</sup> "a more junior certificated employee may be 'skipped' and a more

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<sup>1</sup> Under Education Code section 44955, subdivisions (b) and (c), school districts must retain senior employees over more junior employees and retain permanent employees over temporary employees. Education Code section 44955, subdivision (d), provides an exception that permits a district to 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, or to provide services

senior certificated employee laid off if the more junior employee possesses the following training and experience which a more senior employee does not:

- “1. By March 1, 2016, possesses credentials or certificates valid through the 2016-17 school year which authorize the instruction of English Learners (BCLAD, CLAD, or SDAIE);
- “2. By March 1, 2016, possesses a credential or certificate valid through the 2016-17 school year which authorizes the instruction of students in the particular service provided by the more junior employee; and
- “3. Has experience teaching at least two (2) years within the past three (3) years in the particular service being provided by the more junior employee.”

As part of Resolution No. 15-23, dated January 21, 2016, the board included a page pertaining to “criteria for ‘skipping’.” The subject page for the skipping criteria includes the results of the district’s analysis of the criteria as between three English teachers as follows:

| Name               | Criteria 1 Met | Criteria 2 Met | Criteria 3 Met | All Criteria Met |
|--------------------|----------------|----------------|----------------|------------------|
| Dana Simon         | Yes            | Yes            | Yes            | Yes              |
| Elizabeth Ganshorn | Yes            | Yes            | Yes            | Yes              |
| Elizabeth Stetson  | Yes            | Yes            | No             | No               |

By application of the criteria of Resolution No. 15-23, the board seeks to establish that the district has lawfully complied with the exception that permits a district to deviate from the law that requires a district to terminate a certificated employee in order of seniority so that a teacher having an earlier first date of paid service to a school district is retained when more junior teachers are not reemployed for the following school year.

*General Overview of the Execution of the Layoff That Resulted from Board Resolutions 15-23 and 15-26*

7. All prehearing jurisdictional requirements were satisfied.

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authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, 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.

- (2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

8. On approximately March 11, 2016, the district served upon one certificated employee, namely respondent: a letter titled “Notice of Reduction or Discontinuance of Particular Kinds (sic) of Service”; Resolution No. 15-26, the district’s “Statement of Reduction in Force”; exhibit “B” that reflected respondent’s name only; and, the district’s a blank “Request for Hearing” form, which collectively may be referred to as “layoff packet”.

The layoff packet identified the claimed reason for the recommended reduction in force, advised the certificated employee of her right to a hearing, and explained that if the employee wanted to participate in a hearing, she was required to send the district a written request for a hearing by April 12, 2016, or the employee’s right to a hearing would be deemed waived.

9. As the sole employee to whom the layoff notice was issued, respondent timely submitted to the district a completed “Request for Hearing,” dated March 11, 2016.”

10. On April 14, 2016, the district sent by U.S. mail to respondent: the district’s “Statement of Reduction of Force”; “Statement to Respondent”; a blank form titled “Notice of Participation in Reduction in Force Hearing”; the “Notice of Hearing” that set the date, time, and place for the hearing in this matter; and related relevant sections of the California Education Code and California Government Code

11. On April 19, 2016, respondent’s attorney filed with the district a Notice of Participation that requested a hearing. The document further included an objection to the Statement of Reduction in Force “on the ground that it does not state acts or omissions on which [the district] may proceed.” (Gov. Code § 11506, subd. (a)(2).) And, the Notice of Participation further objected to “the Statement of Reduction of Force on the ground that the proposed reduction-in-force does not comply with Education Code [section] 44955.”

#### *District’s Evidence*

12. Assistant Superintendent Cynthia Toews, Ed.D., offered evidence at the hearing of this matter.

Dr. Toews assumed her district position, in the capacity of Assistant Superintendent, as head of district’s Human Resources Department during 2010.

Dr. Toews was designated by the district’s superintendent to execute the board’s Resolution 15-26, which specifically declared that for the ensuing school year, the district would eliminate the equivalent of one F.T.E. English certificated employee (teacher) position.

Dr. Toews provided the board’s rationale for the exercise of its discretion, pursuant to Education Code section 44955, subdivision (d)(1). The board purportedly identified the course of study as one creating a specific need for personnel at a time of decreased financial resources. The board supposedly found a compelling need to employ and retain certificated

employees for positions as Common Core English teachers as those persons who possess the necessary training and experience to best serve school students.

The California state law regarding Common Core Standards was proposed as early as 1997 and enacted in 2010 as a comprehensive scheme for crafting instructional standards and curriculum for students entering the age of high technology. Although proposed by the state Department of Education some time ago, several years elapsed before the district began to put in place its plan to implement the Common Core Standards and curriculum. And, only during the last school year (2014-2015) has the full implementation of the standardized consortium approved assessment Common Core tests been administered to students at the high school level.

Since becoming the district's Assistant Superintendent, who manages human resources matters, Dr. Toews has seen the advent and implementation of the Common Core system<sup>2</sup> of standards and curriculum. Dr. Toews testified regarding the district's

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<sup>2</sup> What is the Common Core?

