

**BEFORE THE
GOVERNING BOARD
OF THE ARCADIA SCHOOL DISTRICT**

In the Matter of the Accusation Against:

OAH Case No. 2009030106

Certain Certificated Employees of the Arcadia
Unified School District,

Respondents.

PROPOSED DECISION

The hearing in the above-captioned matter was held on April 22, 2009, at Arcadia, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by Margaret A. Chidester, attorney at law. Respondents were represented by Emma Leheny, Rothner, Seagall, Greenstone & Leheny. During part of the hearing, Michaela O'Neill, represented Vicky Hsu, due to a potential conflict of interest.

Oral and documentary evidence was received at the hearing, but the parties waived argument, and submitted the case for decision on the hearing date. The Administrative Law Judge hereby makes his factual findings, legal conclusions, and order, as follows.

FACTUAL FINDINGS

1. Complainant Beverly Klatt, Ed.D., filed and maintained the Accusation¹ in the above-captioned matter while acting in her official capacity as Director of Personnel Services of the Arcadia Unified School District (District).
2. The following persons are certificated employees of the District and are the Respondents in this case, as each of them was requested a hearing, and filed a notice of defense:

¹ The term "accusation" refers to a type of pleading utilized under the Administrative Procedure Act, Government Code sections 11500 and 11503; that statutory scheme governs the hearing procedures in this case. The Respondents are not "accused" in the every-day sense of that word; they have done nothing wrong, and all appear to be dedicated professionals. It might be said that they are simply accused of not having enough seniority or other qualifications to retain their positions with the District in the face of a resolution to reduce positions.

Elissa Abney, Alice Augilar, Phuanon An, William Barton, Ryan Bettencourt, Heather Brown, Alicia Campopiano, Margarita Chapman, Michael Cockroft, Helen Conroy, Kristen Cook, Tiffany Crosby, Kathryn Doring, Matt Dzurma, Kristen Eichhorst, Michael Feraco-Eberle, Daniella Fey, Christina Fugitt, Christy Gazanian, Yumiko Goto, Kristina Grumbine, Christa Heinrich-Josties, Vicky Hsu, David Jones, Chih-Yun Jong, Leslie Klipstein, Amy Kratochvil, Cindi Lee, Terry Liu, Christopher Marsten, Kristen Mendel, Kathleen Murphy, Yoon Nho, Esther Oh, Sherwin Olavi, Nandita Pal, Luck Phayrin-Ito, Jennifer Prince, Lillian Seto, Keith Shigemasa, Sarah Steinberg, Jenny Tran, Jennifer Wong, Matthew Woodin, and Susan Yoo.

3. (A) On February 25, 2009, the Governing Board (Board) of the District adopted resolution number 1190, entitled “Resolution of The Governing Board of the Arcadia Unified School District Regarding A Reduction or Discontinuance of Particular Kinds of Certificated Employee Service” (Reduction Resolution). By that resolution, the Board determined to reduce and discontinue particular kinds of certificated services at the close of the 2008-2009 school year. Specifically, the resolution requires the reduction of 45.8 “FTE”—Full Time Equivalents—by reducing a variety of teaching positions in grades kindergarten through twelve, as well as certain other services (counselors, Teachers on Special Assignment, a dean, and a program specialist). The need for reduction is the result of the State’s fiscal crisis, which impacts the District’s budget.

(B) The 45.8 FTE to be reduced are described as follows:

K-5 classroom teaching positions	13 FTE
6-8 multiple subject classroom teaching positions	4.5 FTE
6-8 classroom teaching positions, History	1.5 FTE
6-8 classroom teaching positions, Science	1.0 FTE
6-8 classroom teaching positions, Math	1.5 FTE
6-8 classroom teaching positions, Industrial Tech	.8 FTE
6-8 classroom teaching positions, Video Tech	.8 FTE
6-8 classroom teaching positions, PE	.2 FTE
6-8 classroom teaching positions, Art	.5 FTE
6-8 classroom teaching positions, English	1.0 FTE
9-12 classroom teaching positions, CCP/Alt	2.0 FTE
9-12 classroom teaching positions, Career & Tech	.5 FTE
9-12 classroom teaching positions, English	3.0 FTE
9-12 classroom teaching positions, ELD	1.0 FTE
9-12 classroom teaching positions, Math	2.0 FTE
9-12 classroom teaching positions, PE	1.0 FTE
9-12 classroom teaching positions, Biology	1.0 FTE
9-12 classroom teaching positions, Social Science	3.0 FTE
9-12 classroom teaching positions, Mandarin/Spanish	1.5 FTE
9-12 classroom teaching positions, Visual Arts	1.0 FTE
TOSA	1.0 FTE

K-12 Counselors	2.0 FTE
Dean	1.0 FTE
Program Specialist	1.0 FTE

4. The services which the District seeks to discontinue or reduce are particular kinds of services that may be reduced or discontinued under section Education Code section 44955.²

5. The decision by the Board to reduce or discontinue services was neither arbitrary nor capricious, but rather was a proper exercise of the District’s discretion given uncertainty regarding the state budget and the District’s financial resources.

6. 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.

7. As part of the Reduction Resolution, the Board adopted criteria to be used to break ties where one or more teachers shared the same seniority date. The tie-breaking criteria was set forth on Exhibit B to the Reduction Resolution. The tie-breaking formula sets out ten criteria, and further provides that if a tie still exists after the application of the tie-breaking criteria, then seniority will be determined by a lottery.

8. The Reduction Resolution also determined that certain types of certificated employees would be exempted from layoff by virtue of certain credentials, competence, experience, assignment, or certification. For example, those holding a credential authorizing school nursing, or those qualified as educational psychologists, were exempted.

9. (A) Between March 9 and 11, 2009, the District served 58 certificated employees with a written notice that their services would not be required in the 2009-2010 school year pursuant to sections 44949 and 44955. The notices, denominated as Preliminary Notices, informed the employees that they could request an administrative hearing to determine if cause existed to lay them off.³

² All further statutory references are to the Education Code.

³ While the District only intended to reduce 45.8 positions, it gave notices to 58 persons, so as to be assured that it could in fact reduce the appropriate number of personnel, if the lay-off process revealed that some teachers receiving notice could not be laid off. There was no objection to this “over-noticing.” Fifteen of the teachers who received lay-off notices were classified as temporary teachers, and they are among the Respondents. The temporary employees who were noticed hold seniority ranks 510 (Vyas) through 524 (Johnson).

(B) In addition to those Respondents identified in Factual Finding 2, the Preliminary Notices were served on the following employees:

Noah Adler, Daniel Brownell, Marisa Gaeta-Catano, Bryan Hatcher, Kimberly Johnson, Megan Lehey, Nick Lemas, Linda Mackessy, Ryan Piszzyk, Rebecca Spear, Kathy Swanson, Pearlin Vyas, and Tiffany Yeung.

10. Forty-five of the teachers who received a notice requested a hearing in a timely manner. One teacher, Nandita Pal, withdrew her request for a hearing. Thereafter, an Accusation was served upon each of the teachers who had requested a hearing, including Nandita Pal. Those Respondents, 45 in number, each filed a timely notice of defense, and they are identified in Factual Finding 2. All jurisdictional requirements have been met.

11. In determining how many positions to reduce, the District considered “positively assured attrition” (PAA), as it had received notice from 14 teachers that they would not be returning to teach in the 2009-2010 school year.

12. In the course of the reduction in force process, the District created a seniority list. That seniority list took into account a number of factors, including first date of paid service and the tie-breaking criteria. As to tie-breaking, in some cases the District was obligated to resort to the last criteria, a lottery. The tie-breaking criteria were appropriately applied to the teachers listed on the final seniority list (Ex. 2).

13. (A) The District reviewed its records and the seniority list to determine which employees might “bump” other employees, because they held credentials in another area and were entitled to displace a more junior employee. Likewise, in conformity with the exemption provisions of the Reduction Resolution, the District determined that certain junior teachers fell within the group to be exempted, which allowed such junior teachers to be retained or “skipped.”

(B) In the course of the hearing, Complainant clearly identified each of the teachers who were able to bump another teacher, and Complainant also identified those persons who were to be exempted. In some cases, a Respondent was bumped out of part, but not all, of their position. The persons who were bumped out of part of their positions were William Barton, bumped out of 80 per cent of his position; Kathryn Doring, bumped out of 90 per cent of her position; Christina Fugitt, bumped out of 40 per cent of her position; Chih-Yun Jong, bumped out of 50 per cent of her position; Sherwin Olavi, bumped out of 50 per cent, and Jennifer Prince, bumped out of 50 per cent of her position. Rebecca Spear, Leslie Klipstein, Christina Fugitt, Amy Kratochvl, Michael Cockroft, and Heather Brown were bumped entirely from their position.

(C) No Respondent established that they could bump a more senior teacher, and none of the Respondents established that they should have been skipped.

14. During the hearing, the District withdrew the layoff notices previously issued to the following certificated personnel:

Kathy Swanson, Nicholas Lemas, Nandita Pal, Keith Shigemasa, Christa Heinrich-Josties, Kristina Grumbine, Cindi Lee, Jennifer Wong, Luck Phayrin-Ito, Tiffany Crosby, Esther Oh, Vicky Hsu, and Noah Adler.⁴

15. As a result of the withdrawals set forth in Factual Finding 14, various stipulations on the record, and the failure of some certificated teachers to appear and defend, the District developed, at the hearing, a final list of persons who would receive a notice of layoff, or if temporary, who would be released, which was received in evidence as Exhibit 8. That list included a description of the percentage of a person's position to be lost if their position was only being reduced due to bumping by a more senior teacher.

16. No certificated employee junior to any Respondent was retained by the District to render a service for which a Respondent was certificated and qualified to render.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to sections 44949 and 44955, based on Factual Findings 1 through 10.

2. (A) A District may reduce a particular kind of services (PKS) 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.) The Court of Appeal has made clear that a PKS reduction does not have to lead to less classrooms or classes; laying off some teachers amounts to a proper reduction. (*Zalec v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 853-85; see also *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 631, 637 [reduction of classroom teaching can be a reduction of a PKS; as long as there is a change in the method of teaching or in a particular kind of service in teaching a particular subject any amount in excess of the statutory minimum may be reduced]; *California Teachers Assn. v. Board of Trustees* (1982) 132 Cal.App.3d 32.)

(B) The services to be discontinued are particular kinds of services within the meaning of 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. Cause for the reduction or discontinuation of services relates solely to the welfare of the

⁴ Swanson, Lemas, and Adler did not request hearings or file Notices of Defense and therefore have not been denominated as Respondents.

District's schools and pupils within the meaning of section 44949. This Conclusion is based on Factual Findings 3, 5, and 6, and the foregoing authorities.

3. (A) A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated to fill. In doing so, the senior employee may displace or “bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) At the same time, junior teachers may be given retention priority over senior teachers—may “skip” that senior employee—if the junior teacher possesses superior skills or capabilities not possessed by their more senior colleagues. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Governing Bd. of Santa Clara Unified School Dist.* (1981) 116 Cal.App.3d 831.)

(B) No Respondent established that they had the right to bump a junior employee or that they should have been skipped, based on the foregoing rules, and Factual Findings 13 (A) through (C). At the same time, it was established that some Respondents would be bumped out of some or all of their positions. (See Factual Finding 13(B).)

4. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render, based on Factual Finding 16.

5. The District may lay off the remaining Respondents, in reverse order of seniority, in order to reduce services by 45.8 FTE, based on all the foregoing.

ORDER

1. The Accusations are sustained, except as set forth hereafter.

2. Respondents Nandita Pal, Keith Shigemasa, Christa Heinrich-Josties, Kristina Grumbine, Cindi Lee, Jennifer Wong, Luck Phayrin-Ito, Tiffany Crosby, Esther Oh, and Vicky Hsu are dismissed from the proceeding and shall not be laid off. As the District withdrew the lay-off notices to certificated employees Kathy Swanson, Nicholas Lemas, and Noah Adler, they shall not be laid off either.

3. (A) Notice shall be given to employees occupying up to 45.8 full-time equivalent certificated positions that their services will not be required for the 2009-2010 school year because of the reduction and discontinuance of particular kinds of services, or if those persons are temporary employees, they will be released. Those persons denominated as temporary employees are those holding seniority ranks 510 (Vyas) through 524 (Johnson).

(B) The District may give such lay-off notices to the following certificated employees, in inverse order of seniority, the most junior first, and the most senior last, with the proviso that certain Respondents shall only be laid off as to some part of their position:

Elissa Abney, Alice Augilar, Phuanon An, William Barton (80 per cent), Ryan Bettencourt, Heather Brown, Daniel Brownell, Alicia Campopiano, Margarita Chapman, Michael Cockroft, Helen Conroy, Kristen Cook, Kathryn Doring (90 per cent), Matt Dzurma, Kristen Eichhorst, Michael Feraco-Eberle, Daniella Fey, Christina Fugitt (40 per cent), Marisa Gaeta-Catano, Christy Gazanian, Yumiko Goto, Bryan Hatcher, David Jones, Chih-Yun Jong (50 per cent), Kimberly Johnson, Leslie Klipstein, Amy Kratochvil, Megan Leahy, Terry Liu, Linda Mackessy, Christopher Marsten, Kristen Mendel, Kathleen Murphy, Yoon Nho, Sherwin Olavi (40 per cent), Ryen Piszyk, Jennifer Prince (50 per cent), Lillian Seto, Rebecca Spear, Sarah Steinberg, Jenny Tran, Pearl Vyas, Matthew Woodin, Tiffany Yeung and Susan Yoon.

April 29, 2009

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings