

BEFORE THE GOVERNING BOARD
BERKELEY UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against:

DELILAH ABRAMO, et al.,

Respondents.

OAH No. 2009030220

PROPOSED DECISION

Administrative Law Judge Nancy L. Rasmussen, Office of Administrative Hearings, State of California, heard this matter on April 16, 2009, in Berkeley, California.

John R. Yeh, of Miller Brown & Dannis, represented the Berkeley Unified School District.

Stewart Weinberg, of Weinberg, Roger & Rosenfeld, represented the respondents, all of whom were present except for Jessica Behrendt, Jan Cameron, Christopher Harrell and Allison (O'Hare) Mutaw.

The record was held open for Mr. Yeh to submit additional information regarding the adoption of the proposed decision from the 2008 teacher layoff hearing. Later in the day on April 16, 2009, Mr. Yeh submitted by fax a copy of the May 12, 2008 minutes of the Berkeley Unified School District's governing board. When the original of this document and Mr. Yeh's cover letter were received on April 20, 2009, they were marked collectively as Exhibit 20 and admitted in evidence. The record was closed and the matter was deemed submitted for decision on April 20, 2009.

FACTUAL FINDINGS

1. Clifford Wong made and filed the accusation in his official capacity as Interim Assistant Superintendent, Human Resources, of the Berkeley Unified School District.
2. Respondents are listed on Appendix A, attached hereto and by this reference incorporated herein. Each respondent is a certificated employee of the district.
3. On March 4, 2009, the district's governing board adopted Resolution No. 09-37 reducing or eliminating particular kinds of services for the 2009-2010 school year and directing the Superintendent or his designated representative to give appropriate notices to certificated employees whose positions will be affected by the action.

4. On or before March 15, 2009, Assistant Superintendent Wong gave written notice to respondents and other certificated employees of the recommendation that their services will not be required for the 2009-2010 school year. The reasons for the recommendation were set forth in these preliminary layoff notices.

5. On behalf of respondents and other certificated employees who received preliminary layoff notices, the Berkeley Federation of Teachers (BFT) filed a timely request for a hearing to determine if there is cause for terminating the services of these employees for the 2009-2010 school year. On behalf of all respondents, Attorney Stewart Weinberg accepted service of an accusation and filed a timely notice of defense.¹ All prehearing jurisdictional requirements have been met.

6. The board took action to reduce or eliminate the following particular kinds of services for the 2009-2010 school year:

<u>SERVICES</u>	<u>FTE²</u>
<u>Administration</u>	
Manager, Attendance & Welfare	1.0
VP Adult School	1.0
Dean	1.0
Coordinator, Independent Study	1.0
Coordinator, Staff Development	1.0
High School Vice Principal	1.0
Middle School Vice Principal	<u>2.0</u>
	8.0
 <u>Counselors</u>	
Counselors (Including counselors serving under a Pupil Personnel Services credential with specialization in School Social Work (Cal. Code Regs., tit. 5, § 80049.1))	14.8
 <u>Teachers on Special Assignment</u>	
Literacy/Reading Recovery/Writing	19.05

¹ The district's list of certificated employees whose preliminary layoff notices have not been rescinded includes Sharon Friedman and Rochelle Jacobs, but they are not respondents in this proceeding. They received preliminary layoff notices, but their names are not on the list of employees for whom the joint hearing request was made, and neither filed an individual request for hearing. Neither Friedman nor Jacobs is on the list of respondents attached to the accusation. Jacobs was present at the hearing and represented by Attorney Weinberg, who asserted that she is not a respondent. Friedman was not present or represented at the hearing.

² Full-time equivalent positions.

Intervention/ULSS (Universal Learning Supports and Services)	1.7
BTSA/PAR	1.0
ELD Coach	1.0
EL Coordinator	1.4
Two Way Immersion	0.2
Teacher Leaders BHS	4.8
International Baccalaureate	1.0
Professional Development	1.0
Media BHS	0.2
Student Support Coordinator	1.0
Evaluation/Assessment/Technology	4.0
Counseling Liaison	0.2
Garden	0.4
English Language Learner	0.6
Math Coaches K-5	3.0
Math Support	1.2
Technology BHS	1.4
Activities Coordinator BHS	1.0
Middle School Administrative Support	0.2
After School Drama	<u>0.2</u>
	44.55

<u>Other</u>	
State Preschool Teacher	1.0
Music	2.0
Math	6.0
Biology	7.0
Chemistry	1.0
Physics	1.0
English (Language Arts)	3.0
Social Science	3.0
Physical Education	2.0
Mild to Moderate Special Education	5.0
Moderate to Severe Special Education	6.0
Multiple Subject	12.0
Art	2.0
ROP Fire Science	0.4
ROP Bio Tech	0.2
Independent Study	<u>2.0</u>
	53.6

Grand Total: 120.95

7. The district agreed to treat respondent Zohra Taymuree as a probationary employee for purposes of this layoff proceeding.

8. The district changed the seniority dates of respondents Jaime Vines and Jill Wimmer from August 27, 2007, to August 26, 2007.

Skipping

9. Pursuant to the board's resolution, the district intends to retain regardless of seniority (i.e., "skip" in the layoff process) certificated employees who possess qualifications needed for various programs, including employees with a BCLAD³ certificate – Spanish-English, or a Bilingual Certificate of Competence – Spanish-English.

10. Respondent Delilah Abramo started working for the district this year, teaching second grade under a multiple subject credential. Before coming to this district, Abramo taught bilingual Spanish classes for five years in the Oakland Unified School District and for one year in the West Contra Costa Unified School District. In December 2004, she completed a master's degree in Teaching English as a Second Language from the University of San Francisco. Abramo's course work there included two BCLAD Spanish courses, and she received the highest possible passing score on three sections of the Spanish Foreign Service Institute Exam: Listening & Speaking (Oral Proficiency), Reading & Writing, and Translation. Abramo's application for a BCLAD certificate was denied by the Commission on Teacher Credentialing (CTC), reportedly because she had not done her student teaching in a bilingual classroom. CTC did issue Abramo an emergency BCLAD permit which was valid from August 1, 2007, to September 1, 2008, restricted to service in the Oakland Unified School District. Abramo does not hold a Bilingual Certificate of Competence.

Abramo asserts that she should be skipped because she has done everything possible to obtain a BCLAD certificate and because she has extensive experience teaching bilingual Spanish classes. Abramo's assertion cannot be sustained. The board acted within its legal authority when it adopted the skipping criteria. While Abramo may be as good a bilingual teacher as a teacher who holds a BCLAD certificate or a Bilingual Certificate of Competence, the district is not obliged to waive the board's unequivocal requirement that a teacher possess one of these certificates in order to be skipped.

Challenges to 2008 Seniority Dates by Teachers

11. The district's calendar for the 2008-2009 school year provided that August 25, 2008 was a staff development day and the first day of service for certificated employees under the contract between the district and BFT. August 26, 2008 was a teacher work day, and August 27, 2008 was the first day of school for students.

³ Bilingual, Cross-Cultural, Language and Academic Development.

On June 13, 2008, the district and BFT entered into a memorandum of understanding (MOU) modifying the 2008-2009 school year calendar to allow three elementary schools and two middle schools to schedule earlier staff retreats in lieu of the staff development day on August 25, 2008. The MOU provided:

The Union and the District understand that having these retreats before the traditional staff development day may result in teachers at that site rendering a day of service prior to teachers at other sites for the 2008-2009 school year. *It is not the intent of the parties that an employee's attendance at the staff development retreat establish a first date of paid probationary service (i.e., "seniority date") under Education Code section 44845 or any other statute, for the purposes of a hearing under Education Code section 44949 or 44955, or for the purposes of Education Code sections 44956 or 44957, or for any other purpose.* The parties expressly agree that the first date of paid probationary service for all unit members for the purposes stated above shall be the first date of paid service as defined in the Collective Bargaining Agreement between the parties for all unit members for the 2008-2009 school year. [Italics added.]

12. Respondents Michael Della Penna, Joal Arvanigian, Adam Weis, Dborah Klein and Anna Parisi are elementary teachers with seniority dates of August 25, 2008 who assert that they are entitled to an earlier seniority date because they were required to attend orientation or training before August 25, 2008. Della Penna, Arvanigian, Weis and Klein attended new teacher orientation on August 22, 2008. Klein also attended Sharrocky Hollie training on August 11 and 18, 2008, and Everyday Math training on August 19, 2008. Parisi attended Everyday Math training on August 19, 2008, and a school retreat on August 21 and 22, 2008.⁴ (Parisi missed new teacher orientation on August 22, 2008, but was told she could make this up at a later date.)

Weis could not recall being paid for attending new teacher orientation, but the other respondents were paid for attending that orientation and/or the other training. Their compensation was over and above their regular salary for the 2008-2009 school year, because these orientation and training days were not part of the contractual 185-day school year.

Respondents were told by their principals or by someone else in the district that they needed to attend or were required to attend new teacher orientation and/or the other training, but it was not established that attendance was mandatory in the sense of there being negative consequences for failing to attend.

⁴ Parisi teaches at Emerson Elementary School, one of the schools covered by the June 13, 2008 MOU (Finding 11).

Respondents Michael Della Penna, Joal Arvanigian, Adam Weis, Dborah Klein and Anna Parisi have not established that they are entitled to earlier seniority dates by reason of attending new teacher orientation and/or other training before the start of the school year on August 25, 2008. A certificated employee's seniority begins with the date he or she "first rendered paid service in a probationary position."⁵ Respondents first rendered service in a probationary position when they began working on the first day of the 185-day school year.

13. Respondent Ariel Morris teaches English at Berkeley High School (BHS). Her seniority date of September 4, 2008 reflects the date she signed a contract and started working in the classroom. (Morris could not sign the contract earlier because of a delay in obtaining her fingerprint clearance.) Morris claims she is entitled to an earlier seniority date because she was required to attend training and orientation before school started. From July 21 to 25, 2008, she attended Advanced Placement training at Stanford University. When Morris was "hired" in June 2008, BHS principal Jim Slemple told her to attend this training, and he agreed to pay her a stipend of \$100 per day. Morris eventually received her \$500 stipend and reimbursement for the Stanford fees and her expenses. On August 11 and 12, 2008, Morris attended a BHS small school retreat which Slemple and a teacher-leader had told her to attend. On August 18 and 19, 2008, she attended BHS new teacher orientation. It was not established whether Morris was compensated for attending the small school retreat or new teacher orientation, although Slemple apparently told her she would be paid for the extra days she worked before school started.

Respondent Ariel Morris has not established that she is entitled to an earlier seniority date by reason of attending training, the small school retreat or new teacher orientation before the start of the 2008-2009 school year. She first rendered service in a probationary position on September 4, 2008, when she signed a contract and started working in the classroom.

Challenges to 2007 Seniority Dates by Teachers

14. The district's calendar for the 2007-2008 school year provided that August 27, 2007 was a staff development day and the first day of service for certificated employees under the contract between the district and BFT. August 28, 2007 was a teacher work day, and August 29, 2007 was the first day of school for students.

15. The district changed the seniority date of respondent Jaime Vines from August 27 to August 26, 2007, because staff development day at her school site was on the earlier date. However, Vines asserts that she is entitled to a seniority date of August 20, 2007, the date she attended new teacher orientation. She had been notified by the district's Human Resources Department that she was required to attend this orientation, and she received some compensation over and above her salary for the 2007-2008 school year.

⁵ Education Code section 44845.

Respondent Jaime Vines has not established that she is entitled to an earlier seniority date by reason of attending new teacher orientation before the start of the 2007-2008 school year. She first rendered service in a probationary position when she began working on August 26, 2007 (the first day of the 185-day school year for her).