The Common Core is a set of curriculum standards in math and English language arts (ELA). The standards set guidelines for what every student should know at every grade so that they'll be on track and fully prepared for college by the time they graduate high school.

So, for instance, the Common Core tells schools that one of the things students should be able to do by the end of second grade is add single digit numbers in their heads. By 11th grade, students should be able to "demonstrate knowledge of eighteenth-, nineteenth- and early-twentieth-century foundational works of American literature."

The Common Core provides a destination, but teachers and schools still decide how to get there: They create the curriculum, pick the projects, assign the homework, and determine the best way is for a student to move from point A to point B.

Teachers often say that the old California state standards were "a mile wide and an inch deep." The Common Core includes fewer topics than the old standards; but teachers will go deeper into each one to make sure students really understand the ideas and concepts and can apply them.

Where did the Common Core come from?

A simple but urgent truth: too many students graduate from high school and aren't ready for college. Many don't make it to college at all. Others start college classes and can't handle the work or have to take remedial classes that cost them time and money and can be a huge obstacle on the road to a college degree.

determination for reducing the particular kind of services, namely one full time equivalent English teacher's position. According to Dr. Toews, the district is experiencing a reduction of students in the district so that the number of English teachers must be reduced by one FTE. More importantly, in the district's view, the future underpinning for instruction in English is to be grounded on the federal and state directives for implementation of Common Core instruction. In addition, because of the curriculum change brought about by reason of the implementation of Common Core Standards, the teaching of English is moving to an integrated approach of instruction. The requirements of the Common Core Standards led to a district goal of ensuring a sufficient number of teachers who were highly qualified to teach Common Core English. As a result, respondent, who was perceived to lack sufficient Common Core orientation and training has been slated to be skipped by two teachers who are junior to respondent.

Under the Common Core standards and curriculum, in the realm of English Language Arts, a student is to: be challenged to use evidence from text to support the student's argument; read more complex text and learn to dissect the text when comprehension is not immediately attained; and, read a mix of fiction and non-fiction that may be integrated into science and social studies.

In the consideration and analysis of the district, two junior teachers (Ms. Ganshorn and Ms. Simon) have undergone training in Common Core standards by reason of having classroom assignments teaching Common Core curriculum at the high school level and middle school level. And, supposedly they have shown proficiency in teaching the curriculum for English under the Common Core system. Because respondent was given a "special assignment" at the elementary school level to teach, among other things, drama classes, she was not afforded the opportunity for exposure to the nature and extent of training

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In response, educators from across the country came together to develop standards that would prepare students for the demands of college. The Common Core standards have been over ten years in the making. They draw on input from top colleges and universities, business leaders, and other countries and on the best research about how students learn.

California adopted the Common Core standards in 2010, with the full support of public university system, the California Teachers Association and hundreds of local community groups. Most other states in the country have also adopted the standards.

¶ . . . ¶

In general, the Common Core puts more emphasis on critical thinking, on explaining why the answer is right, understanding why it matters, and applying it to real world challenges.

([www.innovateschools.com](http://www.innovateschools.com))

in Common Core standards, strategies and curriculum styles as given to the junior teachers, Ms. Ganshorn and Ms. Simon.

13. The district considered all positively assured attrition in determining the actual single final layoff notice that needed to be delivered to the affected certificated employee.

*Teachers Whom the District Proposes to Skip Respondent*

14. The district contemplates skipping two teachers who have first dates of paid services years after respondent began performing services as an English teacher for the students of the district. Even though the two teachers are junior in seniority to respondent, the district contends each of those teachers possesses special training, experience, or skill that warrants the district to retain their services for the ensuing school year while respondent is discharged. As set forth below, the district's contention is neither compelling nor supported by the facts or the law.

15. Neither Ms. Ganshorn nor Ms. Simon came to the hearing of this matter to provide testimony.

16. The district provided its "Certificated Seniority List with Credentials" as the only documentary proof regarding the experience and training of the subject two junior teachers who the district seeks to skip respondent, while she is to be nonreemployed. Dr. Toews did offer some testimony regarding the claimed "special experience and training" that warrants retention of the junior teachers over respondent. But, the testimony was insufficient to sustain the district's proposed action to non-reemploy respondent for the ensuing school year.

By reason of the respective assignments of the two junior teachers (high school English classroom and middle school (grade 7) English classroom), the junior teachers had the opportunity to partake in traditional instruction of English courses within the context of Common Core standards. Those teachers "worked on bench marks" of the Common Core Standards and they were part of the teachers designated by the district to share in the training. (But, Dr. Toews acknowledged during her testimony that at the district's expense respondent received "some" training in Common Core standards and curriculum to include an "instructional model" that incorporates some strategies of Common Core called the "gradual release of responsibilities." Also, respondent has received "some" training in the "OARS" (Online Assessment Reporting System) program, which is a data storage program and computerized quizzes and tests for the assessments systems (test comparisons) under Common Core. (OARS facilitates the collection, reporting, and analysis of periodic assessments so as to help districts meet California and federal government testing and reporting requirements.) But, respondent has not received training in another phase of the Common Core system called "AVID" (advancement via individual determination) in English. The district hired a PIVOT, which is a company that worked with district teachers was part of trainings on Common Core "close reading" aspects. And, Dr. Toews stated that

respondent has been exposed to training and courses for general Common Core standards and curriculum, but not to the extent enjoyed by Ms. Ganshorn and Ms. Simon.

