

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

In the Matter of the Layoff/Accusation
Against:

OAH No. L2007030796

19 CERTIFICATED EMPLOYEES,

Respondents.

PROPOSED DECISION

This matter came on regularly for hearing before Roy W. Hewitt, Administrative Law Judge (ALJ), at Rialto, California on April 24, 2007.

Mark W. Thompson, Esq. of the Law Offices of Atkinson, Andelson, Loya, Ruud & Romo, represented the Rialto Unified School District (the district).

Glenn Rothner, Esq. of Rothner, Segall & Greensone, represented 18 of the 19 certificated employees affected by the proposed layoffs (respondents).

The remaining respondent of the 19 certificated employees affected by the proposed layoffs, Earl Anderson, elected to represent himself, but failed to appear at the hearing.

Oral and documentary evidence was received and the matter was submitted on April 24, 2007.

FACTUAL FINDINGS

1. Anna M. Rodriguez, Assistant Superintendent, Personnel Services, acting in her official capacity and in conformity with a delegation of authority from the district's Superintendent, caused all pleadings, notices and other documents to be timely filed and served upon respondents pursuant to the provisions of California Education Code sections 44949 and 44955.

2. All respondents affected by the layoffs received written notice, on or before March 15, 2007, notifying them that the Superintendent of the district had recommended they not be re-employed in the 2007-2008 school year.

3. All prehearing jurisdictional requirements have been met.

4. Each respondent was properly noticed of the date, time and place of the instant hearing. Any respondent who failed to appear at the instant hearing was properly noticed of the hearing.

5. Respondents are certificated employees of the district.

6. On February 28, 2007, Edna E. Davis-Herring, Superintendent (Superintendent), sent a confidential memorandum to the Board of Education of the District (the board) recommending a reduction in particular kinds of services (PKS) provided by the district for the 2007-2008 school year. (Exh. A.) The memorandum recommended a reduction in services equaling seven Full-Time Equivalent (FTE) positions. In the "RATIONALE" section of the memorandum the Superintendent states:

"The provisions of the Education Code require that such a Resolution be approved and written notice be provided to affected certificated employees prior to March 15. However, there are sufficient vacancies existing in the District to reemploy all affected employees such that no employees shall be terminated as a result of this reduction. (Exhibit A.)"

The Superintendent recommended the following services for elimination: Child Development Teacher on Special Assignment (1 FTE); Reading First Coaches (4 FTE); and Renaissance Learning Coaches (2 FTE). The Superintendent does not state the precise reason(s) for recommending the elimination of these services.

7. On February 28, 2007, the board adopted Resolution No. 06-07-52 calling for the elimination of seven FTE positions, as recommended by the Superintendent. In the February 28, 2007 Resolution, the board does not state the specific reason(s) for the need to reduce the seven FTE positions. In pertinent part, the board states:

"WHEREAS, the Board of Education of the Rialto Unified School District has determined that the particular kinds of services set forth herein must be reduced or discontinued; and

WHEREAS, it is the opinion of the Board that because of the aforementioned reason¹, it is in the best interest of the District that the

¹ Notwithstanding this language, no "aforementioned reason" was given by the board.

number of regular certificated employees of the District must be reduced; and

WHEREAS, this Board does not desire to reduce the service of regular certificated employees based upon reduction of average daily attendance during the past two years. (Exhibit A.)”

The Superintendent’s memorandum and the board resolution, considered together, fail to reveal a reason for the proposed reduction. In fact, the portion of the board resolution that states that the “ Board does not desire to reduce the service of regular certificated employees based upon reduction of average daily attendance during the past two years” indicates that the proposed termination of seven regular certificated employees was not based on a reduction in average daily attendance.

8. On March 14, 2007, the Superintendent sent a confidential memorandum to the board recommending that the board approve “an Amended Resolution authorizing the reduction and/or deletion of particular kinds of services and a corresponding reduction of certificated staff in accordance with Education Code sections 44949 and 44955.” (Exh. 1.) The memorandum recommends the reduction of 77 FTE positions but it does not state a specific reason for the recommendation. In the “RATIONALE” section, the Superintendent states:

“The provisions of the Education Code require that such a Resolution be approved and written notice be provided to affected certificated employees prior to March 15. The District will consider retirements, nonreelections, and other attrition and give notice only to those employees who, according to seniority and Board-determined criteria are appropriate for layoff. (Exhibit 1.)”

That same date, March 14, 2007, the Superintendent provided the board with another confidential memorandum recommending to the board that, “as a result of the Board’s determination to reduce or discontinue particular kinds of services, the appropriate employees as determined by seniority and Board-determined criteria according to statute be given notice that their services will not be required for the ensuing 2007-08 school year. . .” (Exh. 2.)

Other than “as a result of the Board’s determination to reduce or discontinue particular kinds of services” there is no stated justification for the recommended reduction in services of 77 FTE positions.

9. On March 14, 2007, the board adopted “AMENDED RESOLUTION NO. 06-07-57.” (Exh. 3.) Amended Resolution number 06-07-57 provides, in pertinent part:

“WHEREAS, The Board of Education of the Rialto Unified School District has determined that the particular kinds of services set forth herein must be reduced or discontinued; and

WHEREAS, it is the opinion of the Board that because of the aforementioned reason², in the best interest of the District, the corresponding number of regular certificated employees of the District must be reduced; and

WHEREAS, this Board does not desire to reduce the services of regular certificated employees based upon reduction of average daily attendance during the past two years.

WHEREAS, this Board has determined that due to a significant population of English Language learners with specialized educational needs, a specific and compelling need exists to employ and retain certificated employees who have authorization to teach English Learner ("EL") students, as determined by the California Commission on Teacher Credentialing, and the special training and experience that comes therewith; and

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

WHEREAS, State law mandates that each failure to staff a classroom containing one or more EL students with a certificated employee possessing an appropriate EL authorization is a "misassignment" subject to sanction by the California Commission on Teacher Credentialing; and

WHEREAS, compliance with the provisions of the No Child Left Behind Act and the Williams Settlement require that EL students be served by certificated employees with appropriate EL authorizations; and

WHEREAS, the needs of the District and the students thereof should not and cannot be adequately served by concentrating EL students in particular classrooms in such a manner as to lessen the need for certificated employees with EL authorizations.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Rialto Unified School District as follows:

A. That the particular kinds of services set forth below be reduced or eliminated commencing in the 2007-2008 school year.

² Again, as with the original resolution, no "aforementioned reason" was given by the board.

* * *

D. That the reduction of certificated staff be achieved by termination, in seniority order, of only those certificated employees who do not possess EL authorization in one of the following approved forms:

* * *

E. That 'competency' as described in Education Code section 44955(b) for the purposes of bumping shall necessarily include possession of a valid credential in the relevant subject matter area and EL authorization as described above.

* * *

H. That this AMENDED RESOLUTION shall replace and supplant Resolution No. 06-07-53, adopted by this Board on February 28, 2007. (Exhibit 3)"

10. Pursuant to Amended Resolution No. 06-07-57, the following "particular kinds of services" were slated for reduction or elimination commencing in the 2007-2008 school year:

Child Development Teachers on Special Assignment	1 FTE
Reading First Coaches	4 FTE
Renaissance Learning Coaches	2 FTE
SDC Teachers	2 FTE
RSP Teachers	4 FTE
BTSA Support Teachers, Non-EL Authorized	1 FTE
Reading First Coaches, Non-EL Authorized	2 FTE
Elementary Classroom Teachers, Non-EL Authorized	4 FTE
RSP Teachers, Non-EL Authorized	4 FTE
Secondary (6 th Grade) Teachers, Non-EL Authorized	1 FTE
Secondary Art Teachers, Non-EL Authorized	1 FTE
Secondary Science Teachers, Non-EL Authorized	3 FTE
Secondary Business Teachers, Non-EL Authorized	1 FTE
Secondary English Teachers, Non-EL Authorized	6 FTE
Secondary Industrial Arts Teachers, Non-EL Authorized	1 FTE
Secondary Math Teachers, Non-EL Authorized	7 FTE
Secondary Music Teachers, Non-EL Authorized	3 FTE
Secondary ROTC Teachers, Non-EL Authorized	4 FTE
Secondary Social Science Teachers, Non-EL Authorized	8 FTE
Secondary Spanish Teachers, Non-EL Authorized	1 FTE

Secondary Study Skills Teachers, Non-EL Authorized	2 FTE
Special Education Teachers, Non-EL Authorized	15 FTE
TOTAL CERTIFICATED POSITIONS	77 FTE

11. On March 14, 2007, the Superintendent designated Assistant Superintendent Rodriguez as her designee to act on the Superintendent's behalf for purposes of these "certificated Layoff proceedings." (Exh. 4.) Pursuant to this delegation of authority, Ms. Rodriguez recommended to the board that teachers without EL Authorization be noticed of the instant proceedings as required by Education Code sections 44955 and 44949.

Ms. Rodriguez testified that she recommended retaining teachers with EL Authorization because approximately 30 per cent of the district's students are Spanish speaking, English Language Learners³; therefore, to meet the EL needs of such students, all of the district's teachers must be EL Authorized. Ms. Rodriguez testified that due to the settlement in the *Williams, et al. v. State of California, et al.* case and the resulting legislation, enacted in July 2005⁴, if a classroom has only a single EL student, the teacher must be EL Authorized. Consequently, all teachers must be EL Authorized in order to be competent to teach any subject in the district; otherwise, the district cannot remain in compliance with the legislative mandate(s) that it meet the needs of EL students. As a result, on March 15, 2007, 47 certificated teachers identified as not being EL Authorized were notified that their services would not be required for the 2007-2008 school year. (Exh. 6.)

12. Of the 47 certificated teachers/employees who were noticed of termination, 21 timely filed notices of defense and requests for hearing. The district subsequently dismissed the accusation against two of the 21 teachers leaving 19 who were noticed of the instant hearing. Then, during the instant hearing, the district dismissed the accusation against Jessica Wales. The accusation against Ms. Wales and the two other certificated employees was dismissed because they now have EL Authorization. Consequently, only 18 certificated, non-EL Authorized, employees remain subject to the instant proceedings.

13. A review of the records pertaining to the district's compliance with the mandated EL requirements established that during the January 2006 through March 2007 time-frame, the district was in compliance with the "Williams Settlement Legislation" EL requirements. Additionally, during this time-frame approximately 14 teachers who were not EL Authorized obtained their EL Authorizations.

14. Twelve of the 18 teachers impacted by the instant proceedings testified about their teaching qualifications and their lack of awareness that failure to obtain EL Authorizations would result in their potential layoffs. In pertinent part, their testimony was as follows:

³ "English Language Learners" refers to students who have English as a second language.

⁴ Primarily embodied in Education Code section 44258.9. (See Exh. C.)

A. Rosemary Antillon testified that she has been teaching Freshman Seminar Study Skills for the district since 1999. When she was hired, EL Authorization was not required by the district. Although she did not recall the district encouraging teachers to obtain EL Authorization, she is, nonetheless in the process of obtaining her EL Authorization. She is currently enrolled in the second of four classes required to obtain EL Authorization and expects to obtain her EL Authorization by the middle of May, 2007.

B. Timothy Bacon testified that he has been teaching Science in the district since 1993. When he was hired, EL Authorization was not required by the district. Mr. Bacon admitted that the district has made several attempts over the years to encourage teachers to become EL Authorized. Last year, he signed a written commitment with the district to become EL Authorized. Mr. Bacon is working on obtaining his EL Authorization and reported that he is currently working under an emergency EL Authorization that does not expire until November 2007. He completed working on his EL Authorization on April 20, 2007 and is "awaiting approval." Mr. Bacon did not recall the district establishing any "deadline" for obtaining a non-emergency EL Authorization.

