

BEFORE THE
GOVERNING BOARD
DAVIS JOINT UNIFIED SCHOOL DISTRICT
COUNTY OF YOLO
STATE OF CALIFORNIA

In the Matter of the Non-Reemployment of:

CONSTANCE ALEXICH, et al.,

Respondents.

OAH No. 2010021035

PROPOSED DECISION

This matter was heard before Administrative Law Judge Dian M. Vorters, Office of Administrative Hearings, State of California, on April 13, 2010, in Davis, California.

James Scot Yarnell, Attorney at Law,¹ represented complainant, Kevin French, Associate Superintendent, Davis Joint Unified School District.

Ernest H. Tuttle, IV, Attorney at Law,² represented respondents who are listed on Appendix A.

Blair Howard was present and represented himself at hearing.

The matter was submitted on April 13, 2010.

FACTUAL FINDINGS

General Findings Concerning Statutory Requirements

1. Respondents are certificated district employees.

¹ James Scot Yarnell, Attorney at Law, 2485 Natomas Park Drive, Suite 240, Sacramento, California 95833.

² Ernest H. Tuttle, IV, Attorney at Law, 735 Sunrise Avenue, Suite 208, Roseville, California 95661.

2. On February 18, 2010, the governing board of the district resolved to reduce or discontinue particular kinds of services. To that end, the board adopted Resolution 32-10 (Layoff Resolution). Within the meaning of Code section 44955, the services are “particular kinds of services” that can be reduced or discontinued. The decision to reduce or discontinue these services was not arbitrary or capricious but constituted a proper exercise of discretion.

3. Not later than March 15, 2009, the superintendent of the school district caused the governing board of the district and respondents to be notified in writing of his recommendation that preliminary notice be given respondents, pursuant to Education Code sections 44949 and 44955,³ that the district would not require their services for the 2010-2011 school year. The notice stated the reasons for the recommendation. In recommending reductions in certificated staff, the superintendent considered the qualified condition of the district’s budget. The district is expecting a \$5.7 million budget deficit for the 2010-2011 school year. The recommendation was not related to respondents’ performance as certificated employees.

4. A Notice of Intent to Dismiss was delivered to each respondent, either by personal delivery or by depositing the notice in the United States mail, registered, postage prepaid, and addressed to respondents’ last known address.

5. The notice advised each respondent of the following: He or she had a right to a hearing. In order to obtain a hearing, he or she had to deliver a request for a hearing in writing to the person sending the notice. The request had to be delivered by a specified date, which was a date that was not less than seven days after the notice of termination was served.⁴ And the failure to request a hearing would constitute a waiver of the right to a hearing.

6. Respondents timely filed written requests for a hearing to determine whether there was cause for not reemploying them for the ensuing year. An accusation was timely served on respondents. Respondents were given notice that, if they were going to request a hearing, they were required to file a Notice of Defense within five days after being served with the accusation.⁵ Respondents filed timely notices of defense. All prehearing jurisdictional requirements were met.

³ All references to the Code are to the Education Code unless otherwise specified.

⁴ Employees must be given at least seven days in which to file a request for a hearing. Education Code section 44949, subdivision (b), provides that the final date for filing a request for a hearing “shall not be less than seven days after the date on which the notice is served upon the employee.”

⁵ Pursuant to Government Code section 11506, a party on whom an accusation is served must file a Notice of Defense in order to obtain a hearing. Education Code section 44949, subdivision (c)(1), provides that, in teacher termination cases, the Notice of Defense must be filed within five days after service of the accusation.

Positively Assured Attrition

7. The Board must allow for positively assured attrition such as voluntary resignations and retirements which occur during the “computation period.” (*Santa Clara Federation of Teachers v. Governing Board of Santa Clara Unified School Dist.* (1981) 116 Cal.App.3d 831, 847.) The district must “consider evidence of positively assured attrition, involuntary retirements for the [upcoming] school year which were known to the board when it made its preliminary determination on 15 March ... and when it made its final determination on 15 May.” (*Lewin v. Bd. of Trustees of Pasadena Unified School Dist.* (1976) 62 Cal.App.3d 977, 983.)

8. As set forth in the Layoff Resolution, the governing board considered all positively assured attrition, including deaths, resignations, retirements and other permanent vacancies, for 2010-2011, in determining the needed services to be reduced or eliminated.

9. Of the 46 certificated employees who were served with valid notices of layoff and requested a hearing pursuant to Education Code section 44949, subdivision (b), 38 teachers timely returned a Notice of Defense. Seven teachers failed to return a Notice of Defense. One teacher, Lance Gunnensen, returned his Notice of Defense after the deadline of March 19, 2010. As to the eight certificated employees who failed to timely return a Notice of Defense, the matter proceeded as a default pursuant to Government Code section 11520. (Appendix A.)

Competency Criteria

10. The Layoff Resolution includes competency criteria adopted by the board, for use in implementing layoffs. The competency criteria provision states:

That “competency” as described in Education Code Sections 44955, 44956 and 44957 for the purpose of bumping and reemployment rights shall be determined upon current possession of a preliminary or clear credential for the subject matter or grade level to which the employee may bump or will be assigned; a BCLAD if the assignment requires that authorization (Elementary Spanish Immersion, EL Teacher); an EL authorization if the assignment requires that authorization; a certificate issued by the American Montessori Society or American Montessori International if the assignment requires that authorization (Davis Montessori Program); and service within the last five (5) years for teachers on special assignment as English Learning Specialists or Math Specialists. Further, that due to the specific need of the District to hire and retain only highly qualified teachers in academic subject areas, “competency” shall require (highly qualified) current confirmation of qualification of academic subject competency, or verifiable eligibility for competency if not previously reviewed by the District, in all subjects of a proposed assignment, including assignments teaching

multiple academic subjects and assignments in secondary alternative schools, in accordance with the NCLB.

11. Education Code section 44955, subdivision (b) provides that no senior employee may be terminated while any less senior employee is retained to render a service which the more senior permanent employee is “certificated and competent” to render. “It [is] the districts obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possess[es] the seniority and qualifications which would entitle him/her to be assigned to another position.” (*Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 137.)

12. The competency definition contained in the resolution was created for layoff purposes only. The competency definition adopted in the Layoff Resolution is within the district’s discretion.

Services the District Intends to Reduce or Discontinue

13. The governing board of the district determined in the Layoff Resolution that because particular kinds of services were to be reduced or eliminated, it was necessary to decrease the number of permanent employees in the district by 80.25 full-time equivalents (FTE). The particular kinds of services the governing board of the district resolved to reduce or discontinue are:

(A) Elementary (Grades P-6) Classroom Instructional Services:

1.	Elementary Classroom Teaching Services	36.0 FTE
2.	Spanish Immersion Teaching Services	4.0 FTE
3.	Montessori Teaching Services	1.0 FTE
	Total	41.0 FTE

(B) Secondary (Grades 7-12) Departmentalized Instructional Services:

1.	English	5.0 FTE
2.	Mathematics	4.0 FTE
3.	Physical Education	3.0 FTE
4.	Social Science	3.0 FTE
5.	Spanish	3.0 FTE
6.	Science (Life/Biological)	2.0 FTE
7.	Health	2.0 FTE
8.	Art	1.0 FTE
9.	Industrial Technology	1.0 FTE
10.	Science (Physical)	1.0 FTE
11.	Computer Technology	.8 FTE
12.	Fashion/Textiles	.6 FTE
13.	Food Sciences	.6 FTE
14.	Home Economics	.4 FTE
15.	Agriculture	.4 FTE

16.	Woods	.2 FTE
	Total	28.0 FTE
(C) Educational Services:		
1.	Secondary Counseling Services	7.0 FTE
2.	Physical Education Specialist	1.0 FTE
3.	Gate Coordinator	.6 FTE
4.	EL Coordinator	.4 FTE
	Total	9.0 FTE
(D) Administration Services		
1.	Flap Grant Manager	1.0 FTE
2.	Adult School Principal	.5 FTE
3.	Continuation High School Principal	.5 FTE
4.	Co-Director of Special Education	.25 FTE
	Total	2.25 FTE
TOTAL		80.25 FTE

Use of Tie-Breaking Criteria Based on the Current Needs of the District and Students

14. Pursuant to Education Code section 44955, subdivision (b), the governing board of the district established, in the Layoff Resolution, criteria for determining the order of termination as among employees who first rendered paid service on the same date. The Board authorized a point system to be “applied only where the implementation of layoffs or rehire actually impacts two or more employees with the same first date of paid service and is applied only to those employees.” Points were granted to each affected employee based upon all the following criteria:⁶

- a. Possession of a currently valid preliminary or clear California professional, standard or general teaching credential; *2 points*
- b. Possession of more than one valid preliminary or clear California teaching credential; *2 points*
- c. Possession of one or more language certifications (*e.g.*, LDS, CLAD, SB 1969, SB 395, BCC, BCLAD, Certificate of Completion of Staff Development) authorizing instruction to English Learners; *2 points*
- d. Possession of one or more of the following currently valid subject matter authorizations: RSP, SDC, Psychologist, Speech and Language, Reading

⁶ NCLB (No Child Left Behind), a mandated program; BCLAD (Bilingual, Cross-cultural, Language and Academic Development), a certificate; CLAD (Cross-cultural, Language and Academic Development); GATE (Gifted and Talented Education), an honors program for gifted students.

Credential, Sciences, Math, Foreign Languages - *1 point for each listed authorization.*

- e. (Applicable only to a tie between an employee holding a valid Intern Credential and an employee holding a lesser credential/certificate including, but not limited to, provisional credentials/certificates, Short Term Staffing Permit, Pre-Intern Certificated, Provisional Intern Permit, Special Temporary Certificate or State issued waiver) The certificated employee with a valid Intern Credential shall receive *2 points*.
- f. In any case where a tie results after calculating the cumulative points for each the above criteria, then the tie shall be broken by ranking the tied employees from lowest to highest according to the last four digits of their social security number, with the lower number deemed less senior than the next higher number.

Skipping/Bumping/Seniority

15. Skipping describes the process by which the district may deviate from the order of seniority when there is an identified need for a particular type of service, there is a junior employee who is uniquely qualified to provide that service or teach a subject, and there is no senior employee who is certificated and competent to provide the service. (Ed. Code, § 44955, subd. (d)(1).) Complainant employed skipping to achieve a proper list of employees to receive layoff notices.

The board determined that due to the need of the District to retain those individual teachers in the specific courses or courses of study identified below due to their specialized training and experience related to those courses which more senior employees do not possess, the Superintendent and/or his designee is authorized to deviate from terminating those certificated employees in order of seniority in instances where they are currently assigned to teach those courses and will be assigned to teach those courses again for the next school year and more senior employees do not possess the same specialized training and experience related to the course:

- a. Teachers holding a BCLAD and teaching Spanish Immersion Classes;
- b. Instructors in the Elementary Reading Program who hold specialized reading certification;
- c. Special Education Program; or
- d. Teachers holding an American Montessori Society Certificate or American Montessori International Certificate and teaching Davis Montessori Program classes.

16. Bumping describes the process by which the district identifies those employees who are more senior and who are competent to perform a particular kind of service or teach a particular subject. Complainant employed bumping to achieve a proper list of employees to receive layoff notices.

17. Seniority is the relationship between the teachers within a school district. Among the teachers credentialed to provide a given service, greater seniority in the district gives a greater legal entitlement to a position. Seniority is defined as the date upon which an employee first rendered paid services in a probationary position. (Ed. Code, § 44845.)

Associate Superintendent Kevin French testified that a seniority list of all certificated employees is maintained. Employees verify the information and the seniority list is updated annually for accuracy. He stated that no certificated employee was retained in lieu of a more senior employee qualified to render that service.

Layoff/Skipping/Bumping at the Elementary School Level

18. At the elementary school level, the governing board determined it was necessary to reduce 36.0 FTE Elementary Classroom Teaching positions, 4.0 FTE Spanish Immersion Teaching positions, and 1.0 FTE Montessori Teaching position for a total of 41 FTE. (Factual Finding 13.) The district implemented the reduction by first looking at the seniority chart and identifying which employees held relevant credentials. The district skipped those employees who were currently assigned to teach specific courses that meet a specific need and require specialized training and experience. (Factual Finding 15.) Tie-breaking procedures were implemented as necessary between those employees who first rendered paid service on the same date. Bumping was employed to ensure that the more senior teachers who were certificated and competent to render this particular kind of service, were retained over those with less seniority.

19. To reduce 1.0 FTE Elementary/Montessori instruction, the teacher with the least seniority received a layoff notice. A temporary employee received this notice. The remaining Elementary teachers currently assigned and qualified to teach in Montessori classrooms were skipped pursuant to the resolution.

20. To reduce 4.0 FTE Elementary/Spanish Immersion instruction, teachers with the least seniority received layoff notices. One position was held by a probationary teacher whom the district chose not to re-elect. The next three Spanish Immersion teachers had seniority dates of August 27, 2007 or later: Elizabeth Castro, Jose Bermudez, and Lara Erica. These employees were the proper recipients of layoff notices.

21. To reduce 36.0 FTE Elementary instruction, the remaining Elementary teachers not subject to skipping with seniority dates of August 25, 2006 or earlier were retained. Those teachers with a seniority date after August 25, 2006, properly received layoff notices. Three elementary teachers first rendered paid service to the district on August 25, 2006. Eva Dopico-Serantes and Mele Echiburu hold a multiple subject credential and a

BCLAD in Spanish. Mayra Ramos holds a multiple subject credential and a BCLAD. After the district applied the tie-breaking criteria, all three received three points. The district broke the continuing tie using their social security numbers (SSN's). Ms. Dopico-Serantes had the highest number and was deemed to have the most seniority, followed by Mr. Echiburu, and last by Ms. Ramos. As such, Mr. Echiburu and Ms. Ramos received layoff notices. Ms. Dopico-Serantes received a precautionary notice.

Layoff/Skipping/Bumping at the Secondary School Level

22. The governing board determined it was necessary to reduce 28.0 FTE Secondary (Grades 7-12) Departmentalized Instruction positions. (Factual Finding 13.) The District implemented the reduction in secondary school teachers by first looking at the seniority chart and identifying which employees held relevant credentials. Tie-breaking procedures were implemented as necessary between those employees who first rendered paid service on the same date. Bumping was employed to ensure that the more senior teachers, certificated and competent to render this particular kind of service, were retained over those with less seniority.

23. At the secondary level, the district eliminated 5.0 FTE in English, 4.0 FTE in Mathematics, 3.0 FTE in Physical Education, 3.0 FTE in Social Science, 3.0 FTE in Spanish, 2.0 FTE in Life/Biological Science, 2.0 FTE in Health, 1.0 FTE Art, 1.0 FTE Industrial Technology, 1.0 FTE Physical Science, 1.0 FTE Computer Technology, 0.6 FTE Fashion/Textiles, 0.6 FTE Food Science, 0.4 FTE Home Economics, 0.4 FTE Agriculture Instruction, and 0.2 FTE Wood Shop.

24. The district reduced 3.0 FTE of Social Science instruction by noticing two temporary employees (1.2 FTE) and the three least senior Social Science instructors (1.8 FTE).

- a. Blair Howard has a seniority date of August 25, 2008. He currently teaches Social Science (0.4 FTE) and Science (0.1 FTE) at King High School. He received a layoff notice for 0.4 FTE Social Science.

Tie-breaking was employed as to the four Social Science secondary teachers who share a seniority date of August 27, 2007. Ian Stevenson and Tyler Millsap each received six points and were not noticed for Social Science instruction layoff. Caitlin Butler and Kristin Swanstrom each received four points, and using their SSN's to break the continuing tie, Ms. Butler was deemed more senior. Ms. Swanstrom received a notice for 1.0 FTE Social Science instruction and Ms. Butler received a notice for 0.4 FTE Social Science instruction.

25. The district reduced 2.0 FTE in Health instruction by noticing four employees. Bumping was employed.

- a. Dianna Henrickson bumped Blair Howard for 0.1 FTE of Health instruction. Ms. Henrickson has a seniority date of January 28, 2003. She teaches Health and science (0.8 FTE) at Holmes Junior High. She holds a single subject life science/health credential, a certificate of staff development, and an EL authorization.
- b. Mr. Howard has a seniority date of August 25, 2008. He teaches Social Science and Science (0.5 FTE) at King High School. He holds a single subject social science credential, foundational level General Science, and an EL authorization. Ms. Henrickson is more senior and is qualified to bump Mr. Howard in 0.1 FTE of Social Science instruction.

26. Mr. Howard testified at hearing. He contends that he is uniquely credentialed to teach multiple subjects within his core curriculum at Martin Luther King Alternative High School. His class instruction includes United States History and Food Science/Economics. Mr. Howard's credentials qualify him to teach a broad range of Science and Social Science subjects at the secondary level. However, he has the least seniority of similarly qualified credentialed employees. As such, he properly received a notice of layoff for the 2010-2011 school year.

Layoff/Skipping/Bumping of Educational Services

27. The district eliminated particular kinds of Educational Services including Secondary Counseling (7.0 FTE), Physical Education Specialist (1.0 FTE), Gate Coordinator (0.6 FTE), EL Coordinator (0.4 FTE). Bumping was employed to ensure that the more senior teachers, certificated and competent to render this particular kind of service, were retained over those with less seniority. Respondents in these positions, identified by the district, were the proper recipients of layoff notices.

Layoff/Skipping/Bumping of Administrative Services

28. The district eliminated particular kinds of Administrative Services including Flap Grant Manager (1.0 FTE), Adult School Principal (0.5 FTE), Continuation High School Principal (0.5 FTE), and Co-Director of Special Education (0.25 FTE). Bumping was employed to ensure that the more senior teachers, who are certificated and competent to render this particular kind of service, were retained over those with less seniority. Respondents in these positions, identified by the district, were the proper recipients of layoff notices.

Issues Related to Seniority Dates

29. Philip Raymond has a seniority date of August 27, 2007. He was employed for the 2006-2007 and the 2007-2008 school years as a temporary employee. The district employs temporary employees to fill in for permanent employees who are on leave of absence. This ensures that when a permanent employee returns from leave, a position will be available. A temporary employee does not accrue seniority. During the 2007-2008 school year, Mr. Raymond was converted from a temporary to a probationary employee. The district “tacked him back” for a period of one year giving him an August 2007 seniority date.

30. Kelly Carlson has a seniority date of August 27, 2007. She was employed with the district previously but there was a break in her service. Ms. Carlson was employed again with the district as a temporary employee for the 2006-2007 school year. She was converted to a permanent employee for the 2007-2008 school year giving her an August 2007 seniority date.

Education Code section 44848 states that “when any certificated employee shall have resigned or been dismissed for cause 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... or rendered paid service... after his reemployment.”

31. Any other assertions put forth by respondents at the hearing and not addressed above are found to be without merit and are rejected.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists pursuant to Education Code sections 44949 and 44955. All notices and jurisdictional prerequisites required by those sections were satisfied.

2. The services the district seeks to eliminate in this matter, as set forth in Layoff Resolution 32-10, are the particular kinds of service that may 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 the board’s discretion. Pursuant to Education Code sections 44949 and 44955, legal cause exists for the district to reduce or discontinue the particular kinds of services set forth in the layoff resolution. The reduction or discontinuance of these identified particular kinds of services relates solely to the welfare of the district and its pupils.

3. No certificated employee with less seniority than any respondent is being retained to render a service that any respondent is certificated and competent to render. Legal cause exists pursuant to Education Code sections 44949 and 44955 to give respondents final notice that their services will not be required for 2010-2011 school year.

RECOMMENDATION

1. The Davis Joint Unified School District's action to reduce or eliminate the particular kinds of services identified in Layoff Resolution 32-10, for the 2010-2011 school year is AFFIRMED.

2. The Accusation against respondents is SUSTAINED. The Davis Joint Unified School District may give final notices to respondents that their services will not be required for the 2010-2011 school year. Notices shall be given in inverse order of seniority.

DATED: April 30, 2010

DIAN M. VORTERS
Administrative Law Judge
Office of Administrative Hearings

APPENDIX A**2010 Davis Joint Unified School District – List of Respondents**

	Last Name	First Name	Procedural Status
1	ALEXICH	CONSTANCE	
2	ALMEIDA	THEREZA	
3	ANDERSON	LAURA	
4	ANGELO	LYNN	
5	ARADHYA	LAKSHIMI	
6	AVILA-TUTTLE	GABRIELA	
7	BERMUDEZ	JOSE	
8	BERNADAC	CHRISTINA	
9	BIEWER-ELSTOB	LINDA	
10	BUTLER	TRISHA	
11	CARIDI	ANN	
12	CARLSON	KELLY	
13	CRUZ	ANA	
14	DAUGHERTY	WILLIAM	
15	DOPICO-SERANTES	EVA	
16	FINGERMAN	LEONARD	
17	GINN	LAUREEN	
18	GUENTHER	LUISA	
19	HANSEN	JOSH	
20	HERRERA	ALICIA	
21	HOWARD	BLAIR	represented himself at hearing
22	LARA	ERICA	
23	MEADE-LEE	SHANNON	
24	MITCHELL	J	
25	MOY	JENNIFER	
26	PALOW	SALLY	
27	PARKS	CARMEN	
28	RAMOS	MAYRA	
29	RAYMOND	PHILIP	
30	RIDGEWAY	KELLY	
31	RUNDLE	MARIE	
32	SATER	ELIZABETH	
33	SHORT	HEATHER	
34	STEWART	CAROL	
35	SUREDA	MAITE	
36	SWANSTROM	KRISTIN	
37	WALTHER	BONNIE	
38	WEIR	KRISTINE	