

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

In the Matter of the Reduction in Force of:

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE ESCALON
UNIFIED SCHOOL DISTRICT,

Respondents.

OAH No. 2010021028

PROPOSED DECISION

Catherine B. Frink, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Galt, California, on May 3, 2010.¹

David E. Robinett, Attorney at Law, of Atkinson, Andelson, Loya, Ruud & Romo, represented the Escalon Unified School District.

Ernest W. Tuttle, IV, Attorney at Law, represented the following individuals (represented respondents): Bruce Campbell; Shawn Dietzel; Martin Louro; Teresa Stavrianoudakis; and Neil Thomas.

Evidence was received, the hearing was closed, and the matter was submitted for decision on May 3, 2010.

FACTUAL FINDINGS

Jurisdiction

1. David M. Mantooth is the Superintendent of the Escalon Unified School District (District). The actions of Mr. Mantooth, and the actions of the Governing Board of the District (Board), were taken in their official capacities.

¹ This matter was originally set for hearing on April 30, 2010. The parties requested a continuance, which was granted. Under Education Code section 44949, subdivision (e), the deadline for issuing the Proposed Decision, and for action by the District's Governing Board, is extended by the length of the continuance. Consequently, the due date for the Proposed Decision to be delivered to the Board is May 10, 2010, and the date for final action by the Board is May 18, 2010.

2. On March 8, 2010, the Board adopted Resolution No. 10-10, which reduced and/or discontinued particular kinds of certificated services no later than the beginning of the 2010-2011 school year.

3. The Board further determined that it shall be necessary by reason of the reduction and/or discontinuance of services to decrease the number of permanent and/or probationary certificated employees at the close of the 2009-2010 school year by a corresponding number of full-time equivalent (FTE) positions, and directed the Superintendent or his designee to proceed accordingly by notifying the appropriate employees to implement the Board's determination.

4. On or before March 15, 2010, the District served 23 certificated employees, including respondents, with written notice, pursuant to Education Code sections 44949 and 44955, that their services would not be required for the next school year (Notice). Each Notice set forth the reasons for the recommendation. The Notice attached and incorporated by reference Resolution No. 10-10, which listed the services to be reduced or discontinued, resulting in a proposed reduction in the certificated staff by 20.74 FTE positions.

5. Requests for Hearing were timely filed by eight certificated employees to determine if there is cause for not reemploying them for the next school year. Any certificated employee who failed to file a request for hearing has waived his or her right to a hearing, and may be laid off by the District.

6. The Superintendent made and filed Accusations against each of the certificated employees who requested a hearing. The Accusations with required accompanying documents and blank Notices of Defense (Accusation packet) were timely served on the represented respondents, and on the following additional certificated employees: Sheri Irion; Alina James; and Matthew Loretelli. As set forth in Finding 10, the District rescinded the Notices to Ms. Irion, Ms. James, and Mr. Loretelli.

7. The represented respondents timely filed Notices of Defense.

8. Each respondent is presently a certificated permanent or probationary employee of the District.

9. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955.

Stipulation Re: Rescission of Layoff Notices

10. At the commencement of the hearing, the District rescinded or confirmed the rescission of Notices to the following employees, who shall be retained by the District for the 2010-2011 school year: Jenna Hobby; Debbie Parks; Sheri Irion; Leslie Mascitelli; Alejandra Herrera; Sandy Anderson; Alina James; Sandy Pendley; Monica Abrew; Melissa Stone; and Matthew Loretelli.

Services to be Reduced or Eliminated

11. The District provides educational services to approximately 2,900 students from kindergarten through the twelfth grade (K-12) at seven school sites. In addition to other funding cuts, the District has experienced a decline in student enrollment over the past five years, which has resulted in loss of revenue to the District. Consequently, the District is facing a budget deficit for the 2010-2011 school year. The salary and benefits of District employees account for more than 80 percent of the District's budget. To accomplish the necessary budget reduction, the District must reduce services for the next school year.

12. Resolution No. 10-10 called for the reduction or discontinuance of the following particular kinds of services for the 2010-2011 school year:

Service	FTE
Elementary Education, K-6	9.0
Counseling Services	3.0
Social Studies, Grades 7-12	1.4
English, Grades 7-12	1.0
Elementary Physical Education	1.0
Agriculture, Grades 9-12	1.0
Art, Grades 7-12	1.0
Independent Study, Grades 9-12	1.0
Administrator	1.0
Life Science, Grades 7-12	0.71
Math, Grades 7-12	0.63
Total	20.74

13. The above-described services are "particular kinds of services" that can be reduced or discontinued within the meaning of Education Code section 44955.

14. In arriving at the number of certificated employees to be noticed for layoff, the Board "considered all positively assured attrition, including all deaths, resignations, retirements, nonreelections, and other permanent vacancies, for the 2010-2011 school year and but for attrition already assured, the Governing Board would have found it necessary to reduce additional services." The Board concluded that, notwithstanding any vacancies

resulting in positively assured attrition, it would still be necessary to terminate certificated employees equal to 20.74 FTE certificated positions.

Bumping and Skipping

15. Economic layoffs are generally to be carried out on the basis of seniority. A teacher with more seniority typically has greater rights to retain employment than a junior teacher. A senior teacher whose position is discontinued has the right to a position held by a junior teacher if the senior teacher is otherwise properly credentialed and competent. That displacement of a junior teacher is known as “bumping.” In general, the District has an affirmative obligation to reassign senior teachers who are losing their positions into positions held by junior teachers if the senior teacher has both the credentials and competence to occupy such positions. The seniority rule is not absolute, and a junior teacher with a needed credential or skills may be retained even if a more senior teacher is terminated. Such “skipping” is recognized by statute (Ed. Code, § 44955, subd. (d)(1)), and appellate law (*Santa Clara Federation of Teachers, Local 2393 v. Governing Board of the Santa Clara Unified School District* (1981) 116 Cal.App.3d 831; *Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127). In order to depart from a seniority-based economic layoff, Education Code section 44955, subdivision (d)(1), requires the District to “demonstrate a specific need for personnel to teach a specific course or course of study... and that the certificated employee [to be skipped] has special training and experience necessary to teach that course or course of study...which others with more seniority do not possess.”

16. The District adopted competency criteria that teachers must satisfy in order to bump into a position held by another teacher. As set forth in Resolution No. 10-10, the competency criteria states:

That for purpose of this certificated layoff, a more senior employee is defined as “competent” for reassignment into a position currently held by a more junior employee pursuant to Education Code 44955(b), if the employee currently possesses:

- a. A “clear” or “preliminary” credential authorizing the subject and grade level(s) to which the employee will be assigned at the beginning of the 2010-2011 school year; and
- b. A currently valid and properly filed BCLAD, CLAD, EL, SDAIE, or other valid certificate authorizing instruction to English Language Learners; and
- c. “Highly qualified” status under the No Child Left Behind Act (NCLB) for the subject matter and grade level to which he/she will be assigned at the beginning of the 2010-2011 school year.

17. The District maintains a seniority list which contains pertinent information such as employees' date of first paid service, current assignment, and credentials on file. The District used the seniority list to develop a proposed layoff list. The District considered whether senior employees currently assigned in the various services being reduced or eliminated could bump more junior employees. In determining who would be laid off for each kind of service reduced or eliminated, the District first applied known vacancies and then applied in progressive sequence the seniority list in inverse order, from least to most senior. Employees with the same date of hire were laid off according to the needs of the District and its students.²

Probationary Status of Alejandra Herrera

18. Alejandra Herrera has a seniority date of August 10, 2005. District documents prepared for this layoff hearing listed Ms. Herrera as a permanent employee of the District. In fact, Ms. Herrera is a second year probationary employee. Ms. Herrera is the most senior second year probationary employee of the District. The District is not retaining Ms. Herrera while laying off a permanent employee who is certificated and competent to perform the duties of Ms. Herrera's position.

Application of Competency Criteria to Shawn Dietzel

19. Shawn Dietzel is a second year probationary employee with a seniority date of August 4, 2008. She holds a clear multiple subjects (MS) credential, and a supplemental authorization to teach English. She is not able to bump a less senior English teacher because her supplemental authorization does not meet the requirements for highly qualified status under NCLB. Therefore, she is not eligible for reassignment under the Board's competency criteria.

Skipping of Employees with English Language Learner Credentials and/or Application of Competency Criteria

20. The District has negotiated an agreement with the Escalon Unified Teachers Association (EUTA) addressing the need for certificated employees to have appropriate credentials or authorizations to provide instruction to English Learners (EL Agreement). The EL Agreement provides, in pertinent part:

1. Effective July 1, 2006, all teachers in the unit shall have or be in the process of obtaining a credential and/or certificate issued by the California Commission on Teacher Credentialing which authorizes the unit members to provide instruction to

² Resolution No. 10-10 contains a list of criteria to be used to determine the order of termination of certificated employees who first rendered paid service to the District in a probationary position on the same date (tiebreaking criteria). There were no disputes between the parties concerning the application of the tiebreaking criteria to certificated employees in this matter.

English Language Learners. All teachers without such a credential at the present time will be required to sign a Letter of Intent that states their intention to participate in training and/or coursework which would result in receiving such a credential. . .

2. Effective July 1, 2007, if a permanent teacher does not possess such a credential and/or certificate, his/her salary will be “frozen” at the salary he/she was paid at the beginning of the 2007-2008 year. The unit member will not be subject to any step or column increases and will not receive the benefit of any negotiated increase to the certificated salary schedule. . . .

3. Effective July 1, 2009, possession of the necessary credential and/or certificate to provide instruction to English Language Learners shall be a condition of employment, and if a permanent teacher still has not attained the necessary credential/certificate, the District may dismiss the unit member for cause pursuant to Education Code 44932.

4. As part of the negotiating process, the District will work with EUTA to include the 2% stipend currently provided to individuals with credentials authorizing them to provide instruction to English Language Learners as part of the overall salary schedule, including, if necessary, the development of a separate salary schedule for individuals for which CLAD certification is not required (e.g. counselors, language and speech therapists).

21. Approximately 19 percent of the District’s students are ELs. Information on the California Department of Education (CDE) website confirms that ELs “require English language development (ELD) and specially designed academic instruction in English (SDAIE). In addition, EL students whose parents have applied for and been granted a waiver require primary language instruction (L1). These three services (ELD, SDAIE, and L1) must be provided by teachers authorized for such instruction until these students are reclassified as English proficient. Through monitoring reviews, the CDE specifically monitors teachers assigned to core academic subjects such as courses required for graduation and promotion.” The CDE website further states, “The California EC [Education Code] requires individuals to hold the appropriate authorization prior to providing instruction services, including specified EL services.” In joint correspondence from the California Commission on Teacher Credentialing (CTC) and CDE, these state entities confirmed that, “There is no numerical trigger and no percentage of students needing particular English learner services that determines a misassignment. If one or more of the students in the class needs English learner services or requires instruction in a subject area, the teacher providing the English learner services must hold an appropriate English learner credential or authorization.”

22. Under “Frequently Asked Questions” (FAQs) on the CDE website, it states:

What is the timeline for certificated staff to attain EL Authorization?

Certification is required on the date when a teacher is assigned to provide instructional services to an EL student or sooner if it is required by the employer.

(Emphasis added.)

23. The District has supported its teachers in obtaining EL certifications. It has notified teachers of the various methods to obtain certification (through coursework, testing, or a combination of the two), and it has paid for training. As of the date of hearing, every certificated employee who needed EL certification had obtained the appropriate credential or certificate, except for three individuals. Two of them, Martin Louro and Neil Thomas, are respondents in this proceeding.

24. The District skipped all teachers with EL certifications, due to the fact that these individuals possess special credentials, training and experience that more senior certificated employees who were identified for layoff do not possess, and the District will have a need for these services in the 2010-2011 school year.

25. Martin Louro has a seniority date of August 7, 2006. He holds a clear single subject credential in history, and currently teaches civics and economics, as well as one period of AVID.³ Mr. Louro is subject to layoff as a result of the Board’s reduction of 1.4 FTE social studies (grades 7-12) positions. The District is retaining (skipping) Matthew Loretelli, who has a seniority date of August 12, 2009. Mr. Loretelli has a clear single subject credential in social science, and has an EL authorization, which Mr. Louro does not possess.

26. Mr. Louro testified at the administrative hearing. He was aware of the fact that the EL Agreement required him to have an EL certification, and that “it would be a criteria for the RIF [reduction in force, i.e. layoff] notices.” He knew his salary was subject to a “freeze” as of the 2007-2008 school year, and he assumed that it had in fact been frozen, although he never verified that fact. He understood that there were negative consequences to his decision not to obtain EL certification, but decided that other things were “more important” than money.

27. Starting in the fall of 2009, Mr. Louro received emails from the superintendent’s office regarding options for obtaining EL certification. He discussed the matter with his school principal, Joel Johannsen, who advised him that tests were offered on

³ AVID (Advancement Via Individual Determination) is a program to identify students who are not traditionally college-bound and provide support for them to succeed academically and apply to college.

December 5, 2009, and June 5, 2010. Based on these discussions, Mr. Louro “thought June was an option,” and believed he had until the end of the school year to obtain his EL certification. Mr. Louro did not take the December 2009 test, and thereafter decided to obtain his EL certification through coursework. He enrolled in a program through the University of Phoenix in late February or early March 2010. He has completed one of the four required courses, and is currently taking the second course. He believes he will complete the program prior to the start of the 2010-2011 school year.

28. In March 2010, Mr. Louro presented Mr. Mantooth with an application form for an emergency credential/EL authorization. Mr. Mantooth signed the form on March 15, 2010, because he “wanted to do what [he] could to help Mr. Louro.” However, Mr. Mantooth told Mr. Louro that obtaining an emergency authorization would not change the District’s position concerning his layoff, because he did not have an EL authorization as of the date that Notices were sent to employees. Mr. Louro attempted to submit the form to CTC, but was told that the District must submit the form on his behalf. In light of his discussion with Mr. Mantooth, Mr. Louro did not further pursue the emergency authorization.

29. Respondents contend that Mr. Louro should not be laid off by the District because he will have his EL certification prior to the start of the 2010-2011 school year, and the District could obtain an emergency EL authorization for him. These contentions are not persuasive. The District is not obligated to seek an emergency authorization for any employee, and there is no guarantee that CTC would have granted emergency authorization had the application been submitted. Mr. Louro had notice of the requirement that he obtain EL certification, and chose not to do so. While he is currently taking classes to obtain EL certification, whether he will eventually obtain EL certification is uncertain.

30. The District properly exercised its discretion by retaining junior employees with EL certifications, and by noticing Mr. Louro and Mr. Thomas⁴ for layoff.

Welfare of the District and Its Students

31. The Board’s decision to reduce or discontinue the particular kinds of services identified in Resolution No. 10-10 was not arbitrary or capricious, but constituted a proper exercise of discretion.

32. 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.

⁴ Mr. Thomas did not testify at the administrative hearing, and no specific contentions were raised concerning his layoff.

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

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. The anticipation of receiving less money from the state for the next school year is an appropriate basis for a reduction in services under Education Code section 44955. As stated in *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 638-639, the reduction of particular kinds of services on the basis of financial considerations is authorized under that section, and, “in fact, when adverse financial circumstances dictate a reduction in certificated staff, section 44955 is the only statutory authority available to school districts to effectuate that reduction.” The District must be solvent to provide educational services, and cost savings are necessary to resolve its financial crisis. The Board’s decisions were a proper exercise of its discretion.

3. The services identified in Resolution No. 10-10 are particular kinds of services that could be reduced or discontinued under section Education Code section 44955. Cause exists to reduce the number of certificated employees of the District due to the reduction or discontinuance of particular kinds of services. Cause for the reduction or discontinuance of services relates solely to the welfare of the District’s schools and pupils within the meaning of Education Code section 44949.

4. A District may reduce services within the meaning of section 44955, subdivision (b), “either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may ‘reduce services’ by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.” (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

5. As set forth in Finding 10, the District has rescinded the layoff notices to the following employees, who shall be retained by the District for the 2010-2011 school year: Jenna Hobby; Debbie Parks; Sheri Irion; Leslie Mascitelli; Alejandra Herrera; Sandy Anderson; Alina James; Sandy Pendley; Monica Abrew; Melissa Stone; and Matthew Loretelli.

6. As set forth in Finding 19, the District properly identified Shawn Dietzel as a certificated employee subject to layoff.

7. As set forth in Findings 20 through 30, the District properly identified Martin Louro and Neil Thomas as certificated employees subject to layoff.

8. No employee with less seniority than any named respondent is being retained to render a service which any named respondent is certificated and competent to render. Except as set forth in Legal Conclusion 5, the Board may give respondents final notice before May 15, 2010, that their services will not be required for the ensuing school year, 2010-2011.

ORDER

1. The District shall comply with Legal Conclusion 5.

2. Except as set forth in Legal Conclusion 5, the Accusations served on respondents are sustained. Notices of layoff shall be rescinded as to Jenna Hobby; Debbie Parks; Sheri Irion; Leslie Mascitelli; Alejandra Herrera; Sandy Anderson; Alina James; Sandy Pendley; Monica Abrew; Melissa Stone; and Matthew Loretelli. Notices shall be given to respondents Bruce Campbell, Shawn Dietzel, Martin Louro, Teresa Stavrianoudakis, and Neil Thomas, that their services will not be required for the 2010-2011 school year because of the reduction or discontinuation of particular kinds of services. Notice shall be given to respondents in inverse order of seniority.

Dated: _____

CATHERINE B. FRINK
Administrative Law Judge
Office of Administrative Hearings