

BEFORE THE
GOVERNING BOARD OF THE
LOS ALAMITOS UNIFIED SCHOOL DISTRICT
COUNTY OF ORANGE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Sondra Bright and Other Certificated
Employees,

Respondents.

OAH Case No. 2009020905

PROPOSED DECISION

Amy C. Lahr, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 17, 2009, in Los Alamitos, California.

Margaret A. Chidester, Attorney at Law, represented Karen Lovelace (Lovelace), Assistant Superintendent, Human Resources and Instruction, Los Alamitos Unified School District (District).

Carlos R. Perez, Reich, Adell & Cvitan, represented Sondra Bright, Stephanie Byrne, Jamie Cathey, Maureen Charlesworth, Kristy Chia, Erica Chung, Noreen Curry, Gina M. Decker, Goldberg Erami, Shereen Francis, Amanda Frazier, Jeni Fukuda, Randi Galbraith, Victoria Gallagher, Marlea Gardea, Alwyn Greene, Lindsey Hamilton, Jeffrey Heeren, Kristina Hensel, Elizabeth Hepperd, Tricia Hinz-Smith, Jennifer Holland, Pinchas Honig, David Hubbard, Joel Jelinowics, Deja Johnson, Karen Joseph, Jessica Karam, Su Kim, Patricia Lee, Amanda Lenton, Andrea Long, Sylvia McCain, Denis McKee, Sarah Meylor, Sarah Myers, Patrick Murphy, Christine Nguyen, Darcy O'Brien, Tiffani Orozco, Jennifer Pagett, Wendy Perrizo, Jennifer Robinson, Scott Robinson, Kelly Rowe, Lisette Sanchez, April Schmietenknop, Maria Schrock, Andrea Sievers, Lisa Sragovicz, Nicole Staker, Kelsey Stolba, Kristina Strandquist, Colette Sullivan, Nga Ta, Amy Terrell, Laura Trotter, Nicole Walters, Leslie Weber, Michael Whitcomb, Kristin Whittaker, Carrie Winn, Joni Wuth, Karen Yoshihara-Ha (Respondents).

The District has decided to reduce or discontinue certain educational services and has given Respondents notice of its intent not to reemploy them for the 2009-2010 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2009-2010 school year.

At the hearing, the District withdrew the Accusation against Jacqueline Post.

Oral and documentary evidence was received at the hearing. The record was held open for the submission of written post-hearing briefs, which both parties submitted on April 22, 2009. The District's brief was marked for identification as Exhibit 9, and the Respondents' brief was marked for identification as Exhibit D. The matter was submitted for decision on April 22, 2009.

FACTUAL FINDINGS

1. Assistant Superintendent Lovelace filed the Accusation in her official capacity.
2. Respondents are employed by the District as permanent, probationary, or temporary certificated employees of the District.
3. On March 10, 2009, the Governing Board of the District (Governing Board) adopted Resolution number 2008/2009-10, reducing or discontinuing the following services for the 2009-2010 school year:

<u>Service</u>	<u>Full-Time-Equivalent Positions</u>
K-5 classroom teachers	45.0
6-8 Learning Specialists	2.0
Speech and Language Specialists	.6
6-12 Math classroom teachers	8.0
6-12 English classroom teachers	10.0
9-12 Spanish classroom teachers	4.6
9-12 Japanese classroom teacher	.4
6-12 Science classroom teachers	3.0
Laurel High School Principal	1.0
6-12 Social Science classroom teachers	4.0
9-12 Health classroom teacher	.8
K-5 music teacher	.25
6-12 instrumental music teacher	.6
K-12 teachers on special assignment	1.8
6-12 counselors	2.0
6-12 PE teacher	1.0
9-12 special education classroom teacher	1.0
School Readiness Nurse	1.0
Cotsen Mentor teachers	<u>3.0</u>
Total	90.05

4. Assistant Superintendent Lovelace thereafter notified the Governing Board that she recommended that notice be provided to Respondents that their services will not be required for the 2009-2010 school year due to the reduction or discontinuance of particular kinds of services.

5. During the period of March 11 to 13, 2009, Assistant Superintendent Lovelace provided notice to Respondents that their services will not be required for the 2009-2010 school year due to the reduction or discontinuance of particular kinds of services. The District provided the same notice to probationary and categorically funded employees.

6. On or about March 16, 2009, the District filed and served the Accusation and other required documents on Respondents.

7. Respondents timely requested hearings and filed notices of defense, to determine if there is cause for not reemploying them for the 2009-2010 school year.

8. All prehearing jurisdictional requirements have been met.

9. 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 44955.¹

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

11. The reduction of services set forth in factual finding number 3 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.

12. Resolution number 2008/2009-10, adopted at the Governing Board's meeting on March 10, 2009, set forth tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. Assistant Superintendent Lovelace applied the tiebreaker criteria to all employees who shared the same first date of paid service, regardless of their status, to assign an employees' rank number. Thereafter, Assistant Superintendent Lovelace accounted for whether the employee held permanent, probationary, or temporary status, and properly determined the layoff order. The District appropriately applied its tie-break criteria. The evidence did not establish that the criteria, or its application, were arbitrary or capricious, or in violation of the Education Code.

¹ All further references are to the Education Code.

13. The District established that no employee was classified as temporary because of their credentials, or lack thereof. In addition, the District demonstrated that all employees in categorically funded positions were afforded the same rights as probationary employees in this proceeding; i.e., they received proper notice and opportunity to be heard.

14. Patrick Murphy is a high school special education teacher, classified as a temporary employee, with a hire date of February 4, 2008, and a rank of number 465 in the layoff order. Mr. Murphy testified that at his job interview, a school official told him that temporary and probationary had the same meaning, with no additional explanation. He does not dispute that he signed a temporary contract; nor does he dispute his order in the layoff, as determined by his hire date.

15. Respondent Joni Wuth is a high school social science teacher, classified as a tenured employee, with a seniority date of September 6, 2005, and a rank of number 378 in the layoff order. The District served her with a preliminary notice, but later stated that it did not propose to lay her off. It did not formally withdraw the Accusation against Respondent Wuth, but it no longer seeks her layoff.

16. Respondents Marlea Gardea, Nga Ta and Patricia Lee are tenured employees, with seniority dates of September 5, 2006, August 7, 2006, and August 2, 2004, respectively. Respondents acknowledged that they were initially hired as temporary employees with the District. They testified that other employees who shared their first date of paid service were granted tenure status sooner; however, they did not state whether these other employees initially held temporary or probationary contracts. The evidence did not establish that the tenure of these Respondents was arbitrary or capricious, or in violation of the Education Code.

17. Respondents Sylvia McCain, Collette Sullivan, Maria Schrock and Amanda Frazier conceded their classification as temporary employees.

18. a. Respondent Noreen Curry is a first grade teacher, classified as a perennial probationary employee, with a seniority date of September 2, 1997, and a rank of number 196 in the layoff order. In her first year, Respondent Curry taught 100 percent of a full-time position. Thereafter, from 1998 through 2009, she taught 50 percent of the school year.

b. In 2000, and each year thereafter, the District issued a contract to Respondent Curry that indicated she was tenured. On March 11, 2009, when she received notice regarding this proceeding, Respondent Curry learned for the first time that she was not tenured, but rather classified as a perennial probationary employee. She disagreed with that status, claiming that she relied on the District's representation in 2000, and each year thereafter, that she was tenured. Respondent Curry stated that the District did not inform that she must work for two complete consecutive years, at least 75 percent of the school days in the first of the two years, in order to receive tenure. Had she known, Respondent Curry would have worked

full-time for an additional year in order to properly receive tenured status.

19. No certificated employee junior to any Respondent was retained to render a service which any Respondent is certificated and competent to render.

LEGAL CONCLUSIONS

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

2. The services listed in factual finding number 3 are determined to be particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 3 and 9.

3. Cause exists under 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 19.

4. Respondents contended that the District erred in classifying its categorically funded employees as temporary, rather than probationary. The District established that it properly classified its categorically funded employees; and that it provided the notice required by Sections 44949 and 44955, as described in factual finding numbers 5 and 13. (See *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2007) 145 Cal.App.4th 1260, 1285-87.)

5. 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 Dist.* (2003) 29 Cal.4th 911, 916.) 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 Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1278-1279.) 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.) 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 Education Code, such as in sections 44918, 44919, 44920, and 44921. (*California Teachers Assn. v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135, 146.)

Districts are required to provide employees with written notice of their classification when first hired. (§ 44916; *Kavanaugh, supra*, 29 Cal.4th at 911.) Section 44916 provides: “The classification [of a certificated employee] shall be made at the time of employment and thereafter in the month of July of each school year. At the time of initial employment during each academic year, each new certificated employee of the school district shall receive a written statement indicating his employment status and the salary that he is to be paid. If a school district hires a certificated person as a temporary employee, the written statement shall clearly indicate the temporary nature of the employment and the length of time for which the person is being employed. If a written statement does not indicate the temporary nature of the employment, the certificated employee shall be deemed to be a probationary employee of the school district, unless employed with permanent status.” Failure to provide notice of temporary employment as required by section 44916 results in probationary service as a matter of law. (*Kavanaugh, supra*, 29 Cal.4th at p. 926.)

The District contended that Respondent Curry’s tenure classification was a mistake, because she had not worked more than 75 percent of the school days for two complete consecutive years. It concluded that it could not inadvertently grant tenure to Respondent Newton because she did not meet the Education Code requirements. (§§ 44929.21, 44914, 44908; *Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 886, 890-893.) The District’s current classification is correct. Section 44929.21 requires that the employee work two “complete” years as a probationary employee in order to attain tenure, and Respondent Curry has only worked 50 percent every year after her first. Thus, she is not entitled to tenure as a matter of law. Accordingly, the original tenured classification was a mistake, and the proper default classification for Respondent Curry is probationary. (See *Vasquez v. Happy Valley Union School Dist.* (2008) 159 Cal.App.4th 969, 983, citing *California Teachers Assn., supra*, 149 Cal.App.4th at 146, 150; and *Bakersfield, supra*, 145 Cal.App.4th at pp. 1279-1281, 1299.) Respondent Curry’s argument of equitable estoppel also does not apply to give her tenured status, because the Code requires two complete years as a probationary employee, and the District may not waive the statutory requirements. (*Fleice, supra*, 206 Cal.App.3d at 894.)

6. Cause exists to terminate the services of Respondents Sondra Bright, Stephanie Byrne, Jamie Cathey, Maureen Charlesworth, Kristy Chia, Erica Chung, Noreen Curry, Gina M. Decker, Goldbarg Erami, Shereen Francis, Amanda Frazier, Jeni Fukuda, Randi Galbraith, Victoria Gallagher, Marlea Gardea, Alwyn Greene, Lindsey Hamilton, Jeffrey Heeren, Kristina Hensel, Elizabeth Hepperd, Tricia Hinz-Smith, Jennifer Holland, Pinchas Honig, David Hubbard, Joel Jelinowics, Deija Johnson, Karen Joseph, Jessica Karam, Su Kim, Patricia Lee, Amanda Lenton, Andrea Long, Sylvia McCain, Denis McKee, Sarah Meylor, Sarah Myers, Patrick Murphy, Christine Nguyen, Darcy O’Brien, Tiffani Orozco, Jennifer Pagett, Wendy Perrizo, Jennifer Robinson, Scott Robinson, Kelly Rowe, Lisette Sanchez, April Schmietenknop, Maria Schrock, Andrea Sievers, Lisa Sragovicz, Nicole Staker, Kelsey Stolba, Kristina Strandquist, Colette Sullivan, Nga Ta, Amy Terrell, Laura

Trotter, Nicole Walters, Leslie Weber, Michael Whitcomb, Kristin Whittaker, Carrie Winn, Joni Wuth, Karen Yoshihara-Ha, by reason of factual finding numbers 1 through 19, and legal conclusion numbers 1 through 5.

ORDER

The Accusation is sustained and the District may notify Respondents Sondra Bright, Stephanie Byrne, Jamie Cathey, Maureen Charlesworth, Kristy Chia, Erica Chung, Noreen Curry, Gina M. Decker, Goldbarg Erami, Shereen Francis, Amanda Frazier, Jeni Fukuda, Randi Galbraith, Victoria Gallagher, Marlea Gardea, Alwyn Greene, Lindsey Hamilton, Jeffrey Heeren, Kristina Hensel, Elizabeth Hepperd, Tricia Hinz-Smith, Jennifer Holland, Pinchas Honig, David Hubbard, Joel Jelinowics, Dejjia Johnson, Karen Joseph, Jessica Karam, Su Kim, Patricia Lee, Amanda Lenton, Andrea Long, Sylvia McCain, Denis McKee, Sarah Meylor, Sarah Myers, Patrick Murphy, Christine Nguyen, Darcy O'Brien, Tiffani Orozco, Jennifer Pagett, Wendy Perrizo, Jennifer Robinson, Scott Robinson, Kelly Rowe, Lisette Sanchez, April Schmietenknop, Maria Schrock, Andrea Sievers, Lisa Sragovicz, Nicole Staker, Kelsey Stolba, Kristina Strandquist, Colette Sullivan, Nga Ta, Amy Terrell, Laura Trotter, Nicole Walters, Leslie Weber, Michael Whitcomb, Kristin Whittaker, Carrie Winn, Joni Wuth, Karen Yoshihara-Ha that their services will not be needed during the 2009-2010 school year due to the reduction of particular kinds of services.

DATED: May 6, 2009

AMY C. LAHR
Administrative Law Judge
Office of Administrative Hearings
Administrative Law Judge