

BEFORE THE
GOVERNING BOARD OF THE
SAN JUAN UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:

MASAKO THOMAS
DEBRA CHIGUINA,

Respondents.

OAH No. 2014110196

PROPOSED DECISION

This matter was heard by Administrative Law Judge Marilyn A. Woollard, Office of Administrative Hearings, State of California, on April 14, 2015, in Carmichael, California.

General Counsel Linda C. T. Simlick represented the San Juan Unified School District (District). Deann Carlson, Acting Director of Certificated Personnel, Human Resources, and Melissa Koehly, Acting Analyst for Certificated Personnel, also appeared on behalf of the District.

Attorney Michael N. McCallum of the Law Office of Michael N. McCallum represented respondents. Respondent Masako Thomas was present. Sandra Galindo, Assistant Executive Director of the San Juan Teachers Association, and Robin Thompson, Paralegal, were also present.

Evidence was received, and the record was left open for the parties to submit written closing arguments. On April 22, 2015, the parties submitted their respective written closing arguments, which are marked for identification as District Exhibit 17 and Respondents Exhibit C. The record was then closed and the matter was submitted for decision on April 22, 2015.

FACTUAL FINDINGS

1. The District has over 2,000 certificated employees. It serves roughly 40,000 students in approximately 60 schools. Over 90 percent of the District's funding is spent on personnel. While state revenues have improved the overall fiscal outlook from previous years, the District's budget still faces challenges due to the reallocation of supplemental grant resources received from the Local Control Funding Formula (LCFF), and a shift in funding

resources within Title 1 and Special Education. Coordinated Early Intervening Services (CEIS) funding is designed to provide services to students to avoid their need for special education services. Previously available CEIS funding to hire extra certificated staff will not continue in 2015-2016. The District previously received one-time money through Common Core, which was used to release eight teachers from their classroom positions into Common Core State Standards Facilitator positions. This funding no longer exists. In addition, the District continues to see a decline in enrollment, with a resulting change in service and delivery models, such as school closure and decreased course offerings in specialized curriculum areas. It anticipates a loss of over 200 students in the 2015-2016 school year.

2. Paul Oropallo is the District's Acting Assistant Superintendent of Human Resources. Deann Carlson is the District's Acting Director of Certificated Personnel, Human Resources. Anticipating these fiscal concerns, beginning in October 2014, Ms. Carlson began working with various District stakeholders to determine whether and which certificated services might need to be reduced. From this data gathering process, Ms. Carlson prepared a list of services to be reduced. Mr. Oropallo and Superintendent of Schools Kent Kern then made a written recommendation to the Governing Board of the District (Governing Board) for the reduction or discontinuation of particular kinds of services (PKS), in order to reduce expenses for the 2015-2016 school year. Specifically, it was recommended that the District eliminate 2.0 full-time equivalent (FTE) administrators and 20.79 FTE certificated positions in the District's K-12 schools.

3. On March 10, 2015, the Governing Board adopted Resolution No. 2754, authorizing the reduction or discontinuation of PKS in the K-12 schools. In this resolution, the Governing Board also adopted "competency criteria" and "skipping criteria" applicable to certificated personnel affected, or potentially affected, by the PKS reduction in services.¹

The Resolution directed the Superintendent, or his designee, to take all appropriate action to implement its terms and to effectuate the layoff of certificated employees necessary to reduce 22.79 FTE positions. As delineated in Exhibit A, the PKS areas affected by Resolution No. 2754 are as follows:

<u>ADMINISTRATORS</u>	<u>FTEs</u>	
Elementary Principal	1.00	
Elementary Vice Principal	1.00	
	<u>Sub-total</u>	2.00

¹ A senior teacher whose position is discontinued has the right to a position held by a junior teacher if the senior teacher is properly credentialed and competent to perform the duties of that position. That displacement of a junior teacher is known as "bumping." In general, the District has an affirmative obligation to reassign senior teachers who are losing their positions into such positions held by junior teachers.

