

BEFORE THE  
GOVERNING BOARD OF THE  
CULVER CITY UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In The Matter Of The Accusation Against:

DOROTHY SMITH, Respondent,

and ELAINE TOWNSEND, Precautionary  
Respondent.

OAH No. L2005030147

PROPOSED DECISION

Michael A. Scarlett, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 21, 2005, at the Culver City Unified School District, in Culver City, California.

Aaron V. O'Donnell, Attorney at Law, represented the Culver City Unified School District (District).

Lawrence Rosenzweig, Attorney at Law, represented respondent members of the California Teachers Association.

Evidence was received, the matter argued, and case was submitted on April 21, 2005. The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders as, follows:

FACTUAL FINDINGS

1. The Culver City Unified School District (District) operates elementary, junior high, and high schools, and an adult school.

2. Dr. Laura McGaughey is the Superintendent of the District (Superintendent). The Superintendent made and filed the Accusations in her official capacity against each of the certificated employees who requested a hearing. The Accusation with required

accompanying documents and blank Notices of Defense were timely served on those certificated employees.

3. Respondents are certificated employees of the District.

4. On March 1, 2005, the Governing Board of the District adopted two Resolutions: Board Resolution No. 23-2004-2005 and Resolution No. 25-2004-2005, which proposed a layoff of 5.5 and 1.5 Full-Time Equivalent (FTE) certificated employees, respectively, to reduce and discontinue particular kinds of certificated services no later than the beginning of the 2005-2006 school year

5. On March 8, 2005, the Governing Board of the District was given notice of the Superintendent's recommendation that 6.5 FTE employees be given notice that their services would not be required for the 2005-2006 school year as a result of the reduction or discontinuance of particular kinds of services.

6. On March 14, 2005, the District personally served on each respondent a written notice that it had been recommended that notice be given to respondents pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year. Each written notice set forth the reasons for the recommendation and noted that the Board had passed Resolutions reducing the certificated staff by 6.5 FTE positions.<sup>1</sup> The District also served respondents the with Notice of the Accusation and the Accusation, including exhibits, and other necessary jurisdictional documents.

Notice was served by personal delivery or certified mail, return receipt requested. Certificated employees timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year.

7. Notices of Defense were timely filed by respondents.

8. All pre-hearing jurisdictional requirements have been met and there is no jurisdictional dispute at issue in this matter.

9. Board Resolution No. 23-2004-2005 and Resolution No. 25-2004-2005, adopted on March 1, 2005, proposed a layoff of 5.5 and 1.5 FTE certificated employees, respectively. Specifically, the Resolutions provided for the reduction or elimination of the following particular kinds of services:

1. Adult School Office Training Center Teaching Services – 1.5 FTE
2. Community Day School Teaching Services - 1.0 FTE
3. NJROTC Teaching Services - 1.0 FTE

---

<sup>1</sup> The district noticed five employees, Wai Kwan Burger, William Michael DeVoy, Dorothy Smith, Elaine Townsend, and Dr. Josephine Basel. However, only respondents Smith and Townsend filed requests for hearings.

4. At Risk Counseling Services – 1.0 FTE
5. Teacher on Special Assignment/Elem. BTSA Support Provider Services - 1.0 FTE
6. Administrator on Special Assignment Services - 1.0 FTE (Resolution No. 25)

**TOTAL SERVICES REDUCED = 6.5 FTE**

10. Subsequent to adoption of the Board's Resolutions, the District identified vacancies due to retirements, release of temporary teachers, and resignations. In implementing the Board's Resolutions, the district has taken into account attrition known at the time of the Resolutions. Two employees currently serving in positions that are to be eliminated will be reassigned to other vacancies, one created by the release of a temporary employee, the other created by retirement, eliminating the need for a 2.0 FTE reduction. With regards to the original five employees notified of layoffs to accomplish the remaining 4.5 FTE reduction, one employee submitted his resignation, and two others decided not to request a hearing and accepted the layoff, accounting for 3.0 FTE. Thus, the number of certificated employees required to be terminated pursuant to this proceeding is 1.5 FTE for the Adult School Office Training Center Teaching Services. The Board resolved in Resolution No. 23 to eliminate the Adult School Office Training Center program. Respondent Smith and Respondent Townsend are the only employees serving in this program.

11. Board Resolution No. 26, adopted on March 1, 2005, established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. The District applied these criteria to break seniority ties through the seniority list; however, no employees being laid off in this proceeding share the same seniority dates. Thus, the tie breaker criteria are not specifically referenced in this decision.

12. The District maintains a Seniority List which contains employees' seniority dates, 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. Dr. Cecelia Hale, the Assistant Superintendent of Human Resources, was responsible for implementation of the technical aspects of the layoff.

13. The District used the Seniority List to develop a proposed layoff and "bumping" list of the least senior employees currently assigned in the various services being reduced. The District then determined whether the least senior employees held credentials in another area and were entitled to "bump" other employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and whether these individuals could "bump" other employees.

14. From the overall Seniority List, the District developed a Seniority List of the nine probationary or permanent employees currently employed in the adult school program.

This Seniority List was developed because the 1.5 FTE at issue in this matter involved only layoffs in the adult school program. The layoff and bumping rights of tenured adult school employees are similar to those of tenured employees serving in the regular K-12 programs of the school district, except that adult school employees may only "bump" or be bumped by other adult school employees, and are not eligible to bump junior employees serving in the regular K-12 programs of the District. Respondents do not assert that they have "bumping" rights in the K-12 programs of the school district.

Respondent Dorothy Smith

15. Respondent Smith is the most senior employee in the adult school and has a hire date of September 19, 1996. Respondent Smith has a Vocational Education and a Life Adult credential. She has taught in the Office Skills Training Center program in the adult school the entire time she has been employed by the District. Respondent Smith teaches clerical skills, keyboard data entry, filing, and computer courses including Microsoft Word and Microsoft Excel applications. Respondent Smith contends that, although the adult school Office Skills Training Center program is being eliminated by the District, computer courses that she is certificated and competent to teach will continue to be offered by the District in the next school year. She claims that junior employees, specifically Leila Rosenberg, have been retained to teach such computer classes.

16. Respondent Smith relies on a brochure prepared by the District entitled "Adult School Spring/Summer 2005" schedule of classes, which indicates that some computer courses may be taught in programs other than the Office Skills Training Center in the Spring/Summer session of the 2004-2005 school year. A course entitled "Introduction to Computers" is scheduled to be taught as an elective in the Independent Learning Center (ILC) and some "computer education" courses may be taught as part of the "Community Education Classes." It was not established, however, that these computer courses will be offered in the 2005-2006 school year, the year the proposed layoffs are to take effect. Furthermore, all of the computer classes, except the Introduction to Computer class in the ILC, are "fee-based classes," which are only offered contingent on sufficient student enrollment in a particular class, and are taught by temporary employees or teachers who have no tenured status with the District. It can not be determined whether any of these courses would be offered in the 2005-2006 school year.

17. Respondent Smith also contends that Leila Rosenberg, a tenured permanent employee in the adult school, is being retained to teach a computer class, even though Rosenberg is junior to Respondent Smith. Although, Ms. Rosenberg is junior to Respondent Smith in seniority, Ms. Rosenberg has credentials that allow her to teach subjects that Respondent is not certificated and competent to teach. Ms. Rosenberg teaches in the ILC of the adult school program and has a Professional Clear Single subject credential in life science, and a Ryan Adult Education Designated Subject credential in basic education and science.

18. The Adult School Spring/Summer 2005 schedule of classes indicates that Ms. Rosenberg will teach Arithmetic, Algebra, Geometry, Graphs, test taking strategies, and time management. Under a section entitled "Courses Offered" in the ILC, Ms. Rosenberg and two other instructors are indicated as the teachers for several categories of courses including: Science, Social Studies, English, Math, and Electives. The Introduction to Computers course is listed as an elective. This section of the schedule does not indicate the specific course each of the three instructors will teach. However, given Ms. Rosenberg's credentials and the fact she is specifically listed as teaching math courses in a section of the schedule immediately following the "Courses Offered" section, it is reasonable to conclude that Ms. Rosenberg teaches math and science courses, classes which Respondent Smith is not certificated or competent to teach.

19. No certificated employee junior to Respondent Smith was retained to render a service which Respondent Smith is certificated and competent to render.

Respondent Elaine Townsend

20. The District classified Respondent Elaine Townsend as a temporary employee. Respondent Townsend contends that she is not a temporary employee and should be designated a probationary or permanent employee, and placed on the District's Seniority List and afforded the rights of a probationary or permanent certificated employee. The District maintains that Respondent Townsend is a temporary employee because she did not complete two consecutive years working 75% of the number of days the regular schools of the district were maintained in order to achieve probationary or permanent employee status.

21. Respondent Townsend began working for the District as an adult school substitute teacher on June 30, 1998. On September 5, 2000, she began working as a temporary teacher working 23 hours per week. During the 2000-2001 school year, Respondent worked 23 hours per week the entire school year, which constituted 75% of the number of days the regular schools of the district were maintained. Working that number of hours would have qualified as one year of probationary status. During the 2001-2002 school year, Respondent Townsend worked 25 of the possible 36 weeks of the school year, taking leave for an injury from January 14, 2002 through March 2002. From April 2002 until the date of hearing, Respondent Townsend has been working only 15 hours per week, making her ineligible to attain permanent status under the District's collective bargaining agreement with the teachers.

22. Under the collective bargaining agreement between the District and the Culver City Federation of Teachers, thirty (30) hours per week is considered a full-time assignment in the adult school. More than 18 hours per week must be worked by an employee to receive permanency status. To attain permanency, a bargaining unit member must teach a minimum of 19 hours per week for 75% of the scheduled weeks in the school year, excluding summer school, for three (3) consecutive years. Respondent Townsend has not attained permanent employee status because she did not work the required number of years as a full-time adult school employee working 19 hours per week or more for 75% of the scheduled school year.

23. Section 44915 of the Education Code provides that: "Governing boards of school districts shall classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified permanent employees or as substitute employees." Section 44918, subdivision (a), provides that: "any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following year."

24. Arguably, under section 44918, subdivision (a), because Respondent Townsend did not work 75% of the scheduled school year in 2001-2002, she did not have two consecutive years working 75% of the school year, and thus, may not be considered a probationary employee. However, section 44915 suggests that an employee who is not classified as a permanent or substitute employee, must be considered a probationary employee. Respondent Townsend is not a substitute teacher or permanent teacher and may conceivably be deemed a probationary employee under section 44915.

25. We need not, however, resolve the probationary status issue in this case because Respondent Townsend, even if considered a probationary employee, would not have greater seniority rights than any of the nine tenured employees in the adult school. Respondent Townsend's earliest possible seniority date would be September 5, 2000, when her status changed from a substitute teacher to a temporary teacher in the adult school program. The permanent teacher with the least seniority currently on the adult school Seniority List has a seniority date of February 16, 2000. More importantly, as a probationary employee, Respondent Townsend would not have bumping rights against any of the adult school teachers, who are all permanent tenured teachers. (*See Campbell Elementary Teachers Assoc., Inc. v Gordon* (1978) 76 Cal.App.3d 796.)

26. No certificated employee junior to Respondent Townsend was retained to render a service which Respondent Townsend is certificated and competent to render.

#### LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945 were met.

2. The services identified in Board Resolution Nos. 23-2004-2005 and 25-2004-2005 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.

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.

In *Campbell Elementary Teachers Assoc., Inc. v Gordon*, *supra*, 76 Cal.App.3d at 812, the court held:

It is true that a district may not dismiss an employee pursuant to section 13477 [now, 44955] and yet continue the identical service and position held by the terminated employee. But the *particular kind* of service of the employee may be eliminated even though a service continues to be performed or provided in a different manner by the district. In *Davis v. Berkeley School Dist.*, *supra* 2 Cal.2d 770, the governing board discontinued the service performed by so-called traveling art teachers-experts who went from school to school giving instruction in art. Thereafter, the district continued to offer art instruction but only by the regular departmental teachers. The court affirmed the judgment denying a writ of mandate to compel reinstatement of one of the traveling art teachers on the ground that the *particular service* performed by the petitioner had in fact been discontinued even though the teaching of art was a service still being performed by the school district. Where, as here, the district apparently contemplated a change in the method of teaching or in the particular kind of service in teaching a subject, there was a discontinuance of the former particular. [Emphasis added by court; citations omitted.]

3. 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.

The District determined that the Adult School Office Training Center program would be eliminated, a reduction of 1.5 FTE. Respondents Smith and Townsend were the only adult school teachers employed in that program providing that particular kind of service. That the District may offer "computer courses" in some other adult school programs is not determinative of respondents' right to be retained. The particular kind of service respondents were performing has been eliminated by the District. Moreover, there is insufficient evidence to conclude that "fee-based" computer courses offered contingent upon student enrollment, constitute a teaching position for which respondents are entitled to be retained to teach. The District has discretion to offer fee-based courses, to be taught by temporary teachers, if the necessity for the courses does in fact materialize. The provision of contingent fee-based courses constitutes the provision of a particular service in a different manner than services respondents provided in the Office Training Center program.

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

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. *Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831.

Section 44929.25 provides, in part, that services for which an employee serving in the adult school has obtained tenure "may be reduced in conformity with sections 44955 and 44956." Section 44955 prohibits the termination of services due to layoff of a permanent or probationary employee if there is a junior employee being retained to render a service that the senior employee is certificated and competent to render. Pursuant to sections 44929.25 and 44929.26, and subject to exceptions that are not relevant to Respondents here, a teacher who serves the required probationary period in the adult school obtains tenure as a teacher of classes for adults, but does not advance towards tenure as a teacher in the regular K-12 programs of a school district. Thus, an adult school employee can have no rights to displace junior employees in the regular K-12 program in the context of a layoff.

As stated above, there is no dispute here that respondents are not entitled to bump any employee in the K-12 school program for the District. Respondent Smith is also not certificated and competent to bump any junior teacher retained by the District in the adult school. Respondent Townsend, even if considered a probationary employee, would not be more senior than any of the permanent tenured teachers retained by the District in the adult school.

#### ORDER

Notice shall be given to Respondent Dorothy Smith and Respondent Elaine Townsend, employees occupying 1.5 full-time equivalent certificated positions in the Adult School Office Training Center program that their services will not be required for the 2005-2006 School Year because of the reduction and discontinuance of particular kinds of services. Notice shall be given in inverse order of seniority.

Dated: May 6, 2005

---

Michael A. Scarlett  
Administrative Law Judge  
Office of Administrative Hearings