

BEFORE THE GOVERNING BOARD OF THE
LUTHER BURBANK SCHOOL DISTRICT

In the Matter of the Layoff of:

CERTIFICATED EMPLOYEES OF THE
LUTHER BURBANK SCHOOL
DISTRICT,

Respondents.

OAH No. 2010031826

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in San Jose, California, on April 22 and May 7, 2010.

James R. Lynch, Attorney at Law, GCR, LLP, represented the Luther Burbank School District.

Christopher Schumb, Attorney at Law, represented respondents Donna Palmese, Perlita Balangue, Natalia Torres Diehl, Fadi Saba, Raquel Bridgen, and Diana Benavides.

Marilyn Aden represented respondent Lorena Mancia.

Respondent Eli Segura represented himself, and was assisted by his wife, Nadine Muir.

The record closed and the matter was submitted on May 7, 2010.

FACTUAL FINDINGS

1. Becki Cohn-Vargas, Ed.D., issued the accusation in her official capacity as Superintendent of the Luther Burbank School District (district).

2. Respondents are certificated employees of the district.

3. On February 9, 2010, the district's governing board adopted Resolution # 02-09-10-03, authorizing the reduction of particular kinds of services for the 2010-2011 school year and directing the superintendent of the district to give appropriate notices to certificated employees whose positions will be affected by the actions. The resolution states that the particular kinds of services to be reduced or eliminated are as follows:

Kind of Service	Number of Full-Time Equivalent Positions ("FTEs")
K-8 classroom Teacher	7.0
Counselor	1.0
Total FTEs	8.0

4. On or before March 15, 2010, the district gave written notice to respondents of the recommendation that their services will not be required for the 2010-2011 school year. The reasons for the recommendation were set forth in these preliminary layoff notices.

5. Respondents filed timely requests for hearing to determine if there is cause for terminating their services for the 2010-2011 school year. An accusation was served on respondents, all of whom filed or are deemed to have filed timely notices of defense. All prehearing jurisdictional requirements have been met.

Respondents' contention regarding mandated services

6. The district has one K-8 school (Luther Burbank), 574 students, and 24 certificated employees. The board took action to reduce or eliminate services because it is faced with a growing deficit.

7. The district has not finalized its plans on how it will deliver instructional services in the 2010-2011 school year. The district currently projects that its enrollment will fall by three students. But even if its enrollment falls, it is likely that the district will need to combine classrooms. At the present time, the district is looking at a combined K/1 classroom (with two other kindergarten and two other first grade classrooms), a combined 6/7 classroom (with one other sixth grade and one other seventh grade classroom), and a combined 7/8 classroom (with one other seventh and one other eighth grade classroom). The district has experience with combined classrooms; it has a combined first and second grade classroom this year. Until now, Cohn-Vargas has been examining the number of students that might be assigned to each class, in an effort to keep class sizes down; she has not yet looked at the issue of delivering the necessary number of instructional minutes to each grade level in a combined class.

Superintendent Cohn-Vargas acknowledges that the district's enrollment projections may prove to be incorrect. If enrollment increases and the district needs more teachers, Cohn-Vargas states that the district will "absolutely" rehire the teachers it has laid off.

8. Respondents assert that the district cannot combine classrooms, as it currently intends to do, and still provide each grade level in the combined 6/7 and 7/8 classrooms with the number of instructional minutes the district must offer under state law. (The district

currently receives financial incentives from the state for offering a higher level of instructional minutes, incentives the district hopes to receive in 2010-2011.) The layoff is invalid, respondents contend, because the district is reducing educational services below a legally-mandated level.

9. Even if respondents are correct and the district's current plan is not workable, that does not make the proposed layoff invalid. Respondents cite no authority, and none has been found, for the proposition that the district is required to have a final instructional plan in place to effect an economic layoff. On the contrary, the courts have recognized that a school district must make decisions on economic layoffs between March and May of each year, despite uncertainties regarding its finances and its enrollment for the next year. (*Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 807-808.) A governing board may take action to reduce services even if it has not yet decided how it will provide mandated services or who will provide them. (See *Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 853-854, and *Campbell Elementary Teachers Assn., Inc. v. Abbott, supra*, 76 Cal.App.3d at pp. 810-812.) Respondents' argument that the district will not meet legally-mandated levels of service is premature and it is rejected.

Skipping issues

10. Under Education Codes section 44955, subdivision (c), probationary and permanent employees must be laid off in the inverse order of their seniority. Subdivision (d)(1) of that section provides, however, that a school district may deviate from terminating an employee in order of seniority and "skip" that employee if

[t]he 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.

11. In Resolution # 02-09-10-03, the board adopted two skipping criteria, only one of which – the bilingual skip – is pertinent here. The resolution provides, in relevant part, as follows:

The District shall retain certificated employees . . . regardless of their seniority, to the extent one or more of their assignments meet any of the following criteria:

1. Who is fluent in Spanish (demonstrated by possession of a Bilingual, Crosscultural, Language and Academic Development Certificate (Spanish), passage of the CSET:LOTE Subtest III (Spanish), passage of the BCLAD Examination No. 6 (Spanish), or equivalent

certification), has at least two years' experience of assisting monolingual students and parents in acclimating to the District's English-only course of study during the period September 6, 2005, to March 15, 2010, and who is expected to continue providing such assistance for the District in the 2010-2011 school year.

12. Based upon the bilingual skip criterion, the district proposes to skip respondents Mancía and Segura. There are certificated employees senior to Mancía and Segura who have received preliminary notices and who do not meet the bilingual skip criterion.

13. Superintendent Cohn-Vargas testified to the basis for the bilingual skip. The population the district serves is 91 percent Spanish-speaking and the district has many monolingual Spanish students. Cohn-Vargas herself speaks Spanish and uses it often in her work. Cohn-Vargas states that it is very important for teachers to be able to assist students and communicate with their families in Spanish, and to assist with translation on other occasions, such as parent-teacher conferences. In recognition of these abilities, the district pays a stipend to teachers with a BCLAD in Spanish.

All classroom instruction, however, is given in English. The district does not offer bilingual classes or a bilingual immersion program. Teachers are not required to speak Spanish to be hired by the district.

14. A district may skip a junior teacher based on bilingual ability only if bilingual proficiency is necessary to teach a specific course of study. (Ed. Code, § 44955, subd. (d)(1); *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567.) In this case, it is clear from the testimony of Cohn-Vargas and the teachers – including those who do not meet the terms of the skip criterion – that it is highly desirable for the district's teachers to speak Spanish. The uncontradicted evidence establishes, however, that the district does not offer any courses requiring bilingual ability. The bilingual skip criterion is not valid. Respondents Mancía and Segura may not be skipped.¹

Seniority date issues

15. It was stipulated at hearing that the correct seniority date for respondents Natalia Torres Diehl, Fadi Saba, and Raquel Bridgen is August 27, 2007.

16. It was stipulated at hearing that the correct seniority date for respondent Donna Palmese is August 27, 2008.

¹ In light of this finding, it is not necessary to address the issue of whether the district properly relied on an "equivalent certification" when it concluded that respondent Mancía meets the skip criterion.

17. The district's seniority list states that respondent Lorena Mancía's seniority date is September 2, 2008. The district and Mancía stipulated at hearing that her seniority date should be changed to August 27, 2008, without prejudice to Mancía's claim that she is entitled to an earlier seniority date.

Mancía asserts that her seniority date should be July 21, 2008, the first day of a 40-hour training for English-language learners that the district required her to take. The district paid Mancía a stipend of \$1,000 to attend the training.

Seniority is measured from the first date on which an employee renders paid service in a probationary position. (Ed. Code, § 44845.) Even if attendance at the July training was mandatory, as Mancía states, the evidence did not establish that the training was part of her service in a probationary position. Mancía's contract for the 2008-2009 school year was not offered into evidence. It appears that the training was not part of her probationary service, as she was paid a stipend for her participation, rather than her salary as a probationary employee. Mancía's correct seniority date is August 27, 2008.

18. Respondent Eli Segura is a permanent employee. The district's seniority list states that Segura's seniority date is September 2, 2008. At hearing the district stated that Segura's seniority date should be changed to August 27, 2008. Segura does not object to being assigned an earlier date, but he contends that his seniority date should be earlier still.

Segura was first employed by the district in August 2001. He continued to work for the district until the 2007-2008 school year, when he resigned to teach high school in another district. Segura returned to the Luther Burbank School District on August 27, 2008. When he returned, Richard Rodriguez, the superintendent at that time, assured Segura that he would keep his tenure and his original seniority date.

When a permanent employee resigns from a district and is reemployed within 39 months, he is entitled to retain his classification but his seniority date becomes the date he is reemployed. (Ed. Code, § 44848; *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 641.) Under this principle, Segura was entitled to retain his classification as a permanent teacher, which he did, but his new seniority date would be August 27, 2008, not the date he was first employed by the district.

Segura argues, in essence, that the district should be estopped from asserting a 2008 seniority date because of the contrary assurance he was given by the former superintendent. The evidence fails to establish, however, that Rodriguez knew his statement was false when he told Segura that he would keep his original seniority date, or that Segura relied on such a false statement to his detriment. These are essential elements of an estoppel claim.

Segura's correct seniority date is August 27, 2008.

Other matters

19. The cause for the reduction in particular kinds of services relates to the welfare of the school and the pupils thereof.

20. No permanent employee is being terminated while any probationary employee, or any other employee with less seniority, is being retained to render a service which the permanent employee is certificated and competent to render.

21. Any contentions raised by respondents and not discussed above have been found to be without merit and are hereby rejected.

22. Hearing in this matter was continued from April 22, 2010, to May 7, 2010, at which time the matter was submitted. The effect of the continuance is to extend the date by which copies of the proposed decision must be submitted to the board and to respondents and the date by which final layoff notices must be served. Ordinarily, copies of the proposed decision are required to be submitted to the board and to respondents by May 7 (Ed. Code, § 44949, subd. (c)(3)), and final layoff notices must be “given before” May 15 (Ed. Code, § 44955, subd. (c)). If the hearing has been continued, these dates are extended for a period of time equal to the continuance (Ed. Code, § 44949, subd. (e)). May 7 is 15 days after April 22, so the proposed decision is due 15 days after May 7 (May 22, a Saturday) and final layoff notices are due 15 days after May 15 (May 30, a Sunday).

LEGAL CONCLUSIONS

1. By reason of the matters set forth in Findings 15 through 18, cause exists to require the district to update its records to reflect the correct seniority dates for respondents Diehl, Saba, Bridgen, Palmese, Mancina, and Segura.

2. Cause exists because of the reduction or elimination of particular kinds of services pursuant to Education Code section 44955 to give notice to respondents in 8.0 FTE positions (7.0 K-8 classroom teachers and 1.0 counselor) that their services will not be required for the 2010-2011 school year. The cause relates solely to the welfare of the school and the pupils thereof within the meaning of Education Code section 44949.

ORDER

1. The district shall update its records to reflect the correct seniority dates for respondents Diehl, Saba, Bridgen, Palmese, Mancina, and Segura.

2. Notice may be given to respondents in 8.0 FTE positions that their services will not be required for the 2010-2011 school year because of the reduction or elimination of particular kinds of services.

DATED: _____

DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings