

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

In the Matter of the Accusation Against:

RESPONDENTS LISTED IN
EXHIBIT "A"

OAH No. 2013030897

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in Fontana, California, on April 23, 2013.

Mark W. Thompson, Esq. and Brooke E. Jimenez, Esq, Atkinson, Andelson, Loya, Ruud & Romo, represented Mark W. McLaughlin, the Fontana Unified School District's Director of Certificated Human Resources.

Marianne Reinhold, Esq., Reich, Adell & Civitan, represented Respondents listed in Exhibit "A".

There was no appearance by or on behalf of Respondents Maria Caceres and Nicole White.

The matter was submitted on April 23, 2013.

SUMMARY OF PROPOSED DECISION

The Board of Education of Fontana 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 dedication of the employees 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, seniority, competence, and experience. A tie-breaking procedure authorized by the Education Code was utilized. The selection process was in accordance with the requirements of the Education Code.

FACTUAL FINDINGS

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

2. Mark M. McLaughlin (McLaughlin), the District’s Director of Certificated Human Resources (Director), notified the District’s Governing Board (Board) of his recommendation that the District reduce or discontinue particular kinds of services for the 2013-2014 school year.

3. On March 6, 2013, the Board adopted Resolution No. 13-04 reducing or eliminating particular kinds of services (general) for the ensuing school year, establishing “competency” criteria, and establishing criteria for resolving ties among certificated employees with the same date of first paid probationary service. The Board directed the Superintendent or designated representative to send notices to all employees possibly affected by the reduction or elimination of particular kinds of services.

Resolution No. 13.04 states, in pertinent part:

Middle School Core (Multiple Subject)	7.00	F.T.E.
High School English	2.00	F.T.E.
High School Foreign Language: Spanish	1.00	F.T.E.
High School Mathematics	1.00	F.T.E.
High School Science: Biological	1.00	F.T.E.
High School Science: Earth/Geoscience	1.00	F.T.E.
TOTAL CERTIFICATED POSITIONS	13.00	F.T.E.

The proposed reductions totaled 13.00 full-time equivalent (FTE) positions.

4. On March 6, 2013, the Board adopted Resolution No. 13-05 reducing or eliminating particular kinds of services (categorical) for the ensuing school year, establishing “competency” criteria, and establishing criteria for resolving ties among certificated employees with the same date of first paid probationary service. The Board directed the Superintendent or designated representative to send notices to all employees possibly affected by the reduction or elimination of particular kinds of services.

Resolution No. 13.05 states, in pertinent part:

Elementary EL Intervention	1.50	F.T.E.
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Elementary Instructional Support	16.00	F.T.E.
Elementary Outreach Consultant	2.00	F.T.E.
Middle School Instructional Support	2.25	F.T.E.
High School Assistant Principal (SIG)	1.00	F.T.E.
High School Community Liaison – Activities (SIG)	1.00	F.T.E.
High School Community Liaison – Intervention (SIG)	1.00	F.T.E.
High School Instructional Support – Intervention (Rapid Credit Recovery)	1.00	F.T.E.
TOTAL CERTIFICATED POSITIONS	25.75	F.T.E. .

The proposed reductions totaled 25.75 full-time equivalent (FTE) positions.

5. On March 6, 2013, the Board adopted Resolution No. 13-06 reducing or eliminating particular kinds of services (early education) for the ensuing school year, establishing “competency” criteria, and establishing criteria for resolving ties among certificated employees with the same date of first paid probationary service. The Board directed the Superintendent or designated representative to send notices to all employees possibly affected by the reduction or elimination of particular kinds of services.

Resolution No. 13.06 states, in pertinent part:

Early Reading First Bilingual Intervention Specialist	1.00	F.T.E.
Early Reading First Intervention Specialist	1.00	F.T.E.
TOTAL CERTIFICATED POSITIONS	2.00	F.T.E. .

The proposed reductions totaled 2.00 full-time equivalent (FTE) positions.

6. The Board established “competency” criteria in Resolution 13-04 (General), which states:

¶ . . . ¶

Whereas the Board has determined that a specific and compelling need exists to employ and retain certificated employees for middle school core algebra positions who possess the necessary special training and experience to best serve middle school

students, evidenced by possession of Highly Qualified (“HQ”) status in mathematics under No Child Left behind Act (“NCLB”); and

Whereas Education Code section 44955(d) authorizes this Board to deviate from terminating a certificated employee in order of seniority for the above reason, if necessary.

¶ . . . ¶

THEREFORE, BE IT RESOLVED by the Governing Board of the Fontana Unified School District as follows:

¶ . . . ¶

- D. That “competency” as described in Education Code section 44955(b), 44956 and 44957 for the purposes of bumping and reemployment shall necessarily include (1) HQ status under NCLB, (2) to bump a holder of a single subject credential in a departmentalized secondary assignment, an equivalent single subject credential, (3) to bump a middle school core math teacher holding HQ status in math, equivalent HQ status in math, and (4) to bump into a specialty position including but not limited to librarian, ASB advisor, or AVID, at least one (1) year of prior experience in the assignment within the past five (5) years, and (5) to bump into a teacher on assignment or consulting teacher/support provider position, possession of equivalent training, experience and qualifications necessary to perform the duties of the position.
- E. That bumping shall only be allowed in cases where the senior employee possesses all credentials necessary to assume the whole assignment of the junior employee.

The foregoing paragraphs “D” and “E” are included in Board Resolutions 13.05 and 13.06.

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.

7. On March 6, 2013, the Board adopted Resolution No. 13-14 “Resolution to Establish Criteria for Resolving Seniority Ties in a Certificated Layoff” which included clear instructions for implementation of the criteria. The order of termination was based on the needs of the District and its students.

8. On March 12, 2013, the Director served permanent and probationary certificated Respondents with “Notice of Recommendation that Services Will Not Be

Required”, a copy of Board Resolution Nos. 13-04, 13-05, 13-06 and 13-14, the reasons for the Board’s action, an Accusation, a blank “Request for Hearing and Notice of Defense” form and relevant sections of the California Education Code and California Government Code. In addition, the Director advised Respondents of the right to hearing, that a Request for Hearing was required to be delivered to “the Board of Education” no later than March 27, 2013, and that the failure to request a hearing would constitute waiver of the right to hearing.

9. Each Respondent submitted a timely Request for Hearing and Notice of Defense to determine if there was cause for not re-employing him or her for the ensuing school year.

10. The District served each Respondent with a Notice of Hearing setting the hearing for April 23, 2013, in accordance with Government Code section 11509.

11. All prehearing jurisdictional requirements were satisfied.

12. The Director was responsible for implementing the technical aspects of the layoff. The District developed a seniority list for probationary and permanent certificated staff that included, among other matters, the name of the certificated employee, status, seniority date, assignment, credentials and relevant notes (such as application of tie-breaker criteria).

13. The Director used the seniority list to develop a proposed order of layoff to determine the least senior employees currently assigned in the various services being reduced. Then the District determined whether an employee was qualified to be “skipped”. Then, the District determined whether the least senior employees held credentials in another area that would entitle them to “bump” other junior employees. 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.

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

15. Erica Perea (Perea) argued that she should be treated as a Respondent despite the fact that she did not file a timely Request for Hearing. The District objected.

Along with other employees identified for layoff, Perea received notice that she was required to return her Request for Hearing and Notice of Defense form on or before March 27, 2013. She did not return the form until March 28, 2013. She offered no reasonable explanation for filing an untimely Request for Hearing and Notice of Defense.

The District’s objection is sustained. Perea shall not be treated as a Respondent in this matter.

16. Prior to hearing, the District rescinded the layoff notices that had been issued to the following certificated employees: Jennifer Belikoff, Artie Casas, Monica Diaz, Maria Garces, Deserea Hernandez, Holly Hicke, Friedhelm Lambertson, Deborah Pagliero, Gloria Rodriguez, Gloria Salas and Jaime Soria.

17. During the hearing, the District rescinded the layoff notices that had been issued to the following certificated employees: Renee Bristel, Rebekah Cherniss, Amanda Sullenger.

18. Respondent Amy Dupas (Respondent Dupas)¹ challenged the issuance of a layoff notice to her. She argued that she is eligible to bump more junior employees who are being retained to perform services for which she is certificated and competent to perform in that she has served as an ASB advisor in the middle school for one year.

Respondent Dupas, is a permanent teacher, has a seniority date of February 16, 2012, and holds a Multiple Subject teaching credential. Respondent Dupas received a layoff notice because she is among the most junior employees teaching Math/Science Core and is not HQ in Math. However, Respondent Dupas asserts that she is certificated and competent to bump Jesse Cerda (Cerda)² and Ariana Mota (Mota)³, more junior employees who have been retained to provide services as ASB Director in a high school.

The District's "competency" criterion for purposes of "bumping" does not distinguish between an ASB Advisor in the middle school and an ASB Advisor in the high school. McLaughlin testified that no particular credential is required to serve in this position; the District's concern is that the teacher must have the skills to deal with the financial aspects of the position. The terms ASB Advisor and ASB Director are interchangeable in this District. There is a job description for ASB Director in the high school but not ASB Advisor in the middle school. The duties of the positions are substantially similar.

However, the Director testified that the positions are completely different. The position at the middle school level involves one period of the teacher's workday; the supplemental payment is .5% of the teacher's salary, and the teacher works with middle school students; the high school ASB Director is a full time position, and the supplemental pay is .16% of the teacher's salary, and the teacher works with high school students.

¹ On the District's seniority list, Amy Dupas is identified as reference number 3104.

² On the District's seniority list, Jesse Cerda's seniority date is September 12, 2007; his status is probationary II, and he is listed as reference number 3110.

³ On the District's seniority list, Ariana Mota's seniority date is January 23, 2012; her status is probationary I, and she is listed as reference number 3196.

Considering the facts in the foregoing paragraphs, Respondent Dupas is not competent to “bump” Cerda or Mota. Respondent Dupas does not possess “at least one (1) year of prior experience in the assignment within the past five (5) years . . .” The District properly issued a layoff notice to Dupas.

19. Respondent Clarice Riggio-Ocampo (Respondent Riggio-Ocampo)⁴ challenged the issuance of a layoff notice to her. Her status is probationary I; her seniority date is August 2, 2012; she holds a Multiple Subject credential. She is on a 75 percent contract and is assigned as an Instructional Support teacher. Respondent Riggio-Ocampo received a layoff notice because the Board has reduced the particular kind of service she provides, and she is among the most junior teachers assigned to provide this service.

Respondent Riggio-Ocampo testified that the school to which she is assigned will have instructional support teachers. As such, she argued that she should be retained to provide the service at her school. The statutory and case law is clear that the District is required to retain the most senior teacher who is credentialed and competent to provide the service in the District. Respondent Riggio-Ocampo offered no evidence to establish that her seniority, credential and competency permit her to displace more senior employees with the same credential and competence. The District properly issued the layoff notice to Respondent Riggio-Ocampo.

20. 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.

21. 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.

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

⁴ On the District’s seniority list, Clarice M. Riggio-Ocampo is identified as reference number 3234.

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

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

ORDER

1. The Accusation served on Respondents Jennifer Belikoff, Renee Bristell, Artie Casas, Rebekah Cherniss, Monica Diaz, Maria Garces, Deserea Hernandez, Holly Hicke, Friedhelm Lambertson, Deborah Pagliero, Elaina Rodriguez, Gloria Salas, Jaime Soria, and Amanda Sullenger is dismissed.

2. Except as provided in the foregoing paragraph, the Accusation served on Respondents listed on Exhibit “A” is sustained. Notice shall be given to these Respondents before May 15, 2013 that their services will not be required for the 2013-2014 school year.

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

DATED: May 1, 2013

VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings