

BEFORE THE
GOVERNING BOARD
PASO ROBLES JOINT UNIFIED SCHOOL DISTRICT
COUNTY OF SAN LUIS OBISPO
STATE OF CALIFORNIA

In the Matter of the Layoffs Of:

Dolores Alexander and Other
Certificated Employees of the
Paso Robles Joint Unified School District,

Respondents.

Case No. L2010031401

PROPOSED DECISION

Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, heard this matter on May 5, 2010, in Paso Robles, California.¹

Roman J. Muñoz, Attorney at Law, represented Greig Welch (Welch), Assistant Superintendent, Personnel, Paso Robles Joint Unified School District (District).

John F. Sachs, Attorney at Law, represented Respondents Dolores Alexander, Sylvia Armendariz, Jennifer Bedrosian, Emily Boele, Audra Carr, Maribel Chavez, Kathryn Dale (Dale), Tanya Degnan, Jennifer DiBenedetto, Dena Donovan, Richard Griffin, Jennifer Hansen, Melissa Hernandez-Cornejo, Jillian Johnson, Thanh Kirby (Kirby), Caramé Kroener, Tina Lessi (Lessi), Stephanie Lowe (Lowe), Michelle Magie (Magie), Brenda Matthyse, Cynthia McGuffin, Debra McPherson, Ann Michelic, Michael Moore, Carrie Morgan, Rose Patch, Eric Poppen, Sarah Rhyne, Xelina Rojas, Allison Root, Cynthia Schroeder, Keppi Serpa (Serpa), Carol Sheehan (Sheehan), Bill Spencer, Carrie Spiegel, Robert Springer, Kathleen Stefanek, Lisa Tibbetts, Karen Turner, Melissa Wills, and Sharon Wookey (Respondents).

Sarah Carter (Carter), Maria Cedillo (Cedillo), and Kirk Weller (Weller) represented themselves.

The District has decided to reduce or discontinue certain educational services and has given Respondents and other certificated employees of the District notice of its intent not to reemploy them for the 2010-2011 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2010-2011 school year.

¹ The hearing in this matter was continued from its previously-scheduled date, April 5, 2010, and the deadlines set forth in Education Code sections 44949, subdivision (c), and 44955, subdivision (c), have been extended in accordance with Education Code section 44949, subdivision (e).

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument. The District and Respondents filed initial argument on May 10, 2010, and their submissions have been marked as Exhibits 16 and A, respectively. The District filed a reply on May 11, 2010, which has been marked for identification as Exhibit 17. The matter was submitted for decision on May 11, 2010.

FACTUAL FINDINGS

1. Assistant Superintendent Welch filed the Accusation in his official capacity.

2. Respondents, and Carter, Cedillo, Michael Delibar (Delibar), Emma Marziello (Marziello), Monica Pafumi (Pafumi), Todd Olivera (Olivera), and Weller, are certificated employees of the District.

3. a. On March 2, 2010, the Governing Board of the District (Governing Board) adopted Resolution number 10-18, reducing or discontinuing the following services for the 2010-2011 school year:

<u>Service</u>	<u>FTE² Positions</u>
Elementary K-5	24.50
Secondary 6-12	20.55
Administrative	2.00
Categorical	<u>7.06</u>
Total	54.11

b. On March 9 2010, the Governing Board adopted Resolution number 10-22, further reducing Elementary K-5 teaching services by one FTE position and Secondary 6-12 teaching services by two FTE positions for the 2010-2011 school year.

c. On March 23, 2010, the Governing Board adopted Resolution number 10-23, further describing services reduced or discontinued for the 2010-2011 school year in Resolution numbers 10-18 and 10-22, as follows:

<u>Service</u>	<u>FTE Positions</u>
Grades K-5 Teaching Services	22.00
Grades K-5 Counseling Services	1.00
Grades K-5 Music Teaching Services	2.25
Grades K-5 Special Education Teaching Services	3.00

² Full-time equivalent position.

Grades K-5 Categorical Intervention Teaching Services	6.18
Grades K-8 Library Services	2.00
Grades 6-8 Special Education Teaching Services	4.00
Grades 6-12 Music Teaching Services	1.50
Grades 6-12 PE Teaching Services	2.80
Grades 6-12 Social Studies Teaching Services	1.00
Grades 6-12 Art Teaching Services	1.40
Grades 9-12 Visual and Performing Arts Teaching Services	.80
Grades 9-12 Science Teaching Services	.49
Grades 6-12 Math Teaching Services	2.00
Grades 6-12 English Teaching Services	7.00
Grades 6-12 Foreign Language Teaching Services	.25
Grades 6-12 Special Education Teaching Services	4.00
Grades 6-12 Counseling Services	4.00
Grades 10-12 ROP Teaching Services	.88
Grades 7-12 Alternative Education Teaching Services	4.00
Administrative Services	<u>2.00</u>
Total ³	72.55

4. Before March 15, 2009, the District provided notice to Respondents, Carter, Cedillo, Delibar, Marziello, Pafumi, Olivera, and Weller that their services will not be required for the 2010-2011 school year due to the reduction of particular kinds of services.

5. Assistant Superintendent Welch notified the Governing Board that he had recommended that notice be provided to Respondents, Carter, Cedillo, Delibar, Marziello, Pafumi, Olivera, and Weller that their services will not be required for the 2010-2011 school year due to the reduction of particular kinds of services.

6. Respondents, Carter, Cedillo, Delibar, Marziello, Pafumi, Olivera, and Weller requested a hearing to determine if there is cause for not reemploying them for the 2010-2011 school year. All hearing requests were timely filed.

7. On or about April 14, 2010, the District issued the Accusation, the Notice of Hearing, and other required documents, and served them on Respondents' counsel, who had agreed to accept service on behalf of District Respondents, certificated employees who are members of the California Teachers Association (CTA). Respondents' counsel thereafter filed a timely Notice of Defense on behalf his clients.

³ The difference between this total and the sum of the FTE positions in paragraphs 3.a. and 3.b. appear to be the number of temporary employees employed in categorically-funded programs not retained by the District for the 2010-2011 school year.

8. All prehearing jurisdictional requirements have been met with respect to the Respondents, Carter, Cedillo, and Weller.

9. a. The District did not establish that it served the Accusation packet on individual respondents who are not CTA members or represented by Respondents' counsel, namely, Carter, Cedillo, Delibar, Marziello, Pafumi, Olivera, and Weller.

b. Respondent Cedillo appeared at the hearing, apparently because she had heard about it from an unidentified source. During a break in the hearing, District Administrative Assistant Kathy Boyd (Boyd) contacted the other six individuals by phone. Respondents Carter and Weller agreed to appear at the hearing. As reported by Boyd, Delibar agreed to come to the hearing, Marziello did not want to participate in the hearing, and Olivera was unable to attend because of another commitment. Marziello, Pafumi, and Olivera did not appear at the hearing. Delibar did not enter an appearance, although Respondent Sheehan stated that he had been in the hearing for an undetermined period.

10. The services set forth in factual finding number 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.

11. The Governing Board took action to reduce the services set forth in factual finding number 3 primarily because of anticipated declines in State funding. The decision to reduce or discontinue the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

12. The reduction or discontinuance of services set forth in factual finding number 3, in the context of the significant anticipated decline in revenue, is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

13. a. On March 2, 2010, the Governing Board adopted Resolution No. 10-17, setting forth the criteria to determine seniority among employees who first rendered paid service in a probationary position on the same date (tie-breaking criteria). The specific criteria was listed, not necessarily in order of importance as: credentialing; certificates (BCLAD [Bilingual Crosscultural, Language, and Academic Development]/CLAD [Crosscultural, Language, and Academic Development]/Bilingual Credential Needs); experience; training; special education needs; competence; evaluations; NCLB Highly-Qualified status; Attachment B commitment and progress⁴; and extracurricular activities. No testimony was provided regarding the relative importance of the criteria for the 2010-2011 school year, and no point system was employed to

⁴ This refers to commitment and progress toward attaining certification to teach English language learners.

rank individuals.

b. One of the tie-breaking criteria was “competence,” which was defined as “academic training and one year of successful full-time experience in the specialized area in [the District] in the last five years.” (Exhibit 6.)

c. The criteria are reasonable as they relate to the skills and qualifications of certificated employees.

d. The District did not need to apply the criteria to determine the order of termination of any Respondent.

14. a. Resolution 10-18 contained the following pertinent language: “[B]E IT FURTHER RESOLVED that it will be necessary to retain the services of certificated employees, regardless of seniority, who possess qualifications and competencies needed in projected educational programs for the 2010-2011 school year which are not possessed by more senior employees thereby subject to layoff”

b. The District has a significant number of students who are not proficient in the English language, and the District retained several employees who possess certificates that allow them to teach these English learners. Respondent Dale, who has a seniority date of August 25, 2004, is senior to retained employees Peter Pernell (August 23, 2006) and Celia Moses (September 13, 2004), and shares the same seniority date with two other retained employees, Megan Esquivel and Cynthia Aguirre. Respondent Schroeder, who has a seniority date of August 19, 2005, is senior to Peter Pernell. Respondents Dale and Schroeder and the retained employees hold multiple subject credentials. Respondents hold CLAD certificates. However, unlike Respondents Dale and Schroeder, the retained employees are currently teaching English language learners and, in addition to this experience, have special training as evidenced by their respective BCLAD certificates that enable them to meet the District’s special need for bilingual education instruction.

15. a. The Governing Board has voted to eliminate its elementary school counseling program, although Assistant Superintendent Welch expressed the hope of finding funds to reinstate the program. If the funding is available, the District hopes to retain Respondent Serpa to continue performing the duties of the position. He deems the position to be very different than those of middle or high school counselors, and Respondent Serpa has been performing her work with distinction.

b. Respondent Serpa eloquently testified at the hearing about the bond she has developed with her students, some of whom have been with her for more than one year. She has set up her room in a unique way to connect with the students, and has an assortment of toys and props to assist her. Respondent Serpa is licensed as a Marriage and Family Therapist, and has also worked with older clients. She credibly testified that the counseling needs of elementary

school students are very different than those of older students.

c. Respondent Lessi has been working as a high school counselor for 12 years. One of her first assignments was providing counseling services to teen mothers. She has provided counseling to special education students. She has also provided crisis intervention and other personal and family counseling. Her workload is increasingly composed of academic counseling, and she has not worked as a counselor in elementary school.

d. Respondents Lessi and Serpa hold pupil personnel service credentials, which enable them to provide services at all grade levels. Respondent Lessi has more seniority than Respondent Serpa, having first rendered paid service in a probationary capacity on December 10, 1997, as contrasted with Respondent Serpa's September 18, 2000 date.

16. a. Weller started working for the District on August 28, 2006, and holds a single subject (Music) credential. He teaches Music at Paso Robles High School, and directs several school bands, including the marching band and the jazz ensemble. Weller testified that the District seeks to reduce his services to part-time employment.

b. Weller was listed as a temporary employee on the seniority list, and was referred to as a temporary employee in the resolution pertaining to the non-reelection of temporary employees. Weller testified that he has signed only one employment contract, when first hired, and that he was classified as a temporary employee because he did not possess a CLAD. Weller has performed the same assignment on a full-time basis since he was hired. Weller further testified that an unidentified site administrator told him he was undergoing the evaluation process as a permanent employee during the 2009-2010 school year. Except for the documents referred to in this paragraph, no documents or testimony were introduced to contradict Weller's testimony.

17. Respondent Magie has a seniority date of August 22, 2007, and holds multiple subject and single subject (Music) credentials. She teaches Music in elementary school, and has not taught the subject in the higher grades. Respondent Kirby has a seniority date of August 20, 2008, holds a single subject (Music) credential, and has a CLAD certificate. He teaches Music and is band director for students in grades Fifth through Eighth. Both are certificated to teach the classes that Weller was retained to teach on a part-time basis, but neither Respondent has taught high school Music in order to meet the District's competency criteria. Also, as set forth below, Weller is more senior than Respondents Kirby and Magie.

18. Respondent Lowe has a seniority date of January 16, 2001. She holds single subject (Social Sciences) and Library Media credentials. She has worked as a librarian for the past nine years, often providing classroom instruction as part of her assignment. Respondent Lowe testified that she was certificated to teach Social Science classes that four unidentified junior teachers were retained to teach. However, she has not taught a Social Science class in the District to meet the competency criteria in the area.

19. No certificated employee junior to any Respondent, Carter, Cedillo, or Weller was retained to render a service which any of these individuals is certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955, by reason of factual finding numbers 1 through 8.

2. The services listed in factual finding number 3 are particular kinds of services within the meaning of section Education Code section 44955, by reason of factual finding numbers 3 and 10.

3. Cause exists under Education Code sections 44949 and 44955 for the District to reduce or discontinue the particular kinds of services set forth in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 8, and 10 through 19.

4. Cause does not exist to terminate the services of Delibar, Marziello, Pafumi, or Olivera because the District did not serve the Accusation or the Notice of Hearing on them. Education Code section 44949, subdivision (c), requires that reduction in force proceedings be conducted pursuant to the formal hearing procedures of the Administrative Procedure Act, Government Code section 11500 et seq. Government Code section 11505 requires service of the pertinent documents and provides that “[n]o order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared.” Inasmuch as no notice was provided to Delibar, Marziello, Pafumi, or Olivera, and they did not otherwise appear, no action may be taken against them.

5. Districts are permitted to disregard seniority, and “skip” junior employees, in accordance with Education Code section 44955, subdivision (d), which provides, in pertinent part: “Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons: (1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course of study or to provide those services, which others with more seniority do not possess. . . .” In this case, as set forth in factual finding number 14, the District established that it has a specific need for bilingual teaching services, that it retained employees junior to Respondents Dale and Schroeder to perform the services, and that the retained employees possess special training and experience qualifications to perform the

services which the respondents do not possess.

6. Education Code section 44955, subdivision (b), provides, in pertinent part: “[t]he 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.” (Emphasis added.) “Certificated” is defined by the provisions of the Education Code pertaining to credentials, but “competent” is not specifically defined. In *Forker v. Board of Trustees* (1994) 160 Cal.App.3d 13, 19, the Court defined the term in a reemployment proceeding under Education Code section 44956, in terms of the teachers’ skills and qualifications, specifically, as “relating to special qualifications for a vacant position, rather than relating to the on-the-job performance of the laid-off permanent employee.” In doing so, the Court noted that courts in reduction in force cases, namely *Brough v. Governing Board* (1981) 118 Cal.App.3d 702, 714-15, and *Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, 654-55, had interpreted the term in a similar manner.

Courts in analogous layoff and reemployment contexts, construing provisions similar to Education Code section 44955, have recognized that school districts have discretion to establish rules to define teacher competency. Thus, after reviewing earlier cases, the Court in *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 565 (*Duax*), wrote: “Hence, from these authorities we conclude that a board’s definition of competency is reasonable when it considers the skills and qualifications of the teacher threatened with layoff.” (See also: *Martin v. Kentfield School District* (1983) 35 Cal.3d 294, 299-300; *Forker v. Board of Trustees*, *supra*.)

In *Duax*, the governing board had established a standard of competency that required one year of full-time teaching in the subject area within the last ten years. The Court found such standard “clearly related to skills and qualifications to teach” and therefore a reasonable one. (*Duax*, *supra*, 196 Cal. App.3d 555, at p. 567.) The Court also concluded that the standard did not define competency too narrowly. Consistent with the foregoing authorities, the District’s competency rule relates to the skills and qualifications of its certificated employees, and may be used by the District in implementing the layoffs. In fact, its requirement that teachers have training and one year in the past five of teaching experience in the subject matter in question is a rule similar to the one upheld in *Duax*.

Application of the competency rule impacts Respondents Kirby, Magie, Lessi, and Lowe, who do not meet the experience requirement and may not displace more junior certificated employees, as set forth in factual finding numbers 13, 15, 16, 17, and 18.

7. The Education Code permits certificated employees to be classified in one of four ways: permanent, probationary, substitute, or temporary. (*Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, 916 (*Kavanaugh*).) A certificated employee is classified as permanent, i.e., acquires tenure, if, after having been employed for two complete successive school years in a position requiring certification qualifications, he or she is reelected

for the following year. (§ 44929.21, subd. (b); *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1278-1279 (*Bakersfield*).) Probationary employees are “those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees.” (§ 44915.) “[S]ection 44915 has been understood to make probationary status the default classification for certificated employees who are not otherwise required by the Code to be classified as permanent, substitute, or temporary employees. [Citations].” (*Bakersfield, supra*, 145 Cal.App.4th at p. 1281.) Substitutes are “those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service. . . .” (§ 44917.) Temporary employees are those requiring certification qualifications, other than substitute employees, who are employed for limited assignments, as defined in the Code, such as in sections 44918, 44919, 44920, and 44921. (*California Teachers Association v. Vallejo City Unified School District* (2007) 149 Cal.App.4th 135, 146 (*Vallejo*).)

Employment as a substitute or other temporary status may become employment in a probationary capacity in some circumstances. “A year of employment as a temporary teacher may, in some cases, be treated as a year of probationary service for purposes of attaining permanent status if the employee is rehired for the following year ‘as a probationary employee in a position requiring certification qualifications’ (§ 44909); ‘in a position requiring certification qualifications’ (§ 44917); ‘as a probationary employee’ (§ 44918); or ‘in a vacant position requiring certification qualifications’ (§ 44920). . . .” (*Bakersfield, supra*, 145 Cal.App.4th at p. 1279, fn 11.)

Section 44918, subdivision (a), provides: “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.”

In Weller’s case, he asserts that he was told by his site administrator that he was undergoing the evaluation process as a permanent employee. Although no documentation was presented to support, or for that matter to contradict, Weller’s assertion, no negative inference was drawn from Weller’s failure to provide documentation supportive of his testimony, since he was just informed about the hearing a short period before he appeared. In any event, it is unnecessary to resolve whether he is a permanent employee, as it is clear that he is at least a probationary employee.

Weller was told that he was a temporary employee because he lacked CLAD certification. However, as the courts in *Bakersfield* and *Vallejo* held, employees may not be classified as temporary employees merely because of the nature of their credential. Moreover, even if initially employed as a temporary employee, Weller worked an entire year and was

thereafter retained in a position requiring certification qualifications, entitling him to probationary classification as a matter of law on an additional basis.

The seniority date of a certificated employee is defined as the date the employee “first rendered paid service in a probationary capacity.” (§ 44845.) If a certificated employee is misclassified as a temporary teacher, or if the date on which the employee first rendered paid service in a probationary capacity is otherwise incorrect, the employee’s seniority date may need to be adjusted to reflect the earlier first date of probationary service. (*Bakersfield, supra*, 145 Cal.App.4th at p. 1273.) Weller’s correct seniority date is August 26, 2006, because he started working in a position requiring certification and he was retained as a probationary employee for the 2007-2008 school year. However, even with this seniority date, there is no junior employee performing an assignment that Weller is certificated and competent to render.

8. Cause exists to terminate the services of Respondents Dolores Alexander, Sylvia Armendariz, Jennifer Bedrosian, Emily Boele, Audra Carr, Maribel Chavez, Dale, Tanya Degnan, Jennifer DiBenedetto, Dena Donovan, Richard Griffin, Jennifer Hansen, Melissa Hernandez-Cornejo, Jillian Johnson, Kirby, Caramé Kroener, Lessi, Lowe, Magie, Brenda Matthyse, Cynthia McGuffin, Debra McPherson, Ann Michelic, Michael Moore, Carrie Morgan, Rose Patch, Eric Poppen, Sarah Rhyne, Xelina Rojas, Allison Root, Cynthia Schroeder, Serpa, Sheehan, Bill Spencer, Carrie Spiegel, Robert Springer, Kathleen Stefanek, Lisa Tibbetts, Karen Turner, Melissa Wills, and Sharon Wookey, and Carter, Cedillo, and Weller, by reason of factual finding numbers 1 through 8, and 10 through 19, and legal conclusion numbers 1 through 7.

ORDER

1. The Accusation is sustained and the District may notify Respondents Dolores Alexander, Sylvia Armendariz, Jennifer Bedrosian, Emily Boele, Audra Carr, Maribel Chavez, Dale, Tanya Degnan, Jennifer DiBenedetto, Dena Donovan, Richard Griffin, Jennifer Hansen, Melissa Hernandez-Cornejo, Jillian Johnson, Kirby, Caramé Kroener, Lessi, Lowe, Magie, Brenda Matthyse, Cynthia McGuffin, Debra McPherson, Ann Michelic, Michael Moore, Carrie Morgan, Rose Patch, Eric Poppen, Sarah Rhyne, Xelina Rojas, Allison Root, Cynthia Schroeder, Serpa, Sheehan, Bill Spencer, Carrie Spiegel, Robert Springer, Kathleen Stefanek, Lisa Tibbetts, Karen Turner, Melissa Wills, and Sharon Wookey, and Carter, Cedillo, and Weller, and Carter, Cedillo, and Weller, that their services will not be needed during the 2010-2011 school year due to the reduction of particular kinds of services.

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2. The Accusation is dismissed against Delibar, Marziello, Pafumi, and Olivera.

DATED: _____

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings