

BEFORE THE  
GOVERNING BOARD  
OF THE  
LEMON GROVE SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Layoff/Accusation  
Against:

36 CERTIFICATED EMPLOYEES,

Respondents.

OAH No. 2009020877

**PROPOSED DECISION**

This matter came on regularly for hearing before Roy W. Hewitt, Administrative Law Judge, at Lemon Grove, California on April 3, 2009.

Anthony P. De Marco, Esq. of the Law Offices of Atkinson, Andelson, Loya, Ruud & Romo, represented the Lemon Grove School District (the district).

During the course of the hearing the district dismissed the accusation against respondent Hillary Anelli.

Respondents Kimberly Capriola-Juza, William Otfinoski, Melanie Scott, and Chris Walsh waived their rights to a hearing by failing to file a Notice of Defense and by failing to appear for the hearing. Although respondent Enrique Martinez failed to file a Notice of Defense he appeared at, and participated in, the hearing and the district orally waived any objections to his failure to file a Notice of Defense.

Of the 73 certificated employees served with Notices of "Recommendation Not to Reemploy Certificated Employee[s]," the following 36 certificated employees (respondents) filed Notices of Defense, or in the case of Enrique Martinez, were considered to have timely filed a Notice of Defense:

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|------------------------|-----------------------------|
| 1. Adams, Danielle     | 19. Moudry, Teresa          |
| 2. Alianelli, Kristin  | 20. Murillo, Edna [Pro Per] |
| 3. Andreen, Kevin      | 21. Noble, Steven           |
| 4. Anelli, Hillary     | 22. Owens, Melvetta         |
| 5. Bargaquast, Jessica | 23. Piligian, Cynthia       |
| 6. Bennett, Jennifer   | 24. Plank, Jennifer         |
| 7. Brinkley, Amber     | 25. Poulin, Irma            |

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|---------------------------------|---------------------------------|
| 8. Carter, Kathleen             | 26. Reed, Brenda                |
| 9. Chavarin, Pablo              | 27. Rhoades, Kristina [Pro Per] |
| 10. Davis, Ellen                | 28. Schen, Anna [Pro Per]       |
| 11. Farnsworth, Susan           | 29. Silverio, Michelle          |
| 12. Fripp, Michelle             | 30. Siordia-Johnson, Veronica   |
| 13. Johnson, Craig              | 31. Smith, Cynthia              |
| 14. Labor, Kellie               | 32. Snyder, Katherine           |
| 15. Lacsamana, Francisco        | 33. Stack, Trisha               |
| 16. Lefkowitz, Robyn [Pro Per]  | 34. Stathis, Esme               |
| 17. Martinez, Enrique [Pro Per] | 35. Walker, Erin                |
| 18. Mora-Sanchez, Angelica      | 36. Wasilewski, Robert          |

Jon Y. Vanderpool, Esq. of Tosdal, Smith, Steiner & Wax, represented 32 of the 36 respondents who either filed Notices of Defense or had their failure to file waived by the district. Four of the 36 respondents, Robyn Lefkowitz, Edna Murillo, Kristina Rhoades, and Anna Schen represented themselves.

Oral and documentary evidence was received and the matter was submitted on April 3, 2009.

#### FACTUAL FINDINGS

1. Sometime prior to February 24, 2009, the Superintendent of the district recommended, with regard to the ensuing school year, that the Governing Board of the district (the board) reduce or eliminate particular kinds of services (PKS) provided by the district for the 2009-2010 school year.

2. On February 24, 2009, the board adopted Resolution number 08-09-13, determining that it would be necessary to reduce or discontinue PKS at the end of the current school year. The board determined that the PKS that must be reduced for the 2009-2010 school year were the following full time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
Administrative Services	1
Psychologist	1
K-5 Program Reduction	33
6 <sup>th</sup> Grade Math/Science	2
Middle School Science	1
Extended Day Program-Coordinator	1
Extended Day Program-Lead Teacher	1
Categorical Support Teachers	5.50
Teachers on Special Assignment	4
Project Peace Coordinator	1
Social Worker-Family Support	2.20

Social Worker	2
Academic Counselor	1
Resource Specialist Program	1
Total FTE positions to be reduced or eliminated	56.70

The parties do not dispute the fact that the services listed above are PKS, which may be reduced or discontinued within the meaning of Education Code section 44955.

3. The district’s recommendation and the board’s decision to reduce or discontinue the services listed in Finding 2, above, were neither arbitrary nor capricious; rather, the recommendation and decision were due to “the financial constraints resulting from revenue being insufficient to maintain current levels of programs and necessary program changes resulting therefrom.” (Exh. 1.) Thus the board’s decision represents a proper exercise of its discretion.

4. The reduction and discontinuation of services 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 board.

5. The Superintendent designated the respondents, permanent or probationary teachers employed by the district, by creating a seniority list, first selecting teachers to be laid off in the inverse of the order in which they were employed, then assigning and reassigning employment in such a manner that all employees to be retained will be retained so as to render any service which their seniority and qualifications entitle them to render.

6. By February 30, 2009, all respondents affected by the layoffs received written notice notifying them that “pursuant to Education Code sections 44949 and 44955, the Governing Board has directed that notice be given to you that your services will not be required for the ensuing 2009-2010 school year.” (Exh. 2.) Along with the written layoff notices, respondents were also served with a copy of the Board’s resolution number 08-09-13, a list of the tie-breaking criteria, copies of Education Code sections 44949 and 44955, and a blank “Request for Hearing.” Additionally, the layoff notices advised respondents that they must file their requests for hearing with the district by March 17, 2009 and that “Failure to request a hearing on or before the date specified above will constitute a waiver or the chance to participate in a hearing, and to an advisory determination by an administrative law judge regarding your release.” (Exh. 2.)

7. On March 18, 2009, the Superintendent of the district made and filed an accusation in his official capacity. That same date, the accusation, a blank notice of defense, a notice of hearing and copies of Education Code sections 44949 and 44955 and Government Code sections 11500, 11505, 11506, 11507.5, 11507.6, 11507.7, 11509, and 11520 were served on respondents.

8. Thirty-five (35) respondents timely submitted their notices of defense requesting a hearing to determine if cause exists for not re-employing them for the ensuing

year. The objection to the failure of one respondent, Enrique Martinez, to timely file a Notice of Defense was waived by the district, consequently, the hearing focused on the 36 respondents whose names were listed in the introductory portion of this Proposed Decision.

9. Each respondent who requested a hearing and filed a Notice of Defense was properly noticed of the date, time and place of the instant hearing.

10. All prehearing jurisdictional requirements were met.

11. Respondents are certificated employees of the district.

12. As part of the overall reduction in PKS, the district is releasing its temporary certificated employees. As a general rule, the district releases all temporary certificated employees at the end of each school year and prior to releasing probationary or permanent certificated employees. District temporary certificated employees are employed pursuant to Education Code sections 24216.5, 44909, 44913, 44917, 44919, subdivisions (a),(b), and (c), 44920, and 44986.

In the present instance, all temporary certificated employees signed a written employment contract that specifically and unequivocally set forth the term of employment and stated, "Your employment as a Temporary Employee may be terminated at any time, with or without cause, at the discretion of the Board, and in any event shall cease at the end of the current school year." The employment contract also expressly informed the temporary certificated employees that, "As a Temporary Employee with the District, your services during this period will not qualify you for probationary status. If you are reemployed for the following school year in a position requiring certification qualifications, you may, subject to the provisions of the Education Code, be given retroactive credit for one year of probationary service." (Exh. 9.)

13. The parties stipulated that as to respondents Edna Murillo and Robyn Lefkowitz the district was not seeking complete elimination of their positions, but was only eliminating .20 FTE of respondent Murillo's position, thus reducing her position from .80 FTE to .60 FTE, and .40 FTE of respondent Lefkowitz' position, thus reducing her position from 1.0 FTE to .60 FTE.

14. During the course of the hearing, the parties stipulated that the seniority list should be modified to reflect certain changes in seniority dates. Specifically, Susan Farnsworth's seniority date was changed from 8/24/2005 to 10/11/2004 and Trisa Stack's seniority date was changed from 8/24/2005 to 10/27/2004. Those changes were made via interlineations on Exhibit 5 (the seniority list) and were used in these proceedings to make the final layoff recommendation.

15. The following individual concerns were raised during the hearing:

a. There would not be enough Resource Specialists left in the district to adequately cover the Resource Specialist Program case load;

b. The elimination of the school psychologist slated for layoff would result in the elimination of the only bilingual school psychologist, and result in a lack of necessary psychological services for the Latino population;

c. Certificated K-5 teachers who had taught in preschool programs were not credited with their preschool teaching in calculating their current seniority; and,

d. A teacher who was trained to teach the Read 180 program was skipped even though the Read 180 program is not listed in the “skipping criteria” list (Exh. 2).

In connection with these concerns, the uncontroverted testimony established the following:

a. The remaining Resource Specialists would be shifted around in the district and could adequately provide all of the necessary Resource Specialist Program services;

b. The lack of bilingual ability has not posed any problems for the one non-bilingual psychologist who testified at the hearing. The psychologist testified that most of the students are, themselves, bilingual and if any language problems are encountered a bilingual assistant helps the psychologist. While this may present problems concerning confidentiality and “best practice,” those issues are not the proper focus of the instant hearing. The testimony during the instant hearing established that adequate psychological services could be provided notwithstanding the 1 FTE reduction;

c. Education Code section 8360, et seq., establishes a separate program and seniority system for preschool teachers from that of K-5 teachers. Consequently, preschool teachers are not entitled to seniority credit for their preschool teaching when they become employed as K-5 teachers;

d. The “skipping criteria” as set forth in Exhibit 2, lists “Scope of Service” as criterion 13. The Read 180 program was properly considered as a “Scope of Service” and skipping on this basis was justified.

16. The services of no permanent employee are being terminated while any probationary employee, or any permanent employee with less seniority, is being retained to render services which such permanent employee is certificated and competent to render.

## 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. The services listed in Factual Finding 2 are PKS that can be reduced or discontinued under Education Code section 44955. The board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

3. Based on the Factual Findings, considered in their entirety, cause exists to reduce the number of certificated employees of the District by 56.7 FTE positions, due to the budget crisis described in Factual Finding 3.

4. Cause to reduce or discontinue services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

5. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

6. Respondents in their "Joint Amended Notice of Defense" assert that the certificated teachers who were working for the district under contracts of employment as temporary certificated employees should be classified as probationary employees. Respondents are incorrect. As set forth in Finding 12, the district hired its temporary certificated employees under contracts that unequivocally specify the terms and conditions of their temporary employment and which state in no uncertain terms that: "As a Temporary Employee with the District, your services during this period will not qualify you for probationary status." Consequently, the district's temporary certificated employees were properly classified.

7. As set forth in Finding 13, the district is not seeking complete elimination of Edna Murillo's and Robyn Lefkowitz' positions, but is only eliminating .20 FTE of respondent Murillo's position, thus reducing her position from .80 FTE to .60 FTE, and .40 of respondent Lefkowitz' position, thus reducing her position from 1.0 FTE to .60 FTE.

8. As set forth in the introductory portion of this proposed decision, the district dismissed the accusation against Hillary Anelli.

9. Based on the clarification set forth in Legal Conclusion 6, and the modification set forth in Legal Conclusion 7, above, cause exists to notify the remaining respondents that their services will not be needed during the 2009-2010 school year due to reduction or discontinuance of PKS.

## ADVISORY DETERMINATION

WHEREFORE, THE FOLLOWING ADVISORY DETERMINATION is hereby made:

1. The Accusation is sustained, in part. The district shall notify the following 33 respondents that their services will not be needed during the 2009-2010 school year due to lack of funds and the resulting need to reduce or discontinue PKS:

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|---------------------------------|---------------------------------|
| 1. Adams, Danielle              | 17. Moudry, Teresa              |
| 2. Alianelli, Kristin           | 18. Noble, Steven               |
| 3. Andreen, Kevin               | 19. Owens, Melvetta             |
| 4. Bargaquast, Jessica          | 20. Piligian, Cynthia           |
| 5. Bennett, Jennifer            | 21. Plank, Jennifer             |
| 6. Brinkley, Amber              | 22. Poulin, Irma                |
| 7. Carter, Kathleen             | 23. Reed, Brenda                |
| 8. Chavarin, Pablo              | 24. Rhoades, Kristina [Pro Per] |
| 9. Davis, Ellen                 | 25. Schen, Anna [Pro Per]       |
| 10. Farnsworth, Susan           | 26. Silverio, Michelle          |
| 11. Fripp, Michelle             | 27. Siordia-Johnson, Veronica   |
| 12. Johnson, Craig              | 28. Smith, Cynthia              |
| 13. Labor, Kellie               | 29. Snyder, Katherine           |
| 14. Lacsamana, Francisco        | 30. Stack, Trisha               |
| 15. Martinez, Enrique [Pro Per] | 31. Stathis, Esme               |
| 16. Mora-Sanchez, Angelica      | 32. Walker, Erin                |
|                                 | 33. Wasilewski, Robert          |

2. The district shall notify respondent Murillo, Edna that her position is being reduced from .80 FTE to .60 FTE.

3. The district shall notify respondent Lefkowitz, Robyn that her position is being reduced from 1 FTE to .60 FTE.

4. The Accusation is dismissed as to respondent Anelli, Hillary, and the district may not notify her that her services will not be needed during the 2009-2010 school year.

DATED: April \_\_\_\_, 2009

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ROY W. HEWITT  
Administrative Law Judge  
Office of Administrative Hearings