

BEFORE THE GOVERNING BOARD OF THE
TUSTIN UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against:

CERTIFICATED EMPLOYEES,

By

TUSTIN UNIFIED SCHOOL DISTRICT.

OAH No. 2009020907

PROPOSED DECISION

Daniel Juárez, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on April 14, 2009, in Tustin, California.

Anthony P. De Marco, Attorney at Law, Atkinson, Andelson, Loya, Ruud & Romo, represented the Tustin Unified School District (TUSD).

Carlos R. Perez, Attorney at Law, Reich, Adell, Crost & Cvitan, represented all Respondents listed in Appendix I, except those noted directly below.

Melanie Plunkett, Elizabeth Shenton, Dianne Stinson, and Marella Umali were present at hearing and represented themselves.

The parties submitted the matter for decision on April 14, 2009.

FACTUAL FINDINGS

1(a). The parties stipulated to the facts set forth in Factual Findings 1(b) through 1(n):

1(b). On March 9, 2009, the TUSD Superintendent recommended, with regard to the ensuing school year, that the TUSD Governing Board (the Governing Board) reduce or eliminate particular kinds of services provided by TUSD and that certain certificated employees be notified that their services would not be required.

1(c). On March 9, 2009, the Governing Board adopted the Superintendent's recommendation to reduce or discontinue particular kinds of services provided by TUSD, effective the 2009-2010 school year.

1(d). The resolution included a listing by type and full-time equivalent of those positions which the Governing Board resolved to reduce or eliminate no later than the beginning of the 2009-2010 school year.

1(e). The resolution also included a list and description of the criteria used by TUSD to determine the order of termination of certificated employees who first rendered paid service to the Governing Board in a probationary position on the same date.

1(f). On or before March 15, 2009, TUSD served written notice pursuant to the direction of the Governing Board that the services of certain probationary and permanent certificated employees would not be reemployed in the upcoming 2009-2010 school year.

1(g). On or before March 15, 2009, TUSD served written notice pursuant to the direction of the Governing Board that the services of certain temporary certificated employees would not be required in the upcoming 2009-2010 school year.

1(h). The written notices described in Factual Findings 1(f) and 1(g) included a request for hearing form that, if returned to TUSD by March 20, 2009, would constitute a hearing request.

1(i). Two hundred and seventeen individuals returned request for hearing forms timely.

1(j). On or about March 25, 2009, TUSD's Superintendent filed and timely served the 217 individuals who had submitted a request for hearing form with an Accusation, Notice of Defense, Notice of Hearing, and related materials.

1(k). The certificated employees who were served with the Accusation and related materials were identified as Respondents. (See Appendix I.)

1(l). The Accusation and related materials served on each Respondent included the Notice of Hearing, dated March 25, 2009, which noticed the instant hearing.

1(m). The Accusation included a form, that if returned to TUSD by March 31, 2009, would constitute a Notice of Defense.

1(n). Two hundred and three individuals returned notices of defense.

2. Respondents included those employed by TUSD as probationary or permanent certificated employees and those employed by TUSD as temporary employees. At hearing, TUSD explained that, pursuant to the Governing Board, it intended to include its temporary employees in the hearing process, even though it asserted that temporary employees are not entitled to the protections afforded by Education Code sections 44949 and 44955. (See Legal Conclusion 10.)

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

4(a). The Governing Board's resolution number 03-104-09 proposed a layoff of 187.2 full-time equivalent (FTE) positions.

4(b). Through competent testimony, TUSD identified the certificated employees providing the particular kinds of services that the Governing Board directed to be reduced or discontinued.

5. The services at issue were "particular kinds of services" that could be reduced or discontinued within the meaning of Education Code section 44955. The Governing Board's decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

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

7. The Governing Board considered all known attrition, including resignations, retirements, and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees.

8. In cases where several Respondents shared a first date of paid service, TUSD was required to apply the tie-breaker criteria approved by the Governing Board. The Governing Board's resolution number 03-104-09 established tie breaker criteria that were fair and reasonable. TUSD applied those tie-breaker criteria fairly and appropriately.

9. TUSD conceded that Respondent Tiffany Cruz's seniority date should be amended from September 6, 2007 to September 5, 2007. The parties agreed the change in seniority date would not shield her from lay-off.

10. TUSD conceded Respondent Natalie Declark's seniority date should be amended from August 23, 2006 to November 28, 2005. The parties agreed the change in seniority date would not shield her from lay-off.

11. TUSD conceded that the position slated for reduction held by Respondent Joshua Porter (Respondent Porter) should be amended to show the name of Respondent Amy Alvarado (Respondent Alvarado) in his stead. That is, Respondent Alvarado would be subject to lay-off, and Respondent Porter would not be subject to lay-off. Respondent Alvarado testified that she should not be laid off, and presented her qualifications in support of her position.

12. Respondents Jacqueline Stoerger, Evelyn Eslinger, Kimberly Lee, Lee-Ann Lippert, Faith Peay, Earl Wright, Walter Wagner, Amy Alvarado, and Heather Tolliver presented various claims in defense of lay-off. The claims included the alleged arbitrary or unfair nature of the tie breaking criteria, detrimental reliance (namely, Respondent Eslinger arguing that she was told she would be offered probationary status when she was brought into TUSD as a temporary employee), inaccurate seniority dates, inaccurate status as a temporary employee, and qualifications to bump other Respondents. Each Respondent provided insufficient evidence to corroborate their testimony and argument, and thus, their claims fail.

13. Respondent Shofei Chiu presented documents establishing that she had founded the Chinese language program at Beckman High School in Irvine, California. The documents included credentials and certificates of professional development, however, Respondent Chiu did not testify on her own behalf.

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

LEGAL CONCLUSIONS

1. The parties met all notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945.

2. Cause exists to sustain TUSD's action to reduce or discontinue 187.2 full-time equivalent positions, as set forth in TUSD's resolution number 03-104-09 for the 2009-2010 school year, pursuant to Education Code sections 44949 and 44955, as set forth in Factual Findings 1-14, and Legal Conclusions 1, and 3-10.

3. Education Code section 44955 states, in pertinent part:

[¶] . . . [¶]

(b) whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or . . . when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

[¶] . . . [¶]

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render.

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study . . . and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

4. Education Code section 44949 states, in pertinent part:

(a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

[¶] . . . [¶]

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

[¶] . . . [¶]

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition.

5. The services identified in the Governing Board's resolution number 03-104-09 are particular kinds of services that the Governing Board can reduce or discontinue under Education Code section 44955. The Governing Board's decision to reduce or discontinue the identified services was not arbitrary or capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of TUSD's schools and pupils within the meaning of Education Code section 44949.

6. TUSD identified the certificated employees providing the particular kinds of services that the Governing Board directed to be reduced or discontinued.

7. A school district may reduce services within the meaning of Education Code 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.)

8. The evidence did not support Respondents' arguments alleging the tie-breaking criteria were unfair or inappropriately applied by TUSD (Factual Finding 8). The criteria were reasonable and fair. Those discretionary decisions must be left to the special competence of TUSD. (*Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 565 [citing *Martin v. Kentfield School District* (1983) 35 Cal.3d 294, 299].) The evidence did not support Respondent's other arguments, namely detrimental reliance as to Respondent Eslinger, or the remaining arguments described in Factual Finding 12. There was insufficient evidence to consider a defensive position in favor of Respondent Chiu as described in Factual Finding 13.

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

10. As to its temporary employees, TUSD requested that the Administrative Law Judge order that letters of release be issued to them. “[T]emporary employees, unlike permanent and probationary employees, may be dismissed at the pleasure of the [Governing] [B]oard and need be given only a more limited form of notice before the end of the school year, and no hearing.” (*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1273; see also *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 917-918.) However, the *Bakersfield* Court also noted that “certificated teachers assigned to a categorically funded program may be laid off without the procedural formalities due a permanent and probationary employee *only* if the program has expired. (*Bakersfield Elementary Teachers Association v. Bakersfield City School District, supra*, 145 Cal.App.4th at 1287.) Here, all Respondents, including those assigned to categorically funded programs, though temporary employees, were entitled to participate in the instant hearing. Based on the evidence presented, TUSD may take action with respect to its temporary employees, as it requests.