K-12 CERTIFICATED,

NON-ADMINISTRATIVE POSITIONS

	<u>FTEs</u>	
Art	0.56	
Common Core State Standards Facilitator	8.00	
Counselor, Special Programs: CEIS	2.60	
Counselor, Special Programs: S3 Grant	0.50	
English	0.80	
Japanese	0.40	
Physical Education	0.24	
School Social Worker: 225 Day/8 Hour	1.00	
Science: Biology/Life	0.25	
Site Resource Elementary: CEIS Coach	5.00	
Site Resource Elementary: Thomas Edison	1.00	
Site Resource Elementary: Title 1 Coach	1.00	
	<u>Sub-total</u>	20.79
	<u>TOTAL</u>	22.79

4. On March 10, 2015, the Governing Board adopted Resolution No. 2755, specifying criteria to be used in determining the order of termination of certificated employees with the same District seniority (tiebreaker criteria).

5. To implement the layoff, the District first considered known attrition by retirement or resignation in each of the PKS-identified areas. It also considered additional funds that enabled the retention of certain teachers otherwise displaced by the PKS Resolution. After considering such attrition and alternate funding, only two PKS areas required a reduction in certificated personnel: Japanese (.40 FTE) and School Social Worker (1.0 FTE). As a result, the District only issued two preliminary layoff notices.

6. *Preliminary Notice:* On March 12, 2015, Mr. Oropallo caused a written Preliminary Notice of Recommendation That Service Will Not Be Required (Preliminary Notice) to be served on respondents Masako Thomas, a permanent certificated employee, and Debra Chiguina, a probationary certificated employee, pursuant to Education Code sections 44949 and 44955. Each Preliminary Notice recited that it had been recommended to the Governing Board that respondents' services would not be required for the ensuing school year due to a reduction or discontinuation of PKS. The notices provided respondents with information and deadlines for requesting a hearing and included blank Requests for Hearing forms. Both respondents filed Requests for Hearing.

7. *Statement of Reduction in Force:* On March 19, 2015, Deann Carlson filed and served the District's Statement of Reduction in Force on Ms. Thomas and Ms. Chiguina, who filed their Notice of Participation in Reduction in Force Hearing through their counsel.

8. *Jurisdiction:* The matter was then set for hearing, which convened and concluded on April 14, 2015. During the hearing, the parties orally stipulated that the

District had properly noticed and served the Preliminary Notice on respondents; that respondents had appropriately and timely filed a request for hearing; and that the District timely served the Statement of Reduction in Force on respondents, who then timely filed a Notice of Participation. All jurisdictional requirements of Education Code section 44949 and 44955 have been satisfied.

9. *Respondent Debra Chiguina:* Ms. Chiguina is a probationary employee with a seniority date of August 11, 2014. The PKS reduction in School Social Worker directly affected permanent certificated employee Jill Adams (seniority date: August 31, 2011), who then bumped into the position held by Ms. Chiguina, who was the least senior social worker. At hearing, counsel provided a Stipulation Regarding Withdrawal of Request for Hearing (Stipulation) signed by Ms. Simlick and Ms. Chiguina. Pursuant to this Stipulation, Ms. Chiguina acknowledged her agreement that the District may lay her off for the 2015-2016 school year, subject to the additional rehire rights delineated in that document. Based on this Stipulation, the hearing proceeded solely to address the layoff of Ms. Thomas.

Respondent Masako Thomas

10. *Seniority, Credentials and “Highly Qualified” Status:* Masako Thomas is a permanent certificated employee with an uncontested seniority date of August 15, 2007.² She is assigned to Churchill Middle School, where she teaches one section of Exploration Japanese (culture and language exploration) and one section of International Baccalaureate Middle Year (IBMS) Japanese. Each of these sections is worth .20 FTE; consequently, Ms. Thomas has a .40 FTE teaching position. At the time of this Reduction in Force, the District employed three Japanese language teachers. It is undisputed that Ms. Thomas is the least senior Japanese teacher in the District and that she was appropriately affected by the .40 PKS reduction of Japanese.

Ms. Thomas holds a Single Subject teaching credential in Japanese and a Single Subject Teaching Credential in Introductory Mathematics. Ms. Thomas also has a CLAD certificate. Ms. Carlson described the CLAD as a cross-cultural language authorization on Ms. Thomas’ single subject credential, which allows her to provide services to English language learners, but which is not a stand-alone credential to teach.

² Seniority is the relationship between the teachers within a school district. Seniority date is defined as the date upon which an employee first rendered paid service in a probationary position. (Educ. Code § 44845.)

Education Code section 44944, subdivision (b), provides in pertinent part that, “As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof.” Ms. Thomas shares this seniority date with many other District employees; however, it was undisputed that the District did not need to utilize the Tie Break Criteria set forth in Resolution No. 2754, and no tie break issues were asserted by Ms. Thomas.

Under the federal No Child Left Behind Act (NCLB), teachers in core academic areas, including mathematics and foreign languages, must be designated as “Highly Qualified” to teach those subjects. Ms. Thomas is designated as NCLB “Highly Qualified” to teach Japanese. Although she taught algebra for a year at the District several years ago, Ms. Thomas is not designated as NCLB “Highly Qualified” to teach introductory mathematics. The District is subject to a continuing audit by the State Department of Education to achieve 100 percent compliance in Highly Qualified teachers; the District is currently at approximately 90 percent compliance. Ms. Carlson has previously informed Ms. Thomas how she can become so designated in math (via test or additional course work), but Ms. Thomas has not pursued this avenue.

11. *Statutory Preference for Retaining More Senior Employees:* Education Code section 44955, subdivision (b), provides in pertinent part that: “Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.”

Education Code section 44955, subdivision (c), in pertinent part, provides that: “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. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee’s major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.”

12. *District’s Competency Criteria:* District Resolution No. 2754 provides, in pertinent part, as follows:

Teachers are deemed to be “certificated and competent” to teach any class that is not a Regional Occupational Program (ROP)/Career Technical Education (CTE) class if the teacher meets EITHER criteria listed below.

- a. Holds a valid credential issued by the State of California which is associated with the course(s) being taught AND, for course(s) identified by NCLB (ESEA) as core curriculum, is NCLB (ESEA) Highly Qualified to teach the course(s), or
- b. If there is no credential issued by the State of California associated with the course(s) being taught, has taught the specific course(s) for at least one semester in the current school year or any of the five preceding school years.

13. *Parties' Contentions:* It is undisputed that there are no Japanese teachers whose positions Ms. Thomas can bump into based on seniority. It is also undisputed that, because she is not "Highly Qualified" in math, Ms. Thomas cannot use her math credential to bump into a math position held by a less senior employee.

The sole issue is Ms. Thomas' ability to bump into a non-credential specific course under Resolution No. 2754, subdivision (b). The District asserts that its "competency criteria" are appropriate and are not arbitrary or capricious. Respondent argues that the competency criteria are arbitrary and unlawful and cannot be used to lay her off. Respondent also agrees that, if the competency criteria are valid, she can be laid off because she has never taught any of the non-credential specific courses.

14. Ms. Carlson described some of the non-credential specific courses offered by the District. These include: Advancement Via Individual Determination (AVID), Study Hall and Study Skills; Student Government; Student Activity Director; and Athletic Director. The AVID, Study Hall and Study Skills courses are substantially similar. In these classes, students are taught study skills and good study habits and additional help is offered to them as needed. The teacher assigned to the Student Government course coordinates the work of the members of the elected student body. The teacher assigned as Student Activity Director oversees various student activities and government, typically at the high schools. The Athletic Director oversees and coordinates all of the athletic activities at the school site.³

15. Ms. Thomas identified several permanent certificated employees with less seniority who were not laid off and are assigned to teach non-credential specific courses. These included:

<u>Name</u>	<u>Seniority Date</u>	<u>Non-Credential Specific Course</u>
Lori Sato	8-13-08	Student Government (2 periods) Student Activities Director (1 period)
Sara Chrisman	8-14-08	Study Skills (1 period)
Minh Vu	8-19-09	Student Government (2 periods) Student Activities Director (1 period)

16. *Reason for the Criteria:* Ms. Carlson testified that the District defines "competency" in a way that provides it with the most flexibility for making future staff assignments. For non-credential specific courses, the requirement for having taught the course within the previous five years is simply a way to help the District implement the bumping process.

³ Ms. Carlson persuasively testified that various non-credential specific "Exploration" courses required that the teacher have a credential to teach the subject being explored.

The competency criteria were developed after previous large layoffs when the District was confronted with large numbers of senior teachers trying to bump into several periods of non-credential specific courses like AVID or Activities Director. As a result, the District determined it was in its best interest to define competency for these non-credential specific areas and to ensure flexibility. When questioned about the purpose of the competency criteria, Ms. Carlson emphasized that “a teacher’s effectiveness is not what’s at issue,” and that the goal was to allow the District flexibility in assignments. Ms. Carlson also explained that, when teachers are initially assigned to teach these non-credential specific courses, they are not required to have previously taught the course.⁴

Ms. Carlson clarified that the District has no problem allowing partial bumps by a more senior teacher selected for layoff, into a portion of the position of a full-time teacher.

17. Ms. Thomas has never taught a course in Study Skills, Student Government or AVID at the District either within the past five years or at any time. However, she is willing to teach any of the non-credential specific courses to save her job. Ms. Thomas has experience in teaching study skills and habits to her students, particularly to those students in her Exploration Japanese class. Ms. Thomas believes she could appropriately teach a study skills course. She also believes that she could perform the job duties of other non-credential specific positions if she was informed of those duties before school began.

18. Respondent correctly notes that the District’s competency criteria for non-credential specific courses has previously been determined to be invalid in contested layoff proceedings by Administrative Law Judges (ALJs) Lew (2012) and Sarli (2013).

In 2012, the non-credential specific competency criteria required experience teaching a particular class for at least one semester in the current school year or in either of the two preceding school years. ALJ Lew noted that “the competency standard must be viewed in context of every possible assignment into junior positions, including those that are non-credential specific.” ALJ Lew found that this competency criteria too narrowly defined competency as applied to teachers with multiple subject/self-contained classroom credentials who sought to bump into non-credential specific English Learner Instructional Specialist and/or Literacy Support positions, and as applied to other non-credential specific positions which included Advance Path (an on-line learning program for at risk youth), Independent Study, and Site Resource – International Baccalaureate (IB) Coordinator.

The competency criteria in 2013 expanded the period for previous teaching experience in the non-credential specific courses to one semester in the current school year or in any of the five preceding school years. It was thus identical to that set forth in the current Resolution, at subdivision (b). ALJ Sarli reviewed respondents’ claim that they had seniority to bump into a variety of non-credential specific courses held by junior employees, including

⁴ For credential-specific courses governed by the Resolution’s subdivision (a), there is no previous teaching requirement for teachers who hold the required credential and are Highly Qualified.

AVID, Student Government, Study Hall and Student Activity Director. ALJ Sarli found that the District had presented “no evidence that it was necessary for any properly credentialed teacher to have particular experience to teach in any of the courses that did not require a specific credential.” She further determined that: “It is not probable that a teacher would not be competent to teach many of these courses (e.g., Study Hall, Student Government, Student Leadership and Student Activity Director) without having taught it before...” Based on this determination, Ms. Thomas’ layoff for the 2013-2014 school year was rescinded.

19. As discussed in Finding 11 above, section 44955 expresses the legislative intent to protect the seniority rights of certificated employees within the context of economic layoffs. Consequently, school districts may not erode the statute’s seniority protections by imposing unreasonable competency requirements on the ability of senior employees to bump into positions held by junior employees. Under the statute, a senior employee wishing to bump a junior employee must establish both that he holds the appropriate certificate for the position and that he is “competent.”

The meaning of “certificated and competent” has been characterized as “a watershed inquiry.” (*Duax v. Kern Community College District* (1987) 196 Cal. App. 3d 555, 564.) In *Duax*, the appellate court reviewed a competency standard contained in a PKS resolution passed by the board of trustees of a community college district under former Education Code section 87743, which required one year of full-time “experience rendering a service or teaching in a specific subject area” within the last 10 years. In analyzing this resolution, the court relied on appellate decisions issued in the context of reemployment rights following layoffs which construed similar statutory language, “certificated and competent,” under section 44956 and its predecessors. The court relied on *Martin v. Kentfield School District* (*Martin*) (1983) 35 Cal. 3d 294, 299, in which the California Supreme Court characterized the decision of whether an employee is certificated and competent as a “discretionary” decision within the “special competence” of the school district. A subsequent case, *Forker v. Board of Trustees* (1984) 160 Cal. App. 3d 13, 19, noted that as interpreted by *Martin*, the term “competent” relates to the specific skills or qualifications required of the applicant. From these authorities, the court in *Duax* concluded that “a board’s definition of competency is reasonable when it considers the skills and qualifications of the teacher threatened with layoff.” The court held the board’s competency resolution standard was one “clearly relating to skills and qualifications to teach,” and did not too narrowly define competency. While “other factors might have been taken into consideration” and other competency standards “might have been imposed by the board, there is no mandate that the board do so.” (*Id.* at 567.)

20. In contrast to the competency criteria found to be reasonable in *Duax*, the competency standards for non-credential specific courses contained in Resolution 2754, subdivision (b), are designed to maximize the District’s flexibility. The criteria too narrowly define competency by requiring that Ms. Thomas have taught in the “specific course(s)” she wishes to bump into rather than in the more expansive “subject area” found reasonable in *Duax*. By doing so, convenience and flexibility are elevated over the mandate that the “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.” (Ed. Code, § 44955, subd. (c).) In addition, the District did not offer any evidence that it was necessary for a credentialed teacher to have particular experience to teach any of the “specific course(s)” that do not require a specific credential, or that it had a specific need for personnel to teach these specific courses. In this regard, citing *Bledsoe v. Biggs Unified School District (Bledsoe)* (2009) 170 Cal. App. 4th 127, the District seemed to conflate the statutory authorization for “skipping” less senior teachers from layoff, under certain circumstances, with the competency analysis.⁵

Further, there was insufficient evidence that the competency criteria for non-credential specific courses relate to the teachers’ skills and qualifications to teach. It is seniority, rather than administrative convenience, that is the touchstone of Education Code section 44955. Ms. Thomas offered testimony that she has experience teaching study skills and study habits to her students. It is not probable that she would not be competent to teach Study Hall/Study Skills, Student Government, and/or to act as Student Activity Director. Ms. Thomas may bump into .40 FTE of the junior teachers assigned to these positions, despite not have taught them as outlined in Resolution 2754, subdivision (b).

LEGAL CONCLUSIONS

1. Education Code 44955, subdivision (b), provides in pertinent part:

Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

2. Education Code 44955, subdivision (c), provides 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. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee’s major

⁵ Under Education Code section 44955, subdivision (d), the District may deviate from terminating a certificated employee in inverse order of seniority where it is able to demonstrate a specific need for personnel to teach a specific course or course of study, or to provide certain services. The court in *Bledsoe* concluded that the District had met its burden under this subdivision.

area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

3. As set forth in the Factual Findings as a whole and, particularly in Finding 8, jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955. All notices and other jurisdictional requirements of sections 44949 and 44955 were met.

4. A school 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.) The burden is on the District to demonstrate that the reduction or elimination of the particular kinds of services is reasonable and that the District carefully considered its needs before it laid off any certificated employee. (*Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 807-808.)

5. The services identified in PKS Resolution No. 2754 are particular kinds of services that may be reduced or discontinued pursuant to sections 44949 and 44955. The description of services to be reduced, both in the Board’s Resolution and in the notice, adequately described particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838; see, also, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

6. *Competency Criteria:* Determinations related to whether employees are “certificated and competent” to render a particular service “involve discretionary decisions which are within the special competence of the school districts.” (*Duax v. Kern Community College District, supra*, 196 Cal.App.3d at p. 565.) The District’s actions will not be overturned unless shown to be “arbitrary and capricious.” (*Fair v. Fountain Valley School Dist.* (1979) 90 Cal.App.2d 180.)

As set forth in the Factual Findings and Legal Conclusions as a whole and, particularly in Factual Findings 18 through 20, the District’s competency criteria for non-credential specific courses are too narrowly defined when applied to the Study Hall/Study Skills, Student Government, and Student Activity Director positions and arbitrarily prevented Ms. Thomas from bumping into junior teachers holding these positions in violation of Education Code section 44955, subdivisions (b) and (c). Ms. Thomas may bump into such positions held by junior teachers assigned to them. Such positions do not require a specific credential and can be taught by Ms. Thomas, despite the fact that she has not previously taught them.

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RECOMMENDATIONS

1. By virtue of the Stipulation Regarding Withdrawal of Request for Hearing set forth in Factual Finding 9, the District may give final notice to respondent Debra Chiguina that it will not require her services for the 2015-2016 school year.

2. The Preliminary Notice sent to respondent Masako Thomas is hereby rescinded to restore her .40 FTE, based on Legal Conclusion 6.

DATED: May 5, 2015

/s/
MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings