

BEFORE THE  
GOVERNING BOARD  
OF THE  
NUVIEW UNION SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Lester Bernard, Alberto Camarena, Elizabeth Everett, Russ Firestone, Ellen Gordon-Ross, Mary Hambly, Lesli Houston, Esther Jones, James Kelton, Rita Koski, Blanca Martinez, Holly Newton, Marla Niffen, Sandra Otero, Mary Riley, and Jermaine Williams,

Respondents.

OAH No. 2008020580

**PROPOSED DECISION**

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Nuevo, California on April 24, 2008.

Mark W. Thompson, Atkinson, Andelson, Loya, Ruud & Romo, Attorneys at Law, represented the Nuview Union School District.

Jesús E. Quiñonez, Holguin, Garfield & Martinez, represented respondents Lester Bernard, Marcy Boatman, Alberto Camarena, Penny Casey, Elizabeth Everett, Russ Firestone, Ellen Gordon-Ross, Linda Guss, Mary Hambly, Lesli Houston, Esther Jones, James Kelton, Blanca Martinez, Holly Newton, Marla Niffen, Mary Riley, Sarah Schaeffer, and Jermaine Williams.

No appearance was made by or on behalf of respondents Rita Koski and Sandra Otero.

The matter was submitted on April 24, 2008.

## FACTUAL FINDINGS

1. Joe Koski, Assistant Superintendent, Educational Services of the Nuview Union School District, made and filed the accusation dated March 12, 2008, in his official capacity as the designee of Dr. Jay N. Hoffman, Superintendent of the District.

2. Respondents<sup>1</sup> are certificated District employees.

3. On March 11, 2008, in accordance with Education Code sections 44949 and 44955, the Superintendent notified the Board of Education of the Nuview Union School District in writing of his recommendation to reduce or discontinue particular kinds of services for the upcoming school year. The Superintendent stated the reasons for the recommendation.

4. On March 11, 2008, the Board adopted Resolution No. 031108A, determining that it would be necessary to reduce or discontinue particular kinds of services at the end of the current school year. The Board determined that the particular kinds of services that must be reduced for the 2008-2009 school year were the following full time equivalent (FTE) positions:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
Teacher on Special Assignment (TOSA) - ELD	1 FTE
TOSA - Reading/Physical Education	1 FTE
TOSA - Child Welfare and Attendance/Discipline	1 FTE
TOSA - Literacy Coach	2 FTE
TOSA - Language Coach	1 FTE
Physical Education Teacher	1 FTE
Middle School Social Studies Teacher	1 FTE
Middle School Math/Science Teacher	1 FTE
Elementary Teacher	5 FTE

The proposed reductions totaled 14 full-time equivalent (FTE) positions.

5. The Board further determined that it would be necessary to retain certificated employees who possess special training and competency that other certificated employees with more seniority might not possess, to wit: teachers 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.

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<sup>1</sup> The accusation named 22 certificated personnel as respondents, 20 of whom filed requests for hearing; the other two, Krista Brown and Meghan Joseph, though timely served with the accusation and with the notice described below in Factual Finding 7, did not file requests for a hearing and thus did not become parties to this proceeding. At the hearing, the District dismissed respondents Marcy Boatman, Penny Casey, Linda Guss, and Sarah Schaeffer. All collective references to "respondents" in this Proposed Decision encompass the remaining 16 respondents, who are named in the caption.



6. The Board directed the Superintendent or his designee to determine which employees' services would not be required for the 2008-2009 school year as a result of the reduction of the foregoing particular kinds of services. The Board further directed the Superintendent or his designee to send appropriate notices to all certificated employees of the District who would be laid off as a result of the reduction of these particular kinds of services.

7. On or before March 15, 2008, the District timely served on respondents a written notice that the Assistant Superintendent had recommended that their services would not be required for the upcoming school year. The notice set forth the reasons for the recommendation. The notice advised respondents of their right to a hearing, that each respondent had to deliver a request for a hearing in writing to the Superintendent by the date specified in the notice, a date which in each case was more than seven days after the notice was served, and that the failure to request a hearing would constitute a waiver of the right to a hearing. At the same time, the District timely served the accusation on respondents.

The recommendation that respondents be terminated from employment was not related to their competency as teachers.

8. Respondents timely filed written requests for hearing to determine if there was cause for not reemploying them for the upcoming school year. Respondents timely filed notices of defense. All pre-hearing jurisdictional requirements were met.

9. The services the Board addressed in the Resolution were "particular kinds of services" that could 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 discretion. No particular kinds of services were lowered to levels less than those levels mandated by state or federal law.

10. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

11. The Board considered attrition, resignations, and retirements in determining the actual number of necessary layoff notices to be delivered to its employees. No evidence was presented that any known attrition was not considered.

12. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.



### *Precautionary Layoff Notices*

13. Though Resolution No. 031108A provided for the reduction of 14 FTE positions, the District served layoff notices on 22 certificated employees. Eleven of these 22 employees were properly served with “precautionary” layoff notices, because the District did not know in advance to what extent the skipping and bumping directives prescribed in the Resolution would be challenged and, if challenged, would be upheld in this proceeding. In the event that the District’s layoff decisions were for any reason not upheld in their entirety, so that its proposed layoff of certain certificated staff could not be effectuated, the District would, by virtue of having sent additional layoff notices on a precautionary basis, still be in a position to lay off additional certificated employees, so as to keep in balance its (proposed reduced) budget for the upcoming school year.

### *Bumping Issues*

14. The Resolution defined “competency,” for purposes of bumping, to “necessarily include possession of a valid credential in the relevant subject matter area, an appropriate EL authorization (if required by the position), and at least one (1) year of experience in the position or assignment within the last three (3) years.” Respondents have challenged the second and third of these three criteria.

a. The Board’s requirement that certificated staff have “appropriate EL authorization” in order to bump a less senior colleague drew a distinction between: (i) Staff who presently possess a formal EL authorization; and (2) those who do not possess formal authorization, but who instead possess an “emergency” authorization, are presently in the process of acquiring formal authorization, and/or have experience teaching English learners. Included in the latter category are respondents James Kelton, Mary Riley, Mary Hambly, and Leslie Houston. The Board’s decision to grant bumping rights only to individuals with formal EL authorization, and the District’s application of that criterion to deny bumping rights to Mr. Kelton, Ms. Riley, Ms. Hambly, and Ms. Houston, was neither arbitrary nor capricious, and constituted a proper exercise of its discretion.<sup>2</sup>

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<sup>2</sup> In early January 2008, these four respondents, and every other District teacher who did not yet possess formal EL authorization, received a letter from the District, which stated, “Effective immediately, all credentialed teachers needing an EL authorization will be required to apply for an Emergency CLAD certificate by January 31, 2008.” The letter also stated, “It is expected that you will obtain certification by August 15, 2008.” The letter was written before the District became aware of the State’s fiscal crisis, announced publicly by the Governor later that month, and the resulting proposed severe across-the-board public school (and other) spending cuts that precipitated the District’s decision to institute this layoff proceeding. Similarly, District staff told at least one respondent, Ms. Riley, at a time not specified in the record, that she would not be fired on the basis that she did not yet possess formal EL authorization. There is no evidence, however, that any such representations were made at the time or in the context of the present budget crisis or a possible economic layoff. Under the circumstances, neither the matters stated in the January 2008 letter nor any representations that were made to respondents can be found to constitute a guarantee that at no future time and under no future circumstances — including specifically an unanticipated state budget crisis — could the District identify EL authorization as one of the criteria on which the right to bump less senior staff would be based.



b. The Board's requirement that certificated staff have "at least one (1) year of experience in the position or assignment within the last three (3) years"<sup>3</sup> in order to bump a less senior colleague drew a distinction between: (i) individuals with recent experience in a formal assignment; and (ii) those with experience that was more remote in time and/or did not occur in the context of a formal assignment to the position in question. Included in the latter category is respondent Ellen Gordon-Ross, a long-time District employee presently teaching middle-school science and math, who during the period from 2002 to 2004 performed, in addition to her teaching duties, a wide range of counseling services as an intern in the process of earning a (pupil personnel services or "PPS") counseling credential, and who was awarded that credential in December 2005. The Board's decision to grant bumping rights only to individuals with at least one year of experience within the last three years, and the District's application of that criterion to deny bumping rights to Ms. Gordon-Ross, was neither arbitrary nor capricious, and constituted a proper exercise of its discretion.<sup>4</sup>

#### *Seniority Issue*

15. Alberto Camarena has been a District fifth grade teacher since 2006. He signed his employment contract on August 21, 2006. The contract provides that "your services . . . will begin August 22, 2006." He was required to and did report to his school site on August 21, 2006, received his keys and did some preparatory work. Students were not present in school on that day. Mr. Camarena was paid for his work on August 21. All other teachers also worked that day.

The District introduced employment contracts of several other teachers whose seniority date was determined to be August 21, 2006. In those instances, however, and in contrast to Mr. Camarena's case, the contractual starting date was explicitly stated to be August 21.

Mr. Camarena's seniority date was August 21, 2006.<sup>5</sup>

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<sup>3</sup> Respondents cited *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 567 in support of their contention that "a one year in three" recency requirement is a too narrow and an improper definition of competency. However, the suggestion in *Duax* that one year of experience in "the last two or three" is too narrow a definition of competency: (a) was at most implied dictum; and (b) cannot properly be extracted from the context, evidence and facts there in question and mechanically applied to the context, evidence and facts of the present proceeding. More important is the actual holding in *Duax* that a governing board is to "establish a standard of competency that relates to the skills and qualifications of the teacher." (*Ibid.*)

<sup>4</sup> The District also denied Ms. Gordon-Ross the right to bump into another *teaching* position, because she currently lacks formal EL authorization. EL authorization is not required with respect to a counselor assignment, and the denial to Ms. Gordon-Ross of an opportunity to bump into the counselor position was thus not based on her lack of formal EL authorization.

<sup>5</sup> However, Mr. Camarena is not in fact subject to lay off, since he is not included among the 11 certificated employees identified in Factual Finding 16 whom the District proposes to lay off, if, as is in fact the case, respondents' challenges to the District's actions are without merit.

### *Ultimate Factual Findings*

16. Of the 22 individuals who received layoff notices, the District proposes to lay off the following 11<sup>6</sup> individuals in order to accomplish the reduction of 14 FTE positions set forth in Resolution No. 031108A: Ellen Gordon-Ross, Mary Hambly, Lesli Houston, James Kelton, Rita Koski, Blanca Martinez, Marla Niffen, Sandra Otero, Mary Riley, Krista Brown, and Meghan Joseph. As noted above, the first nine are respondents in this proceeding; the latter two are not.

### LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. Cause exists under Education Code sections 44949 and 44955 for the District to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. A preponderance of the evidence sustained the charges set forth in the accusation. It is recommended that the Board give notice before May 15, 2008 to the nine respondents identified above in Factual Finding 16 that their services are no longer required by the District.

### ORDER

The accusations served on respondents Ellen Gordon-Ross, Mary Hambly, Lesli Houston, James Kelton, Rita Koski, Blanca Martinez, Marla Niffen, Sandra Otero, and Mary Riley are sustained. Notice shall be given to these respondents before May 15, 2008, that their services will not be required because of the reduction or discontinuation of particular services as indicated. Such notice shall also be given to certificated employees Krista Brown and Meghan Joseph, who were properly on the layoff list due to their failure to file hearing requests.

DATED: 4-29-08



DONALD P. COLE  
Administrative Law Judge  
Office of Administrative Hearings

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<sup>6</sup> The reduction of the last three FTE positions has been accomplished via attrition.