ORDER

1(a). The Accusation served on those Respondents identified by testimony as providing the particular kinds of services that the Governing Board directed to be reduced or discontinued, amounting to 187.2 full-time equivalent positions, is sustained, with the exception of Respondent Joshua Porter, as discussed in Factual Finding 11.

1(b). Other than to Respondent Joshua Porter, notice shall be given to Respondents, as required by law, that their services will be terminated at the close of the 2008-2009 academic year. Notice shall be given in inverse order of seniority.

1(c). Notice shall be given to those Respondents identified as temporary employees, including those assigned to categorically funded programs, pursuant to Education Code section 44909, that their services will be terminated at the close of the 2008-2009 academic year.

Dated: April 27, 2009

DANIEL JUAREZ
Administrative Law Judge
Office of Administrative Hearings

APPENDIX I
RESPONDENTS IN OAH CASE NO. 2009020907, BY ALPHABETICAL ORDER

Adsit , Maria
Aguilar , Danielle
Ahn Kim , Alison
Allard, Jr. , Robert
Alvarado , Amy
Amster , Julie
Anthony Jr , Donald
Ashton , Roselyn
Atkins , Kerri
Atwood , Amy
Avalos , Robin
Badraun , Tricia
Bala , Melissa
Ballinger , Nathan
Barker , Erin
Barr , Vanessa
Beisel , Marlene
Belcher , Lauren
Bell , Cheryl
Bement , Amie
Beyer , Elizabeth
Bhathal , Nicole
Blackman , Elizabeth
Blankenship , Kristy
Bledsoe , Amy
Boex , Kim Irene
Borjian , Afsaneh
Boyd , Julie
Bradshaw , Jennifer
Brennan , Shannon
Bricks , Michelle
Budd-Kozak , Julie
Calvert , Leanne
Calvo , Sharon
Campfield , Dana
Cantrell , Luz
Carder , Meghan
Carey , Lorraine
Carlson , Rachel
Carpenter , Erin
Cassidy , Dina
Catron , Rachel

APPENDIX I—continued
RESPONDENTS IN OAH CASE NO. 2009020907, BY ALPHABETICAL ORDER

Chilingirian , Tatiana
Chittenden , Kyle
Chiu , Shofei
Chrisopoulos , Elizabeth
Christy , Jacquelyn
Chung , Simon
Ciecek , Dawne
Coe , Ashley
Connally , Sean
Contreras , Thomas
Cooke , Kristen
Coons , Erin
Cope , Victoria
Crawford , Brian
Crawford , Brittney
Crawford , Lynne
Cruz , Emily
Cruz , Tiffany
Cuccarese , Annette
Curry , Rebecca
Darden , Melanie
David-Ramirez , Tiffany
Declark , Natalie
Dehn , Chelsea
Dibley , Jeanine
Donavan , Megan
Eslinger , Evelyn
Espinosa , Kim
Falcone , Kimberly
Fano , Kristy
Fick , Sarah
Fielding , Emily
Fino , Tiffanie
Fisher , Glen
Fisk , Michael
Fitch , Katherine
Fleming , Gretchen
Flores , Jeannine
Foote , Steven
Forbes , Christina
Foss , Courtenay
Fossmo , Jenny

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RESPONDENTS IN OAH CASE NO. 2009020907, BY ALPHABETICAL ORDER

France , Tari
Gallagher , Sean
Gallucci , Lisa
Galvan , Brenda
Gammel , Carrie
Ganje , Abigail
Garcia , James
Gibbs , Felisa
Giesler , Katarina
Gordon , Barbara
Gramer , Alyssa
Granger , Denise
Hall , Tracey
Hamamura , Cynthia
Hannaford , Sheri
Hansen , Kimberly
Harr , Ashlie
Hazelleaf , Erin
Heilig , Karen
Helpern , Joshua
Hendricks , Matthew
Henry , Katryn
Hepinger , Nicole Marie
Herrel , Erin
Hockersmith , Alison
Hoffmann , Michael
Hopkins , Wendi
Hyon , Cheryl
Jenkins , Stephanie
Jesung , Tanaz
Jezowski , Geoffrey
Johnson , Aimee
Johnson , Amanda
Johnson , Krista
Johnston , Cori
Jones , Courtney
Jones , Roland
Judd , Julie
Kennedy , Donal
Kerr , Garrett
Kerr , Joy
Khasanova , Elvira

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RESPONDENTS IN OAH CASE NO. 2009020907, BY ALPHABETICAL ORDER

Kick , Jody
Kim , Anna
Kim , Nathaniel
Kinsella , Devra
Klein , Jennifer
Knight , Lisa
Knott , Kristine
Kull , Ann
La Hodny , Katie
Landro , Jennifer
Larson , David
Larson , Timothy
Lavalle , Kevin
Lee , Kimberly
Lemos , Stephanie
Leon , Kristine
Lewis , Eva
Lien , Catherine
Lippert , Lee
Llamas , Christine
Loewenstein , Allison
Lowe , Kris
Lu , Bryce
Lubin , Madeleine
Maeda , Sharon
Manahan , Eryn
Mann , Erin
Mann , Jonathan
Mann , Rosanne
Mcbain , Nancy
Mcdermid , Angela
Mcdonald , Lindsey
Mcfarland , Kristine
Mckee , Aja
Mckenzie , Sally
Mckinsey , Rachelle
Mclean-Crawford , Marci
Mcmillan Archey , Tiffany
Mead , Erin
Meyers , Amy
Miguel , Christopher
Miller , Sandra

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RESPONDENTS IN OAH CASE NO. 2009020907, BY ALPHABETICAL ORDER

Miner , Robert
Mintz , Jan
Mittleman-Hsiao , Sandra
Mokhtari , Sara
Moon , John
Morgan , Kelly
Morrow , Jennifer
Mosqueda , Erica
Muller , Peter
Mulligan , Debbie
Myung , John
Nelson , Julie
Neuer , Erin
Newton , Denise
Nilsen Badami , Joanna
Nur , Brenda
Ollada Alipio , Michelle
Olmedo , Omar
Omalley , Dustin
Otsuka , Keiko
Pacelli , Estephanie
Parker , Laura
Parsons , Linda
Pastel , William
Paxton , Sara
Peay , Faith
Perera , Melani
Petar , Sarah
Petschauer , Denise
Pfaff , Sharee
Pilon , Tricia
Pinedo , Jessica
Place , Stephanie
Plunkett , Melanie
Porter , Joshua
Posavec , Kristina
Prell , Miriam
Profeta , Jeanny
Pueschel , Christine
Pyle , Summer
Pysner , Corinne
Quezada , Marina

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RESPONDENTS IN OAH CASE NO. 2009020907, BY ALPHABETICAL ORDER

Rapp , Lisa
Razavi , Ali
Rehak , Youlina
Repp , Amy
Rhyne , Briana
Romero , Rachel
Root , Elizabeth
Ross , Marie
Rubio , Bryan
Ryan , Lisa
Salazar , Becky
Samarin , Zachariah
Sanchez , Cheryl
Sanchez , Kalika
Sanchez , Michelle
Sandland , Kathleen
Santana , Cynthia
Schaub , Shirley
Schmidt , Dwight
Schmidt , Terri
Schonfeld , Kristin
Scott , Jansey
Scott , Tracy
Secoda , Joseph
Sewell , Laura
Sharoff , Sunita
Shell , Anita
Shenton , Elizabeth
Siebert , Barbara
Smith , Melinda
Smith , Valerie
Spencer , Staci
Stettler , Laurie
Stinson , Dianne
Stoerger , Jacqueline
Stofle , Lauren
Stuck , Nancy
Takeshita , Todd
Tambini , Elizabeth
Tarnay-Kelly , Suzanne
Thomas , Erin
Thompson , James

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RESPONDENTS IN OAH CASE NO. 2009020907, BY ALPHABETICAL ORDER

Tolliver , Heather
Torres , Maria
Trevithick , Kevin
Tyson , Diana
Umali , Marella
Unger , Stephen
Valdez , Graciela
Valencia , Melanie
Wagner , Walter
Waldram Jr , David
Ward , Monica
Wardlaw , Joy
Watson , Kirsten
Watson , Rebecca
Whitfield , Kaylee
Williamson , Jehann Joy
Wise , Piper
Wong , Sheryl
Wright , Earl
Wright , Jeffrey
Wright , Margie
Wu , Michelle
Zavala , Anna
Zazueta-Monheit , Lucille
Zeigler , Samantha