*a. Ms. Elizabeth Ganshorn*

17. Ms. Elizabeth Ganshorn has a first date of paid service to the district of August 17, 2009. She holds a single subject credential in English. A CLAD certificate has been issued to her.

Ms. Ganshorn is a permanent employee of the district. For the current school year, she has a teaching assignment at St. Helena High School.

Ms. Ganshorn holds an administrator's credential.

Dr. Toews could not explain the reason that Ms. Ganshorn was able to hold the full time teacher position to teach English at the high school level as opposed to respondent gaining the position during the 2011-2012 school year, even though respondent has at least three years seniority as an English teacher in the district. All that Dr. Toews perceived for respondent's exclusion from the high school teaching position was that the district had not received a written request from respondent seeking to perform services as a full-time English teacher.

*b. Ms. Dana Simon*

18. On August 16, 2010, is the first date of paid service by Ms. Dana Simon to the district. Ms. Simon possesses a single subject credential in English (Examination), and she holds a CLAD certificate.

Ms. Simon is a permanent employee of the district. For the 2015-2016 school year, Ms. Simon holds a teaching assignment at the Robert Lewis Stevenson Middle School for English grade seven.

The district, according to Dr. Toews, has a record that Ms. Simon possesses a subject area "Master's Degree" in English. That degree indicates a higher level of education for Ms. Simon than respondent has attained. But, the possession of a Master's Degree<sup>3</sup> is not part of the criteria for skipping privileges for the district to retain Ms. Simon, who is junior to respondent.

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<sup>3</sup> The district has a program for "advanced placement" that permits a high school student, who is taught by a Master's Degree holding teacher in a particularized subject area, to earn community college level credits within the confines of the high school so as to enable the advanced placement high school student to move more easily into a four-year university. But, Ms. Simon is not teaching at the high school level and her middle school English class student were not shown to be eligible for advance placement enrollment at Napa Community College.



### *Challenges Made by Respondent and Her Evidence*

19. Respondent challenges the district's issuance of a layoff notice to her. She contends that the district impermissibly proposes to retain two employees with less seniority to render a service that she is certificated and competent to teach. And, she contends that the board's "skipping" criteria is too narrowly drawn for it to be lawful. That paragraph numbered 3 to the subject board resolution arbitrarily and capriciously impacts her, and, is, therefore, invalid. Respondent's contentions are compelling and persuasive.

20. Respondent has a single subject credential in English and a certificate in (CLAD).

Respondent has ten years experience as a teacher with the district as her first date of paid service is August 14, 2006. For her first four school years with the district (2006-2007, 2007-2008, 2009-2009 and 2009-2010), respondent taught English at the Grade Nine level.

21. Beginning her second year (2007-2008) with the district, respondent received assignments teaching photography. She taught photography for seven school years. Her second year through fourth year with the district involved her splitting teaching assignments between English as grade nine classrooms and photography classrooms.

22. For various, non-consecutive school years (2007-2008, 2010-2011, 2012-2013), respondent demonstrated flexibility by teaching English Language Development (ELD) to students from families having limited English proficiency.

She has taught distinct classes involved the use of written English in classes such as "Yearbook" (2012-2013 and 2013-2014), "World Cultures" (2010-2011), and "Independent Study" (2011-2012).

For the three preceding school years (2011-2012, 2012-2013, and 2013-2014) relative to the current school year, respondent taught "Skills English," also called "sheltered English," which required her to co-teach, along with a credentialed Special Education teacher, students having learning impairments, developmental disabilities or special needs. And, approximately three school years in the past, respondent taught Independent Study students. Those three school years were the last years that she taught at the district's high school.

Respondent consented to accepting special teaching assignments for the immediate last two school years (2014-2015 and 2015-2016) as the teacher of "Art and Drama Enrichment." Those assignments were at the district's elementary school locations for Kindergarten through grade five. Also, during the very last school year, respondent added a middle school drama class on Wednesdays to her teaching assignment. And, during the current school year, respondent teaches "reading intervention" English lessons to very young children in Kindergarten.

The Visual Arts and Drama<sup>4</sup> assignment requires respondent to collaborate with other teacher to blend into Core Curriculum the subject of drama for middle school students. As an English teacher, respondent has incorporated the art portion of the class into an English speaking facet or focus of the instruction. (Dr. Toews confirmed that respondent's assignments for the past two years in the Visual Arts and Drama program require possession by the teacher of an English credential.) In this state, Drama courses are recognized as incorporating instruction in English into the lesson plans and curriculum.

As part of the reading intervention classes as taught at the elementary school, respondent has worked with the middle school teachers to "break down assessments" to guide curriculum. During the second semester, respondent interacted with the middle school's reading specialist in taking on reading intervention of very young students who were reading at "below grade level" or "non-readers."

In the drama course, respondent worked along with the designated lead drama teacher to instruct the portion of the class dealing with "screen writing" for screen plays. Respondent's objective was to foster good writing and dramatic play formatting for students to focus plot development, writing dialogue, outlining dramatic conflict, and formulating ultimate conflict resolution themes through coherent writing techniques. Respondent has worked with videotaping student projects for placement on the teacher web-site (Haiku) platforms for collaborative teacher projects.

23. Respondent persuasively proclaimed at the hearing of this matter that she is "absolutely familiar" with the English language Common Core standards and curriculum. During the last school year (2009-2010) that she last taught three sections of English grade nine, respondent was given orientation regarding the district's transition to Common Core at the high school level. She participated in giving "dry run" English assessment tests," which were not intended to "count" under the oversight of state or federal regulatory bodies. During the 2013-2014 school year when she taught at the high school, respondent was given insight into the Common Core doctrines of "close reading" and enabling students to handle "difficult informational text." Since that time, she had adopted the ideas of "close reading" into her teaching assignments of "photography," "independent student," "drama enrichment," and "yearbook," which is a facet of journalism. Respondent used Common Core strategies in content areas for her personal teacher development areas. She has modeled and practiced the Common Core percepts of participating in collaborative groups for mutual "feed back" among teachers. Further, respondent has scrupulously observed other teachers who execute the implementation of the Common Core rigors and challenges. Over the years, regardless of

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<sup>4</sup> "Drama" is by definition, "a composition in verse or prose intended to portray life or character or to tell a story usually involving conflicts and emotions through action and dialogue and typically designed for theatrical performance." (Webster's Third New International Dictionary, Unabridged, (1968), p. 685.) The instruction in drama necessarily involves the teaching of the English writing and speaking.

the courses taught by her, and in particular with teaching during the past two school years, the Visual Arts and Drama classes, respondent points out that Common Core standards dictate specific areas for matching Common Core for English insofar as writing, speaking, and listening. The Common Core precepts, which can be incorporated into any English language content area, have been used by respondent in fostering critical thinking through the enrichment of the learning experience so as to become problem solvers in all of her class assignments.

24. Dr. Toews testified regarding a current high school teacher in Integrated Science classes having initiated protests, including making speeches at board meeting, because of him being reassigned to middle school classes next year due to that teacher's lack of teaching experience in particular subject areas. Dr. Toews sought by analogy to compare respondent's situation as an English teacher to the now protesting Science teacher. The analogy was not persuasive. First, Dr. Toews notes that the reassigned Science teacher had not taught for any school year classes in Biology, Chemistry, or Anatomy/Physiology. But, respondent has worked eight years to ten years of teaching English and English-related classes for the district. Second, the protesting Science teacher has a dispute with his reassignment from high school to middle school. But, in respondent's case, she is confronted with the loss of employment with the district.

25. Dr. Toews conveyed that the determination to subject respondent to layoff action was due in part to the Assistant Superintendent's receipt of a report from the Superintendent that the chief administrator had visited the classroom taught by respondent. From that single visit, the Superintendent had concluded respondent had not shown use of the Common Core Standards and Curriculum component of the "gradual release of responsibility." But, the length of the visit by the Superintendent to judge respondent's familiarity with Common Core Standards and Curriculum is not known. And, Dr. Toews never personally made a visit to respondent's classroom; and, hence, she has no direct, personal knowledge of whether respondent has taught English or Drama in accordance with Common Core precepts, dogma, or standards.

26. Respondent acknowledges that reading intervention classes does not necessary embrace Common Core directives because of the need to instill such basic skills in grasping the English language. But, respondent emphatically declared during her testimony that Common Core curriculum standards have been integrated into her teaching drama to the middle school students who she has taught during the 2014-2015 and 2015-2016 school years.

Respondent has received specific training in Common Core English teaching techniques. On November 2 and 3, 2015, as well as on February 11, 2016, respondent participated in an intensive, three-day program a course by the California Assessment of Student Performance and Progress (CAASPP) offered in Santa Rosa. Respondent learned practical strategies and best practices for the CAASPP system and she gained insight into the "Smarter Balanced" assessment testing and other Common Core facets such as "Interim

Assessments.” Respondent participated with the English Language Arts teachers for the CAASPP program.

Also, on October 6, 2014, respondent received training at a program titled, “Powerful Arts Teaching and Learning in the Common Core.” She was exposed to a presentation for “building artistic literacy through Common Core State Standards.”

Further, over the past few years, respondent has taken other courses of advanced-level instruction for English teachers, including the courses “Academic Achievement of Long-Term English Learners,” and “the Sonoma Leadership Network-Next Steps in the PLC Journey.” Moreover, respondent has taken independent-study, online courses through the University of San Diego in the recent years of 2012 and 2011

In the immediate year, respondent has participated in district-oriented haiku learning, which is a digital-related learning platform for grades K through 12.

Respondent has no doubt that her experience, training, and knowledge provides with the ability to effectively implement teaching English at the high school level within the context of the Common Core directives. Respondent has the repertoire of skills to teach English at the high school level within the district’s current objectives.

27. With regard to the rationale of the board in selecting Criteria for Competency that may enable the district to skip junior teachers so that they are retained while respondent will not be reemployed, Dr. Toews was not persuasive. The paramount factor in selecting other teachers is the narrowly prescribed criterion that an otherwise credentialed teacher must have had “experience teaching at least two (2) years within the past three (3) years in the particular service being provided by the more junior employee.” Dr. Toews advanced that the two junior teachers have had immediate supervisors (administrators) who had assured that those two individuals have been thoroughly exposed to each and every training program, strategy formulation, and assessments measuring techniques for which the district has paid outside professionals to expose those persons. Respondent, however, has had “some” training in Common Core Standards and curriculum; but, because of her “special assignment” over the past two years in teaching Visual Arts and Drama, respondent has not received the same level of training in the array of Common Core training as the two junior teachers.

But, the logic for the narrow criterion is not persuasive. During her testimony Dr. Toews conveyed that the district does not “believe” that respondent can be as “effective” as an English teacher under the Common Core Standards and curriculum. Yet, she acknowledged that over the past two years, respondent has received some training in Common Core Standards. And, Dr. Toews admitted that for the past two years at the elementary school (TK - 8) level, the district has not fully adopted Common Core standards and curriculum and the district has “held off” implementation because “there were too many initiatives going on.” Hence, district senior administrators do not contemplate the adoption of Common Core at the elementary level until the coming school year, 2016-2017. Also,

even for grades 6, 7, and 8, only next year will the district have full use of Common Core “materials” for full implementation of the consortium’s Standards and curriculum. And, in particular the TK-5, teachers at those elementary school levels have not had the full exposure to Common Core Standards and curriculum.

28. Dr. Toews was not persuasive that paragraph number 3 of the skipping criterion in Resolution No. 15-23, dated January 21, 2016, was intended objectively to apply to all subject areas, including both Science and English. In January 2016, that is two months before the layoff, the district specially focused on respondent by name and set out a conclusion that respondent when compared to two junior teachers, including an employee holding an administrator’s credential, could not meet the narrowly drawn paragraph numbered three criterion.

29. Dr. Toews acknowledged that approximately two years ago when respondent was directed into the special assignments to teach “Visual Arts and Drama,” rather than being given an assignment to teach a class in English at either the middle school level or high school level where two junior teachers were in place, respondent voiced concern of the probable disadvantage to her career by taking the special assignment placement. Despite respondent’s transfer into the position, which took her out of a defined English class, Dr. Toews gave respondent assurance that the transfer was grounded on the best interests of the district. Accordingly, respondent suffered to her detriment by not adamantly exercising her seniority right to demand the district to give her an assignment in an English class at either the middle school level or high school level. Later in Assistant Superintendent’s testimony, when asked the reason for respondent’s special assignments as opposed to acquiring assignments in an English class, Dr. Toews unpersuasively asserted that going back two years that as the Assistant Superintendent for human resources, she was not aware that the district had received from respondent any written demand letter seeking assignment in an English classroom.

30. Dr. Toews’ testimony that Ms. Ganshorn and Ms. Simon had “greater breadth” in the areas that they may teach, the Assistant Superintendent’s testimony was equivocal, at best, for the reasons stated above.

31. In arguments, the district suggests that it is appropriate to retain Ms. Ganshorn and Ms. Simon, more junior teachers, over respondent, a more senior certificated employee, because Ms. Ganshorn and Ms. Simon would have greater “versatility” in teaching next year in respective high school and middle school English classes. To support this position the district seems to rely on the language in *Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 131. But, *Bledsoe* does not assist the district on this issue. With respect to the issue of “versatility,” the court in *Bledsoe* discussed the determination of seniority among two individuals who shared the same seniority date and concluded that an employee having a more “versatile” credential in an area “where the district anticipated needing to move teachers” had seniority over the other with the same seniority date. (*Bledsoe v. Biggs Unified School District, supra*, 170 Cal.App.4th 127, 133.) The “versatility” comment in *Bledsoe* is

not on point because respondent and Ms. Ganshorn/Ms. Simon do not share the same seniority date; respondent is senior to both Ms. Ganshorn and Ms. Simon.

*Bledsoe* also addressed skipping - where a more junior teacher is retained over a more senior certificated teacher. In *Bledsoe*, the district articulated a specific need for teachers to teach in a community day school, which required special training and experience to perform those duties. Mr. Bledsoe was skipped over by two junior certificated employees who were retained by the district to teach at the community day school. The court upheld the skipping, emphasizing a litany of distinctions between Mr. Bledsoe's experience and that of the more junior employees who were retained to teach at the community day school. It concluded that "the evidence supports the finding that Bledsoe does not possess the special training and experience that [the more junior, retained teachers] possess," for teaching in that program. (*Bledsoe v. Biggs Unified School District, supra*, 170 Cal.App.4th 127, 142.) The court emphasized two required components that permit skipping under Education Code, section 44955, subdivision (d)(1): "a district must not only establish a specific need for personnel to teach a specific course of study, but establish that the certificated employee it proposes to retain 'has special training and experience necessary to teach that course or course of study or to provide those services.'" (*Bledsoe, supra*, at p. 138.)

In order to retain Ms. Ganshorn and Ms. Simon over respondent, the district must establish that no junior certificated employee is scheduled to be retained to perform services a more senior employee is certificated and competent to render – that Ms. Ganshorn and Ms. Simon although junior to respondent, are to be retained to perform services that respondent is not competent to perform. Respondent is certificated and competent to teach English to middle school and high school students. She has greater seniority than both Ms. Ganshorn and Ms. Simon. The layoff notice issued to respondent cannot be sustained, and the proposed layoff affecting respondent must be dismissed.

### *Ultimate Factual Finding*

32. The board's Resolution No. 15-26 that proposes to reduce or discontinue the particular kind of service, which adversely impacts respondent, was arbitrary or capricious. The district's formulation and execution of skipping criteria under Resolution No. 15-23, which adversely impacts respondent, constituted an improper exercise of board discretion.

## LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in these sections are satisfied.

## *Background and Controlling Authority*

2. The Education Code contains an extensive network of statutes governing the employment rights of public school teachers. “The purpose of the tenure law is to give employment security to teachers while protecting the community from ineffective teachers.” (*Curtis v. San Mateo Junior College Dist.* (1972) 28 Cal.App.3d 161,165.) “A school district may not avoid the purposes of the tenure law by use of a subterfuge.” (*Mitchell v. Board of Trustees* (1935) 5 Cal.App.2d 64, 68. “Thus, administrative practices that circumvent valid expectations of reemployment created by the tenure statutes are not permitted.” (*Santa Barbara Federation of Teachers v. Santa Barbara High School Dist.* (1977) 76 Cal.App.3d 223, 230.) The requirement of seniority-based layoffs under Education Code section 44955 dates back to the 1930’s. School Code 5.711 was enacted and amended in 1935 and required, when layoffs were implemented that, “employees shall be dismissed in the inverse of the order in which they were employed.” (*Statutes of 1935, Chapter 690*; See also *Chambers v. Bd. of Trustees of City of Madera School Dist.* (1940), 38 Cal.App.2d 561, 566.)

3. The Education Code permits school districts to implement layoffs of certificated employees to effect a reduction or discontinuance of a particular kind of service and layoffs must proceed in accordance with the criteria set forth in section 44955 and the procedures prescribed by section 44949. The District is statutorily authorized to reduce teaching staff and is required to proceed according to seniority principles. The statute specifically protects tenure rights and seniority. Teachers must be laid off, rehired, assigned, and reassigned based on their seniority. (See Ed. Code, §§ 44955, 44956, 44957.) Accordingly, section 44955 prohibits the layoff of a senior employee, if a junior employee is retained to perform a service that the senior employee is credentialed and competent to render.

4. A 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. The decision to reduce or discontinue a particular kind of service is a matter reserved for the district’s discretion and is not subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District, supra*, 64 Cal.App.3d 167.) But, a school district’s decision to reduce a particular kind of service must not be fraudulent, arbitrary, or capricious. (*San Jose Teachers Association v. Allen* (1983) 144 Cal. App. 3d 627, 637.)

6. Education Code section 44955, subdivision (c), requires districts to make assignments in such a way as to protect seniority rights. Employees must be retained to render any service their seniority and qualifications entitle them to render. Thus when a

senior teacher is certificated and competent to render a service a junior teacher is rendering, the district must retain the senior teacher. The burden of proof is on the district to establish that it is justified in terminating the employment of any senior teacher. (Evid. Code, § 500.)

### *Seniority and Skipping of Junior Teachers*

7. The seniority rule is not absolute, and a junior teacher with a needed credential or skills may be retained even if a more senior teacher is terminated. Such “skipping” is recognized by statute and appellate law. (See Ed. Code, § 44955, subd. (d)(1); *Bledsoe v. Biggs Unified School District* (2009) 170 Cal.App.4th 127; *Santa Clara Federation of Teachers, Local 2393 v. Governing Board of the Santa Clara Unified School District* (1981) 116 Cal.App.3d 831).

8. Education Code, section 44955, subdivision (d)(1), authorizes a district to deviate from issuing certificated employee terminations in order of seniority for the following pertinent reason:

The district *demonstrates a specific need* for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, 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*.

(Emphasis added.)

### *Common Core Standards and Curriculum that Bears Disposition of this Controversy*

9. The district’s argument in support of retaining two junior teachers by skipping while not reemploying respondent is that each of those individuals has received training regarding Common Core Standards and Curriculum, and that those teacher have had taught English “at least two (2) years within the past three (3) years in the particular service being provided by the more junior teachers.” To gain an appreciation of the districts’ argument requires review of California Assessment of Student Performance and Progress that embraces the Common Core.

The advent of Common Core system dates back to Education Code section 60605, with creation of the Commission for the Establishment of Academic Content and Performance Standards. The statute required the state board of education no later than January 1, 1998 to “adopt statewide academically rigorous content standards, pursuant to the recommendations of the Commission for the Establishment of Academic Content and Performance Standards, in the core curriculum areas of reading, writing, and mathematics to serve as the basis for assessing the academic achievement of individual pupils and of schools, school districts, and the California educational system.” (Ed. Code, § 60605)



The underpinning of the law required “the state performance standards shall be established against specific grade level benchmarks of academic achievement for each subject area tested and shall be based on the knowledge and skills that pupils will need in order to succeed in the information-based, global economy of the 21st century.” (Id.)

The law made clear that “the standards adopted pursuant to this section shall be for the purpose of guiding state decisions regarding the development, adoption, and approval of assessment instruments pursuant to this chapter and does not mandate any actions or activities by school districts.”

The statute became inoperative on July 1, 2011.

Effective January 1, 2012, Education Code section 60604.5 reauthorized the statewide pupil assessment program deemed the Common Core Standards.

The law was aimed as directing the State Superintendent of Education to oversee shifting to the Common Core standards so as to meet directives that included:

- (1) Aligning the assessments to the standards adopted or revised pursuant to Section 60605.8.
- (2) Implementing and incorporating any common assessments aligned with the common set of standards developed by the Common Core State Standards Initiative consortium or other interstate collaboration in which the state participates.
- (3) Conforming to the assessment requirements of any reauthorization of the federal Elementary and Secondary Education Act (20 U.S.C. Sec. 6301 et seq.) or any other federal law that effectively replaces that act.
- (4) Enabling the valid, reliable, and fair measurement of achievement at a point in time and over time for groups and subgroups of pupils, and for individual pupils.
- (5) Allowing the comparison from one year to the next of an individual pupil's scale scores in each content area tested, so as to reflect the growth in that pupil's actual scores over time.
- (6) Enabling and including the valid, reliable, and fair measurement of achievement of all pupils, including pupils with disabilities and English learners.
- (7) Providing for the assessment of English learners using primary language assessments.

- (8) Ensuring that no aspect of the system creates any bias with respect to race, ethnicity, culture, religion, gender, or sexual orientation.
- (9) Incorporating a variety of item types and formats, including, but not limited to, open-ended responses and performance-based tasks.
- (10) Generating multiple measures of pupil achievement, which, when combined with other measures, can be used to determine the effectiveness of instruction and the extent of learning.
- (11) Including the assessment of science and history-social science in all grade levels at or above grade 4.
- (12) Assessing a pupil's understanding of and ability to use the technology necessary for success in the 21st century classroom and workplace.
- (13) Providing for both formative and interim assessments, as those terms are defined in this chapter, in order to provide timely feedback for purposes of continually adjusting instruction to improve learning.
- (14) Making use of test administration and scoring technologies that will allow the return of test results to parents and teachers as soon as is possible in order to support instructional improvement.
- (15) Minimizing testing time while not jeopardizing the validity, reliability, fairness, or instructional usefulness of the assessment results.
- (16) Including options for diagnostic assessments for pupils in grade 2.

(Ed. Code, § 60604.5)

Further understanding of the law that brings into play Common Core standards and curricular can be gleaned from the set of definitions set out in Education Code section 60603. Those definitions demonstrate the assessments (computer-oriented testing) of students are paramount to Common Core. Those definitions include:

“Achievement test” means any summative standardized test that measures the level of performance that a pupil has achieved on state-adopted content standards.

“California Assessment of Student Performance and Progress (CAASPP)” means the comprehensive assessment system, inclusive of consortium-developed assessments, that has the primary purpose of modeling and promoting high-quality

teaching and instruction using a variety of assessment approaches and item types.

“Census administration” means a test administration in which all pupils take comparable assessments of the same content and where results of individual performance are appropriate and meaningful to parents, pupils, and teachers.

“Computer-adaptive assessment” means a computer-based test that utilizes a computer program to adjust the difficulty of test items throughout a testing session based on a test taker's responses to previous test items during that testing session.

“Computer-based assessment” means a test administered using an electronic computing device.

“Consortium” means a multistate collaborative organized to develop a comprehensive system of assessments or formative tools such as described in Section 60605.7.

“Constructed-response questions” means a type of assessment item that requires pupils to construct their own answers.

“Content standards” means the specific academic knowledge, skills, and abilities that all public schools in this state are expected to teach, and all pupils are expected to learn, in reading, writing, mathematics, history-social science, foreign languages, visual and performing arts, and science, at each grade level tested.

“Diagnostic assessment” means an assessment of particular knowledge or skills a pupil has or has not yet achieved for the purpose of informing instruction and making placement decisions.

“End of course examination” means a comprehensive and challenging assessment of pupil achievement in a particular subject area or discipline.

“Field test” means an assessment or assessment items administered to a representative sample of a population to ensure that the test or item produces results that are valid, reliable, and fair.

“Formative assessment tools” means assessment tools and processes that are embedded in instruction and used by teachers and pupils to provide timely feedback for purposes of adjusting instruction to improve learning.

“High-quality assessment” means an assessment designed to measure a pupil’s knowledge of, understanding of, and ability to apply, critical concepts through the use of a variety of item types and formats, including, but not necessarily limited to, items that allow for constructed responses and items that require the completion of performance tasks. A high-quality assessment should have the following characteristics:

- (1) Enable measurement of pupil achievement and pupil growth to the extent feasible.
- (2) Be of high technical quality by being valid, reliable, fair, and aligned to standards.
- (3) Incorporate technology where appropriate.
- (4) Include the assessment of pupils with disabilities and English learners.
- (5) Use, to the extent feasible, universal design principles, as defined in Section 3 of the federal Assistive Technology Act of 1998 (29 U.S.C. Sec. 3002) in its development and administration.

“Interim assessment” means an assessment that is designed to be given at regular intervals throughout the school year to evaluate a pupil's knowledge and skills relative to a specific set of academic standards, and produces results that can be aggregated by course, grade level, school, or local educational agency in order to inform teachers and administrators at the pupil, classroom, school, and local educational agency levels.

“Performance standards” are standards that define various levels of competence at each grade level in each of the curriculum areas for which content standards are established. Performance standards gauge the degree to which a pupil has met the content standards and the degree to which a school or school district has met the content standards.

“Performance tasks” are a collection of questions or activities that relate to a single scenario that include pupil interaction with stimulus. Performance tasks are a means to assess more complex skills such as writing, research, and analysis.

“Personally identifiable information” includes a pupil's name and other direct personal identifiers, such as the pupil's identification number. Personally identifiable information also includes indirect identifiers, such as the pupil's address and personal characteristics, or other information that would make the pupil's identity easily traceable through the use of a single or multiple data sources, including publicly available information.

“State-determined assessment calendar” means the scheduling of assessments, exclusive of those subject area assessments listed in subdivision (b) of Section 60640, over several years on a predetermined schedule. Content areas and grades shall only be assessed after being publicly announced at least two school years in advance of the assessment.

“Summative assessment” means an assessment designed to be given near the end of the school year to evaluate a pupil's knowledge and skills relative to a specific set of academic standards.

A clear inference that may be formulated is that Common Core is grounded upon the administration of assessments and computer-driven testing. The district offered no evidence that respondent lacks the training and experience to competently administer and oversee testing sessions that are created by computer corporations as authorized by state-level and federal government regulators. And, by her expansive teaching career, including the work performed in the last three years of teaching English in challenging classroom settings establish that she has the training and experience demonstrating her competent to teach students in English classroom settings.

#### *Individual Skipping Analysis*

10. The process of skipping should be conducted on a case-by-case basis, where: 1) the District establishes that a particular assignment requires a teacher with special training and experience, 2) the district establishes that the skipped junior teacher has the necessary training and experience, and 3) the district establishes that the individual senior teachers do not have the necessary training and experience for that assignment. (Ed. Code, § 44955, subd. (d)(1).) The analysis by the district insofar as respondent was not comprehensive. And, the lack of detailed documentations in the record for this matter of the precise training and experience of the two junior teachers for completion of the administrative adjudication “audit” that is contemplated under the hearing process relating to Education Codes sections 44955, 44956 and 44957 cannot be executed.

The District’s proposed skip was premised in part on its belief that respondent simply does not possess the breadth, depth and intensity of training possessed by the proposed skipped employees. The District contends that the skipped employees received training that

was specifically targeted, developed, and aligned with the objective of the Common Core Standards and curriculum. This contention largely relates to preference, not necessity.

11. The District's competency criteria, when applied to the single position of English teaching at least two years within the past three school years is too narrowly defined. Respondent's multiple subject credential may bump into positions held by the junior teacher assigned to teaching high school English notwithstanding the respondent not having taught in the specific course for the approximately three preceding school years.

*Too Narrowly Drawn Skipping Criteria by the District*

12. In the context of this matter that impacts respondent, who has been an English teacher at the district for ten school years, the Skipping Criteria in board Resolution 15-23 is too narrowly drawn.

Respondent offered at the hearing of this matter two Office of Administrative Hearings' Proposed Decisions (Winters Joint Unified School District, OAH No. 2011020721 and Natomas Unified School District, OAH No. 2011020722). Although those proposed decisions by other administrative law judges lack precedential or binding effect; those proposed decisions are persuasive.


Each of the decisions determine skipping criteria for the respective school district as being too narrowing drawn and therefore not meeting the requirement of Education Code section 44955, subdivision (d)(1). The proposed decisions were grounded upon the statement of law in *Duax v. Kern Community College Dist. supra*, 196 Cal.App.3d 555, 564-565. As applicable to this matter is the principle that "a board's definition of competency is reasonable when it considers the skills and qualifications of the teacher threatened with layoff." In this matter, the board's consideration of respondent's skills, qualifications, and experience as an English teacher as amassed over ten years was inexact and arbitrary, the application of the Skipping Criteria paragraph numbered three of board Resolution 15-23 cannot be sustained.

ORDER

1. As to respondent Elizabeth "Libby" Stetson, the district's Statement of Reduction in Force is not sustained.

2. The district shall not give a layoff notice to Elizabeth "Libby" Stetson. The Statement of Reduction in Force is dismissed as to Ms. Stetson.

DATED: May 6, 2014

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PERRY O. JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings