

**BEFORE THE GOVERNING BOARD OF THE
TAFT CITY SCHOOL DISTRICT
COUNTY OF KERN, STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

RICHARD OWENS,

Respondent.

OAH No. 2010031552

PROPOSED DECISION

This matter came on regularly for hearing on April 7, 2010, in Bakersfield, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Peter C. Carton, Attorney at Law, represented the Taft City School District (District).

Paul A. Welchans, Attorney at Law, represented Respondent, Richard Owens (Respondent).

The matter was submitted on April 7, 2010.

SUMMARY OF PROPOSED DECISION

The Governing Board of the Taft City School District (Board) determined to reduce or discontinue particular kinds of services provided by teachers and other certificated employees for budgetary reasons. The decision was not related to the competency and dedication of the individuals whose services are proposed to be reduced or eliminated.

District staff carried out the Board's decision by using a selection process involving review of credentials and seniority, "bumping," and breaking ties between employees with the same first dates of paid service. The selection process was in accordance with the requirements of the Education Code.

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FACTUAL FINDINGS

1. Ron Bryant made and filed the Accusation in his official capacity as Superintendent of the Taft City School District (District).
2. Respondent is a permanent certificated District employee.
3. On or before March 15, 2010, the District personally served on each respondent a written notice that it had been recommended that notice be given to each respondent, pursuant to Education Code sections 44949 and 44955, that his/her services would not be required for the next school year (Notice of Recommendation Not to Reemploy). Each written notice set forth a reason for the recommendation and noted that the Board had passed a Resolution (Board Resolution Number 8-2009-10) reducing the certificated staff.
4. Respondent timely submitted a written request for a hearing to determine if there is cause for not reemploying him for the ensuing school year.
5. The Superintendent made and filed an Accusation against Respondent as the sole certificated employee who requested a hearing. The Accusation, with required accompanying documents and a blank Notice of Defense, were timely served on Respondent.
6. On March 25, 2010, a Notice of Defense, pursuant to Government Code section 11506, was timely filed on Respondent's behalf.
7. Board Resolution Number 7-2009-2010, adopted on February 24, 2010, established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. It provided that the order of termination shall be based on the needs of the District and its students.
8. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments and locations, advanced degrees, credentials, and authorizations. Credential and authorization data are obtained from the records of the County Office of Education, at which certificated employees must register such documents.
9. All prehearing jurisdictional requirements were met.

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10. On March 9, 2010, the Board took action to reduce or discontinue the following particular kinds of services for the 2010-2011 school year:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Self-Contained Classroom Instruction, Grades K-6	8
Self-Contained Sheltered English, Grades 6-8	1
Departmentalized Instruction, Junior High:	
Spanish	0.5
Counseling	1.33
Sports Officiating	0.17
Band/Choir	1
Physical Education	1
Computers	1
RSP and/or SDC Teaching Services:	1
Nurse	1
Total	16

11. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

12. The eliminated services were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The Superintendent’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

13. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

14. Respondent's first date of paid service is August 27, 1999. He holds a clear single subject business credential with a supplemental authorization in social studies. He holds a bachelor's degree awarded to him in 1978. His present assignment is as a computer teacher.

15. Respondent argued that he should be permitted to "bump" teacher Shawn Sutherland, the only teacher assigned to teach the District's Community Day School. Mr. Sutherland's first date of paid service is August 19, 2003. He holds a clear multiple subject credential. Because Respondent's first date of paid service pre-dates that of Mr. Sutherland, he may "bump" Mr. Sutherland from his position if he is certificated and competent to render the service being provided by Mr. Sutherland. (Ed. Code¹, § 44955, subd. (b).) However, he is not permitted to do so 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 . . . which others with more seniority do not possess." (§ 44955, subd. (d)(1).)

16. Respondent claimed that he is competent and willing to teach the Community Day School class because he is properly certificated pursuant to section 44865, and because he taught the Opportunity Class, a 4th through 8th grade self-contained class, when he was first hired by the District in 1999. He did not indicate how long he taught that class or the circumstances under which he stopped teaching it.

17. The Community Day School consists of an all-day 1st through 8th grade self-contained class for which the District requires a multiple subject credential.

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¹ All statutory references are to the Education Code unless otherwise indicated.

18. Section 44865 states in relevant part:

A valid teaching credential issued by the State Board or the Commission on Teacher Credentialing, based on a bachelor's degree, student teaching, and special fitness to perform, shall be deemed qualifying for assignment as a teacher in the following assignments, provided that the assignment of a teacher to a position for which qualifications are prescribed by this section shall be made only with the consent of the teacher:

- (a) Home teacher.
- (b) Classes organized primarily for adults.
- (c) Hospital classes.
- (d) Necessary small high schools.
- (e) Continuation schools.
- (f) Alternative schools.
- (g) Opportunity schools.
- (h) Juvenile court schools.
- (i) County community schools.
- (j) District community day schools.
- (k) Independent study.

19. In a manner similar to section 44955, subdivision (d)(1), which permits a junior teacher to be retained over a more senior teacher if the junior teacher has “special training and experience necessary” to teach a certain course or course of study, Section 44865 requires a teacher to possess “special fitness to perform,” in addition to a credential based on a bachelor's degree, in order to teach in the kinds of programs listed in the statute. Those types of programs are disparate, and therefore, the “special fitness to teach” one of them may be quite different from that for another (i.e., a home teacher, as opposed to an adult school teacher, as opposed to a necessary small high school teacher, as opposed to an independent study teacher). Because district community day schools and opportunity schools are separately listed in section 44865, it may reasonably be inferred that the “special fitness to teach” for one is not the same as for the other.²

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² No evidence was offered to indicate that the two programs are in any way alike. In his closing argument, Respondent's counsel simply referred to them as “very similar.”

20. The evidence did not establish that Respondent has maintained the skills that once provided him with the special fitness to teach the Opportunity Class for the District, or that those skills would properly translate into a special fitness to teach the Community Day School. On the other hand, the District established that Mr. Sutherland has the “special training and experience necessary” to teach that program and thus satisfy the District’s “specific need” for his services, by virtue of his multiple subject credential and his experience in teaching the program. (§ 44955, subd. (d)(1).) Therefore, Mr. Sutherland was properly retained over Respondent.³

21. Section 44955, subdivision (c) states in pertinent part: “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.” That obligation was met in this case. (See also, *Bledsoe v. Biggs*, *supra*.)

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met.

2. The services identified in Board Resolution Number 8-2009-10 are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Board’s decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District’s schools and pupils within the meaning of Education Code section 44949.

3. 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.)

³ In describing the “specific need” and Mr. Sutherland’s special training and experience necessary to meet that need, the District did not go into the detail that was reflected in *Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127. However, “[s]ubdivision (d)(1) of section 44955 expressly allows a district to demonstrate its specific ‘needs’ and there is nothing in the statute that requires such needs to be evidenced by formal, written policies, course or job descriptions, or program requirements.” (*Id.* at 138.) The District adequately established the “specific need” regarding the Community Day School and sustained its burden of proof by a preponderance of the evidence.

4. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. The District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued.

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

6. 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. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.)

ORDER

1. The Accusations against the respondents are sustained. Notice may be given to the respondents that their services will not be required for the 2010-2011 school year because of reduction or discontinuance of particular kinds of services.

2. Notice shall be given in inverse order of seniority.

DATED: April 12, 2010

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings