

BEFORE
THE GOVERNING BOARD OF THE
CALEXICO UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Layoff of

CERTIFICATED EMPLOYEES OF THE
CALEXICO UNIFIED SCHOOL
DISTRICT

Respondents.

OAH No. 2012030454

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in Calexico, California, on April 25, 2012.

Eran M. Bermudez, Esq., and Erika D. Anderson, Esq., represented the Calexico Unified School District.

Jon Y. Vanderpool, Esq., and Jon R. Cadieux, Esq., Tosdal Smith Steiner & Wax represented all Respondents, except Margarita Buchanan.

There was no appearance by or on behalf of Respondent Margarita Buchanan.

The matter was submitted on April 25, 2012.

SUMMARY OF PROPOSED DECISION

The Board of Education of the Calexico Unified School District determined to reduce or discontinue particular kinds of services provided by teachers for budgetary reasons. The decision was not related to the competency and/or dedication of the individuals whose services the Board seeks to reduce or eliminate.

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

FACTUAL FINDINGS

1. Respondents listed in Exhibit “A” (Respondents) are certificated employees of the Calexico Unified School District (District).

2. On February 23, 2012, Richard P. Fragale, the District’s Superintendent (Superintendent), notified the District’s Governing Board (Board) of his recommendation to reduce and/or eliminate particular kinds of services being provided by certificated employees due to financial conditions for the 2012-2013 school year.

3. On February 23, 2012, the Board adopted Resolution No. 27-02-12 reducing or eliminating particular kinds of services for the ensuing school year and establishing “competency” criteria for purposes of displacement and criteria for resolving ties among certificated employees with the same date of first paid probationary service. Further, the Board directed the Superintendent or his designated representative to send notices to all employees possibly affected by the reduction or elimination of particular kinds of services.

Resolution No. 27-02-12 states in part:

<u>Particular Kind of Service</u>	<u>Reduction</u>	<u>Full time Equivalents</u>
Academic Support Teacher/Resource	reduction	1.0
Resource Assessment – Teacher on Special Assignment services	reduction	2.0
English teaching services	reduction	7.0
Math teaching services	reduction	5.0
AVID teaching services	reduction	1.0
Physical Education teaching services	reduction	1.0
Art/Art Appreciation teaching services	reduction	1.0
Social Science teaching services	reduction	6.0
Spanish teaching services	reduction	4.0
Adult Education teaching services	reduction	3.0
Counselors services	reduction	3.0
Special Education services	reduction	2.0
Estudiantina	reduction	1.0
Video Production/Computer Design	reduction	1.0

<u>Particular Kind of Service</u>	<u>Reduction</u>	<u>Full time Equivalents</u>
Ag. Biology/Vet. Science teaching services	reduction	1.0
Resource Teacher	reduction	1.0
Curriculum Resource Teacher	reduction	1.0
Preschool teaching services	reduction	3.0
K-6 teaching services	reduction	42.0
	TOTAL FTE	86.0

The proposed reductions totaled 86.0 full-time equivalent (FTE) positions.

4. The Board established “competency” criteria in its Resolution, which states in part:

NOW, THEREFORE BE IT RESOLVED, DETERMINED AND ORDERED by this Governing Board, as follows:

[¶ . . . ¶]

5. Subject to requirements (if any) within the Educational Employment Relations Act, that for purposes of “competency” as to “bumping” (displacement) rights within the meaning of Education Code section 44955 (b) and as to reemployment rights within the meaning of Education Code sections 44956 and 44957, to the extent such might apply, “competency” shall be based upon the following: possession and current filing of a preliminary or clear credential for the subject matter into which the employee would bump for the 2012-2013 school year or be reemployed.

The Board established the competency criteria for purposes of bumping or displacing more junior employees with senior employees who were competent and credentialed to hold the position held by the junior employees. There is no evidence that the competency criteria were arbitrary or capricious or otherwise invalid.

5. In its Resolution, between/among employees who first rendered paid service to the District on the same date, the Board included “Criteria for Breaking Seniority Ties” and provided clear instruction for implementation of the criteria. The order of termination under the tie-breaking portion of the resolution was based on the needs of the District and its students.

6. On March 12, 2012, Teresa Estrada, the District’s Director of Human Resources (Human Resources Director) served permanent and probationary certificated Respondents with “Notice of Recommendation that your Services Will Not Be Required for

the Ensuing School Year (2012-2013),” a copy of the Board Resolution No. 27-02-12, and stated the reason for the Board’s action. The Human Resources Director advised Respondents of the right to hearing, that the Request for Hearing had to be delivered to the District’s office no later than March 23, 2012, and that the failure to request a hearing would constitute waiver of the right to hearing.

7. Respondents submitted a timely Request for Hearing to determine if there was cause for not re-employing him or her for the ensuing school year.

8. On April 3, 2012, the Superintendent made and filed an Accusation Against Certificated Employees. He served the Accusation upon Respondents who submitted a Request for Hearing, along with a blank Notice of Defense and relevant sections of the Education Code and the Government Code. Paragraph 7 of the Accusation stated:

Respondent may request a hearing by filing a Notice of Defense as provided in Government Code section 11506 and Education Code section 44949(c)(1) within five (5) days after service upon Respondent of this Accusation. Failure to file a timely Notice of Defense will constitute a waiver of Respondent’s right to a hearing. A Notice of Defense form is enclosed with this Accusation.

9. Respondents filed a Notice of Defense in a timely manner.

10. The District served Respondents with a Notice of Hearing, setting the hearing for April 25, 2012, in accordance with Government Code section 11509.

11. All prehearing jurisdictional requirements were satisfied.

12. There was no appearance by or on behalf of Respondent Margarita Buchanan.

13. The District rescinded layoff notices issued to Respondents Jessica Grijalva, Danjomi Ramirez, and Cathy Ray.

14. The District considered all positively assured attrition in determining the actual number of final layoff notices to be delivered to its certificated employees.

15. The Human Resources Director was responsible for implementing the technical aspects of the layoff. She developed a seniority list for probationary or permanent certificated employees who received preliminary notices of layoff. It included, among other matters, the teacher’s name, seniority date, status, site, assignment, and credential(s) and subject(s) authorization(s).

16. The Human Resources Director used the seniority list to develop a proposed order of layoff. Then, the District determined whether the least senior employees subject to the layoff held credentials in another area that would entitle them to “bump” into the position held by a more junior employee. In determining who would be laid off for each kind of

service reduced, the District counted the number of reductions and determined the impact on incumbent staff in inverse order of seniority. Then, the District checked the credentials of affected individuals and whether they could “bump” other employees, considering the District’s “competency” criteria established by the Board in its Resolution.

17. Respondent Debra Buchanan was laid off 1.0 FTE as a result of the reduction of 1.0 FTE physical education teacher. She holds a single subject credential in Physical Education. Respondent Debra Buchanan challenged her release from the District, arguing that class size will be increased and she questioned whether mandated services would be provided.

During the 2011 – 2012 school year, along with three other physical education teachers, Respondent Debra Buchanan was assigned to William Moreno Middle School. Debra Buchanan teaches five sections, four contain 40 students, and the fifth has 44 students. According to the collective bargaining agreement between the District and the teachers, class size is limited to 40 students; if the class size is greater than 40 students, it is considered “overload”, and the teacher is paid \$4 for each student over 40, for each period. Debra Buchanan explained that it is more difficult to manage a class with more than 40 students.

Respondent Debra Buchanan testified that, for the 2012 – 2013 school year, William Moreno is projected to have an enrollment of 780 students. As such, with three physical education teachers assigned to this school, each class will have 52 students. As such, it will be more difficult to teach the classes and more costly for the District than retaining Respondent Debra Buchanan.

The Human Resources Director testified that, despite the proposed elimination or reduction of services, all mandated services will be provided. There is no evidence to the contrary. The issue of class size is outside the jurisdiction of this proceeding.

Considering the facts in the foregoing paragraphs, the District properly issued a layoff notice to Respondent Debra Buchanan.

18. Respondent Eliza Pereda (Respondent Pereda) asserted that she improperly received a layoff notice because there are more junior teachers being retained to perform services that she is certificated and competent to teach.

Respondent Pereda has a seniority date of November 13, 2006, and she holds a multiple subject credential with a supplemental authorization in English that authorizes her to teach English to students in 9th grade and below. During the 2011-2012 school year, Pereda was assigned to teach 9th grade English.

Luz Espinoza (Espinoza) and Marilu Fletes (Fletes) each have a seniority date of August 21, 2007, and each holds a Single Subject Credential in English. During the 2011-2012 school year, Espinoza was assigned to teach English Language Arts to 10th through

12th grade students, and Fletes was assigned to teach English Language Arts to 12th grade students.

Respondent Pereda contends that her BCLAD credential authorizes her to teach 10th through 12th grade English Language Arts (ELA). She is mistaken. Students in 10th through 12th grade receive credit in English for the classes taught by Espinoza and Fletes because these teachers possess a Single Subject Credential in English. If the District assigned Respondent (with her BCLAD) to teach students in 10th through 12th grade ELA, the students would not receive English credit because Respondent Pereda, unlike Espinoza and Fletes, does not possess a Single Subject Credential in English. As such Respondent Pereda is not credentialed and competent to provide the services performed by Espinoza and Fletes.

Considering the foregoing, Respondent Pereda properly received a layoff notice.

19. Luisella Martinez-Godinez (Respondent Martinez-Godinez) contends that the district maintained an incorrect seniority date for her and therefore improperly issued a layoff notice to her.

Her first date of paid service with the District was August 1999; the District employed Respondent Martinez-Godinez continuously thereafter until July 2006; at that time, as a permanent employee of the District, she resigned.

Respondent Martinez-Godinez testified that when she submitted her letter of resignation, the District's Director of Personnel represented to her that if she returned within 39 months she would retain her status and seniority date.

Respondent Martinez-Godinez returned to the District on September 18, 2007. At that time, her status as a permanent employee and seniority date of August 1999 were restored. She did not receive a layoff notice at the end of the (2011-2012) school year because the District listed her seniority date as August 1999. On March 5, 2012, following an audit of the seniority list, the District corrected and changed Respondent's seniority date to September 18, 2007.

Respondent Martinez-Godinez contends that, given the facts of her case, the District should be estopped from changing her seniority date from August 1999 to September 18, 2007.

20. The doctrine of equitable estoppel prevents a party who intentionally misleads another, by statement or conduct, to believe that a particular circumstance is true and to act upon such belief from subsequently asserting a contradictory position in any litigation arising from such statement or conduct. (See Cal. Evid. Code § 623; *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297). In general, equitable estoppel requires the presence of four elements: (1) the party to be estopped must be apprised of the facts; (2) she must intend that her conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to

believe it was so intended; (3) the other party must be ignorant of the true state of facts; (4) she must rely upon the conduct to his injury. (*Driscoll, supra* at 305).

“[The] doctrine of equitable estoppel may be applied against the government where justice and right require it” (*City of Long Beach v. Mansell*, (1970) 3 Cal.3d 462,493).

21. Education Code section 44948 states in part:

When any certificated employee shall have resigned . . . and shall thereafter have been reemployed by the board, his date of employment shall be deemed to be the date on which he first accepted reemployment (if reemployed before July 1, 1947) or rendered paid service (if reemployed after June 30, 1947) after his reemployment. . . .

Education Code section 44931 states in part:

Whenever any certificated employee of any school district who, at the time of his or her resignation, was classified as permanent, is reemployed within 39 months after his or her last day of paid service, the governing board of the district shall, disregarding the break in service, classify him or her as, and restore to him or her all of the rights, benefits and burdens of, a permanent employee, except as provided in this code. . . .

In other words, when a teacher resigns, the teacher’s seniority date is deemed to be the first day the teacher rendered paid service following rehire. In *San Jose Teachers Association v. Allen*, the Court of Appeal upheld this rule and held that when a permanent certificated employee resigns and is reemployed within 39 months, his/her date of employment for seniority purposes is the date of re-employment and the employee does not regain his or her original hiring date. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 641.)

The foregoing rule has been applied in cases where a certificated employee asserted estoppel after a school district representative assured the employee that he would keep his original seniority date. In *Board of Education v. Round Valley Teachers Association*, the Court ruled that the district had no authority, by its own action or by formal collective bargaining agreement, to confer statutory employment rights in excess of those provided for under the Education Code. (*Board of Education v. Round Valley Teachers Assn.* (1996) 23 Cal4th 269.)

In this case, after attaining permanent status with the District, Respondent Martinez-Godinez left the District for less than 39 months. When she returned, she was entitled to regain her status as a permanent employee but she was not entitled to retain her original seniority date. Despite any representation that she asserts may have been made by the District, the District could not have lawfully agreed to confer upon Respondent Martinez-Godinez any seniority date other than the date expressly provided for under the Education Code. The District cannot be estopped from asserting an employee’s proper seniority date as mandated by Education Code section 44848 and *San Jose Teachers Association v. Allen*.

22. Respondent Martinez-Godinez's seniority date is September 18, 2007, the first date of paid service after she was rehired. Therefore, she is subject to layoff.

23. The services that the Board proposed to reduce were "particular kinds of services" that can be reduced or discontinued within the meaning of Education Code section 44955. The Board's decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious but constituted a proper exercise of discretion.

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

25. No certificated employee junior to any Respondent was retained to perform any services that any Respondent was certificated and competent to render.

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.

2. 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 vs. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. Cause exists under Education Code sections 44949 and 44955 for the Calexico Unified School District to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuance of particular kinds of services is related solely to the welfare of the schools and the pupils thereof.

4. A senior teacher whose position is discontinued has the right to transfer to a continuing position that he/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 vs. Richmond Unified School District* (1975) 13 Cal. 3d 469.)

5. The District has the discretion to determine whether teachers are certificated and competent to hold the position for which said teachers have been skipped and retained. (*King v. Berkeley Unified School District* (1979) 89 Cal.App.3d 1016.)

6. No employee with less seniority than any Respondent is being retained to perform a service that any Respondent is certificated and competent to render.

7. All arguments not addressed herein are not supported by the evidence and/or the law and therefore rejected.

ORDER

1. The layoff notices issued to Respondents Jessica Grijalva, Danjomi Ramirez and Cathy Ray are rescinded. The Accusation served upon Respondents Jessica Grijalva, Danjomi Ramirez and Cathy Ray is dismissed.

2. Except as provided in the foregoing paragraph of this Order, the Accusation served on Respondents listed on Exhibit "A" is sustained; notice shall be given to these Respondents listed on Exhibit "A" before May 15, 2012 that their services will not be required for the 2012-2013 school year because of the reduction or discontinuance of particular kinds of services.

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

DATED: May 1, 2012

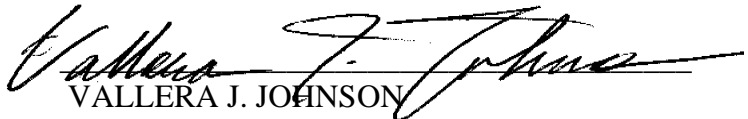

VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

Exhibit “A”

Alvarado Chavarin	Carlos M.
Arroyo	Jose
Aviña	Nelly
Ayala	Susana
Bercovich	Blanca
Buchanan	Debra
Buchanan	Margarita
Buenrostro Zepeda	Antonio
Campos	Yesenia
Carrillo	Ana Maria
Cerros	Leticia
Colunga	Christine
Cordero-Flores	Rosana
Costa	Kristina A.
Cota	Blary Ruhama
Cuesta	Lourdes
De La O	Gisela
Delgado	Brenda
Dominguez	Guadalupe R.
Dominguez	Juan Carlos
Dreesen	Darla M.
Escutia	Claudia Denisse
Espinoza	Uriel
Esquer	Noemi
Fifer	Elizabeth
Figueroa	Rodrigo
Fimbres	Patricia D.
Garcia	Robert P.
Garcia	Mayra Y.
Gonzalez	JuanGabriel C.
Gradillas	Ana Hilda
Grijalva	Jessica
Gutierrez	Roberto O.
Hansanugrum	Pollavet
Hernandez	Zeltzin
Herrera	Cecilia Patricia
Hopkins	Theron James
Hurtado	Delia Susana
Jackson-Lopez	Liliana

Jimenez	Jorge
Jimenez	Cecilia
Kovac	Paul
Leon	Rocio R.
Leos	Xavier
Leyva	Martin
Lopez	Silvano
Magallanes	Karla
Magaña	Adriana Y.
Marquez	Janet
Martinez	Marina
Martinez	Mike
Martinez- Godinez	Luisella
Mayo Wells	Giovanna D.
Medina	Victoria Susan
Melendez	Zahira O.
Meza	Claudia
Miramon	Marco A.
Munguia	Carolina
Munoz	Maria A.
Nogales	Florencia
Ojeda	Guadalupe
Padilla	Juan Carlos
Padilla Jr.	Francisco
Peralta	Marcela
Pereda	Eliza
Perez	Maura
Perez	Mercedes L.
Ramirez	Juan P.
Ramirez	Danjomi (Daniel Jose Miguel)
Ramos	Susan K.
Rangel	Alejandrina
Ray	Cathy A.
Rivera	Yordan
Rodriguez	Maricella S.
Rodriguez	Elsa Maria
Romero	Elizabeth
Rosiles Padilla	Brenda R.
Sanchez	Laura
Sanchez-Romero	Maria Elena P.

Stone III	Robert L.
Torres	Martha
Valdez	Karla J.
Valenzuela	Elizabeth
Velasquez	Leyda Illiana
Verduzco	Diana
Villanueva	Hector