16. Respondents Pooja Govil and Susan Lee are fourth grade teachers at Berkeley Arts Magnet School with a seniority date of August 27, 2007. They assert that they are entitled to a seniority date of August 17, 2007, the date they and two other teachers attended an upper grade level meeting with the school principal. The principal had told them to attend this meeting. Govil and Lee were paid for attending the meeting with a stipend over and above their salary for the 2007-2008 school year. Govil also attended new teacher orientation on August 20, 2007. (Lee was not asked whether she also attended that orientation.)

Respondents Pooja Govil and Susan Lee have not established that they are entitled to an earlier seniority date by reason of attending the upper grade level meeting or new teacher orientation before the start of the school year on August 27, 2007. They first rendered service in a probationary position when they began working on the first day of the 185-day school year.

It is noted that Pooja Govil was also a respondent last year in the hearing on the proposed layoffs of certificated employees by the district. She raised the same challenge to her seniority date, and it was rejected in the proposed decision adopted by the board on May 12, 2008.

17. Respondent Caroline Kim disputes her seniority date of August 27, 2007. She is a teacher on special assignment who works throughout the district as a math coach. Teachers on special assignment get paid extra for working up to 10 days more than the 185 days in the school year. For each additional day they work, they receive an amount corresponding to one day's salary. Teachers on special assignment apparently are not required to work the extra days, although Kim testified that if she is called to work on a certain day she must work that day. Before the start of the 2007-2008 school year, Kim got a call from either the coordinator of professional development or the head math coach telling her to attend a math coach meeting on August 16, 2008. She attended this meeting and was paid (over and above her salary for the 185-day school year) for working that day.

Respondent Caroline Kim has not established that she is entitled to an earlier seniority date by reason of attending the math coach meeting before the start of the school year on August 27, 2007. She first rendered service in a probationary position when she began working on the first day of the 185-day school year.

Challenges to 2008, 2007 & 2006 Seniority Dates by Counselors

18. Respondents Xia Lee, Angela Price and Brenda Wong are counselors at Berkeley High School with seniority dates of August 25, 2008, August 27, 2007 and August

28, 2006,⁶ respectively. These three respondents dispute their seniority dates, because they started working eight or nine business days before those dates. Under the contract between the district and BFT, counselors receive a stipend of \$1,672 for working nine days more than the regular school year (184 days for secondary school teachers).

Lee testified that she reported for work on August 13, 2008 (a Wednesday) at the direction of vice-principal Maggie Heredia-Peltz and fellow counselor Brenda Wong. This was nine work days before Tuesday, August 26, 2008, the designated teacher work day. (Lee saw no teachers at school on Monday, August 25, 2008, the designated staff development day and first contractual day of service for certificated employees.) In the days before school started, Lee and the other counselors were primarily occupied with class scheduling. When she met with personnel specialist Sheila Rose to sign her contract, Lee questioned the starting date of August 25, 2008 and informed Rose that she had been told to report for work on an earlier date.

Price and Wong assert that they, like Lee, started working nine days earlier than teachers in the year they began their employment in the district. Price claims she reported for work on August 14, 2007,⁷ and Wong claims she reported for work on August 15, 2006. Each of these dates is a Tuesday nine work days before the Monday designated staff development day and first contractual day of service for certificated employees.

Price and Wong were also respondents last year in the hearing on the proposed layoffs of certificated employees by the district, and they raised the same challenge to their seniority dates in that proceeding. In the proposed decision adopted by the board, Wong's challenge was rejected. Price was held to lack standing to challenge her seniority because she was then classified as a temporary employee.

The claims of these counselors to earlier seniority dates differ significantly from the claims of teachers who attended training, meetings or new teacher orientation before school started. The counselors were required to start working eight or nine days before the first contractual day of service for certificated employees, and they continued to work until school started. They performed the duties for which they were hired rather than simply attending orientation or training. Although the counselors were paid a stipend over and above their salaries, the payment was pursuant to a provision of the district-BFT contract stipulating that counselors work nine days more than the regular school year. Respondents Xia Lee, Angela Price and Brenda Wong have established that they first rendered service in a probationary position when they began working eight or nine days before the seniority dates assigned to them by the district. They are entitled to have their seniority dates changed accordingly. It is

⁶ The district's calendar for the 2006-2007 school year provided that August 28, 2006 was a staff development day and the first day of service for certificated employees under the contract between the district and BFT. August 29, 2006 was a teacher work day, and August 30, 2006 was the first day of school for students.

⁷ Price could not recall this date until she consulted a 2007 calendar.

noted that despite the change in seniority dates, these respondents are still subject to layoff in this proceeding.

Although the board's 2008 layoff decision would ordinarily be given res judicata effect to bar the claim of Brenda Wong to an earlier seniority date, to do so would result in her being treated differently than Xia Lee and Angela Price. This would not serve the interests of the district and it would be unfair to Wong.

Challenge to Seniority Date & Classification as Temporary Employee

19. Respondent Roger A. Smith-Truss has a seniority date of August 27, 2007, which is the date he first rendered service under a probationary contract. As early as 2005, Smith-Truss worked for the district as a substitute teacher, and on November 15, 2006, he started working under a temporary contract as a full-time credentialed teacher at Berkeley Technology Academy, a continuation high school. The position he filled was an open position; Smith-Truss replaced a retired teacher who was substituting in the class. Smith-Truss contends that he is entitled to a seniority date of November 15, 2006, because he should have been classified as a probationary employee rather than a temporary employee when he began working on that date.⁸ He contends that the provision for employing temporary employees to replace employees on leave (Ed. Code, § 44920) would not apply in his case, because he was not filling a vacancy created by an employee on leave. This contention is without merit. The district is not required to have a one-to-one match between employees on leave and the employees temporarily filling their positions, as long as the total FTE's of temporary employees hired under Education Code section 44920 does not exceed the total FTE's of employees on leave. (*Santa Barbara Federation of Teachers v. Santa Barbara High School Dist.* (1977) 76 Cal.App.3d 223, 232-233; *Paulus v. Board of Trustees* (1976) 64 Cal.App.3d 59, 62-63.) There is no evidence that the district had an excessive number of temporary employees when it hired Smith-Truss on a temporary contract.

20. All contentions made by respondents not specifically addressed above are found to be without merit and are rejected.

21. No certificated employee junior in seniority to any respondent is being retained by the district to perform services that any respondent is certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955.

⁸ Smith-Truss acknowledges that he is not entitled to "tack" on his service as a temporary employee for seniority purposes (under Ed. Code, § 44918), because he did not work for 75 percent of the 2006-2007 school year.

2. By reason of the matters set forth in Factual Finding 18, cause exists to change the seniority dates of respondents Xia Lee, Angela Price and Brenda Wong to the dates each began working (i.e., providing the services for which they were hired) before the regular school year in the year they began their employment in the district. Unless district payroll records show a different date, the correct dates for these respondents are:

Xia Lee – August 13, 2008
Angela Price – August 14, 2007
Brenda Wong – August 15, 2006

3. Cause exists because of the reduction or elimination of particular kinds of services pursuant to Education Code section 44955 to give notice to respondents that their services will not be required for the 2009-2010 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

ORDER

1. The district shall change the seniority dates of respondents Xia Lee, Angela Price and Brenda Wong as set forth in Legal Conclusion 2.

2. Notice may be given to respondents that their services will not be required for the 2009-2010 school year because of the reduction or elimination of particular kinds of services.

DATED: _____

NANCY L. RASMUSSEN
Administrative Law Judge
Office of Administrative Hearings

Appendix A

RESPONDENTS

Delilah Abramo
Joal Arvanigian
Jessica Behrendt
Jan Cameron
Richard S. Conn
Michael Della Penna
Pooja Govil
Christopher Harrell
Rosina J. Keren
Caroline Kim
Dbora Klein
Jamie Knight
Susan Lee
Xia Lee
Ariel Morris
Allison (O'Hare) Mutaw
Molly Offerman
Anna Parisi
Angela Price
Roger A. Smith-Truss
Zohra Taymuree
Jaime L. Vines
Adam Weis
Jill Wimmer
Brenda Wong