C. Thomas Benedict testified that he has been teaching History in the district for the past 27 years. When he was hired there was "no such thing as an EL language learner." Mr. Benedict acknowledged that the district has encouraged teachers to obtain their EL Authorizations and that he had been warned by the district that he needed to obtain an EL Authorization by June 30, 2007. Currently, he has an emergency EL Authorization and is in the process of obtaining his regular EL Authorization.

D. Theodore Caruthers III testified that he has been teaching Elementary School (fourth grade) for the past two and one-half years. When he was hired, EL Authorizations were not required. Mr. Caruthers has been on emergency leave since January 2007. When he received his "layoff notice in April 2007" indicating that he was subject to layoff because he did not have an EL Authorization, he enrolled in the necessary classes and is diligently pursuing an EL Authorization at the University of San Diego. He currently has an emergency EL Authorization, which is due to expire in June 2007, and expects to receive his regular EL Authorization in the middle of July 2007.

E. Wayne Harris testified that he has taught seventh grade Mathematics in the district for the past 17 years. When he was hired there were "no EL Authorizations." Mr. Harris acknowledged receiving "more than one letter" from the district over the years encouraging teachers to obtain EL Authorizations. (See Exhs. 14, 15, and 16.) The most recent letter from the district, dated January 18, 2007 stated, in pertinent part: "You are presently performing your EL teaching duties under the authority of an Emergency CLAD Certificate. You must be eligible for the CLAD Certificate (or AB2913) by June 30, 2007." (Exh. D.) Mr. Harris' Emergency EL Authorization is not due to expire until November 2007. He has completed the AB2913 Training and is waiting for the EL Authorization paperwork to be processed.

F. Kenyo Macias testified that he currently teaches high school Spanish in the district. Mr. Macias was born in Mexico City and came to the United States when he was 17 years old. English is his second language and he believes he is competent to teach Spanish to EL learners. Nonetheless, he has completed the coursework necessary to get his EL Authorization and is waiting for the transcripts from the University of San Diego. Currently he holds an emergency EL Authorization that is due to expire in June 2007.

G. Ralph Mahoney testified that he has been with the district for the past 28 years coaching athletics and teaching U.S. History. Last year Mr. Mahoney was an Athletic Director and did not believe he would need an EL Authorization. However, during the 2006-2007 school year he taught U.S. History and was told that he needed to obtain an EL Authorization. Mr. Mahoney obtained an Emergency EL Authorization that is effective until November 2007 and he is in the process of completing the final class necessary to obtain a Non-Emergency EL Authorization.

H. Victoria Meister testified that this academic year was her first year with the district. She teaches a Special Education class and was told to obtain EL Authorization within her first year with the district. Ms. Meister has completed her coursework for EL Authorization and is merely awaiting her transcripts.

I. Theresa Pulaski testified that this academic year was her first with the district. She is a Special Day teacher and has completed the coursework to obtain her EL Authorization, she is merely waiting for her "paperwork."

J. Steven Rodriguez testified that he has been teaching Music in the district for the past seven years. There was no "EL requirement" when he was hired. Mr. Rodriguez admitted that since 1999, the district has advised him on an annual basis to obtain his EL Authorization; however, the district never warned him that lack of EL Authorization could result in loss of his job. Mr. Rodriguez has completed the coursework necessary to obtain EL Authorization and is awaiting transcripts.

K. Arnold L. Smith testified that he has been with the district for 13 years. Currently, Mr. Smith teaches Special Education and has an emergency EL Authorization. Prior to receiving his "layoff notice," Mr. Smith had been told by district personnel that he needed to obtain his EL Authorization by commencement of the next school year (2007-2008).

L. Janice Williams testified that she was hired by the district on September 11, 2006 as a Reading First Coach. She was not told that she would need an EL Authorization at the time she was hired, however, she is currently enrolled in the necessary classes and plans to obtain EL Authorization by the middle of May 2007.

15. Teachers with emergency EL Authorizations qualify to teach EL students and emergency EL Authorizations may be renewed for a second one-year period. Historically, such renewals have been readily granted.

LEGAL CONCLUSIONS

1. Jurisdiction for the instant proceedings exists pursuant to Education Code sections 44949 and 44955, and all notices and other requirements of those sections have been provided, as required.

2. Seventeen of the 22 services listed in Factual Finding 10 are not PKS within the meaning of Education Code section 44955. Those 17 "services" are identified with the "Non-EL Authorized" label. For example, "Secondary Spanish Teachers, Non-EL Authorized" is not a PKS within the meaning of Education Code section 44955. The PKS is "Secondary Spanish Teachers." "Non-EL Authorized" refers to a factor based on the needs of the district and pupils. It is improper to combine a factor such as "Non-EL Authorized" and a PKS to create a hybrid PKS such as "Secondary Spanish Teachers, Non-EL Authorized." Although the district in the present instance put a novel spin on the PKS concept, the district's position does not pass muster. In essence, the district identified the positions being taught by Non-EL Authorized teachers and then created new "PKS" that would result in the layoff of all teachers in the district without EL Authorization. This resulted in an improper use of the layoff procedures embodied in Education Code sections 44949 and 44955 resulting in the retention of more junior teachers while senior teachers were subjected to "layoff" due to their lack of EL Authorizations.

The identical situation was addressed by the Court of Appeal in *Alexander et al. v. Board of Trustees of the Delano Joint Union High School District* (1983) 139 Cal.App.3d 567. In *Alexander*, the school district reduced the number of its teachers by using the layoff procedures embodied in Education Code section 44955 to eliminate teachers who lacked Spanish speaking skills. Rather than creating hybrid categories of "PKS" as done here, the Delano district used Spanish speaking abilities as bases for "bumping" and "skipping." Junior teachers with Spanish speaking skills were allowed to "bump" more senior teachers who lacked Spanish speaking skills and junior teachers with Spanish speaking skills were "skipped" and more senior teachers without such skills were slated for layoff. In *Alexander* the Court of Appeal concluded that the district's actions violated Education Code section 44955. The court noted that Education Code section 44955 provides that seniority determines the order of dismissals of permanent school district employees, and that as between employees with the same first date of paid service, the order of termination may be based on the needs of the district and its students. However, for teachers having different employment seniority dates, the needs of the district and its students is not a proper measure of priority. The court held that already employed teachers who were hired as monolingual teachers and who were otherwise competent could not be discharged merely because more junior teachers possessed bilingual skills and met the district's current bilingual program needs. (*Id.* at 572-575.) The same is true in the present instance.

3. The following five services listed in Finding 10 are PKS within the meaning of Education Code section 44955: Child Development Teachers on Special Assignment;

Reading First Coaches; Renaissance Learning Coaches; SDC Teachers and RSP Teachers. These PKS total 13 FTE positions; however, the facts, considered in their entirety, fail to reveal whether these 13 FTE positions, standing alone, require layoffs. For example, on February 28, 2007, when the board initially adopted Resolution No. 06-07-52, no layoffs were anticipated as a result of the elimination of three of these same PKS (Child Development Teacher on Special Assignment, Reading First Coaches and Renaissance Learning Coaches) totaling 7 FTE. (Findings 6 and 7.) The subsequent "Amended" Resolution, adopted by the board on March 14, 2007, a mere two weeks after adoption of the original Resolution, called for the reduction of 77 FTE. It became apparent during the hearing that the resulting recommendation of teachers to be eliminated was based on the district's desire to ensure that all teachers remaining in the district were EL Authorized. Having concluded that layoff proceedings represent an inappropriate vehicle for achieving that goal, it is unclear whether the necessity of reducing the number of teachers for any other reason still exists. Consequently, the accusation shall be dismissed in its entirety.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The Accusation is dismissed as to all respondents and the district may not notify respondents that their services will not be needed during the 2007-2008 school year.

DATED: May 4, 2007



ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings