

BEFORE THE GOVERNING BOARD
BRISBANE ELEMENTARY SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against
Certificated Employees:

CYNTHIA DALMACIO, et al.,

Respondents.

OAH No. 2009030489

PROPOSED DECISION

Administrative Law Judge Steven C. Owyang, State of California, Office of Administrative Hearings, heard this matter in Brisbane, California, on April 23, 2009.

Claire A. Cunningham, Deputy County Counsel, County of San Mateo, represented the Brisbane Elementary School District. Superintendent Toni Presta was present as a representative of the district.

Sheila K. Sexton, Beeson, Tayer & Bodine, represented respondents Cynthia Dalmacio, Donna Hong, Lynn Ann Howe, Paul Luperini, Felipe A. Macay, Megan Martins, Holly Rios, Jeannette Shereda, and Krystin Simmons.

Various issues were resolved by stipulation. The parties' post-hearing briefs were timely filed by April 29, 2009. The matter was submitted for decision on April 29, 2009.

FACTUAL FINDINGS

1. Toni Presta, Superintendent, Brisbane Elementary School District, made the accusation in her official capacity.
2. Each of the respondents is a certificated employee of the district.
3. No jurisdictional issues are in dispute. The district's preliminary layoff notices and accusation and respondents' requests for hearing and notices of defense were timely.
4. In February 2009, the district prepared an updated seniority list after providing certificated employees the opportunity to review and make corrections to their seniority dates.

5. On March 6, 2009, the Governing Board, Brisbane Elementary School District, in resolution 2008-2009-XV, determined that it was necessary to reduce the following particular kinds of service not later than the beginning of the 2009 – 2010 school year and to decrease a corresponding number of certificated employees at the close of the 2008 – 2009 school year:

<u>Services</u>	<u>Full-Time Equivalent Positions</u>
ELD	.5
Math Coach	1.0
BTSA Coach	.3
Math Coach Prep Provider	.2
K-2 SDC	1.0
Middle School PE	.6
Homework Center	.36
 Total	 3.96

The proposed reductions and discontinuances are based on the district’s financial situation and are in the interest of the district’s schools and its pupils.

6. On March 6, 2009, the board, in resolution 2008-2009-XVI, adopted criteria to determine the order of termination for employees with the same date of first paid service (“seniority date”). The tie-breaker criteria are:

1. Credentialing – including but not limited to:
 - a. Legal requirements for each program vs. credentials held
 - b. Specialties specified within each credential held
 - c. Variety and breadth of credentials held

2. Experience – including but not limited to:
 - a. Length of experience here and elsewhere
 - b. Nature of experience here and elsewhere
 - c. Relation of experience to positions to be filled

3. Education – including but not limited to:
 - a. Degrees earned and dates
 - b. Majors and minors in all post-high school studies
 - c. Courses completed since employed in this district
 - d. Other inservice experience

4. Performance – including but not limited to:
 - a. Attendance
 - b. Evaluation documents on file
 - c. Specific job-related skills (such as signing) as measured in employment screening

7. On March 6, 2009, the board, in resolution 2008-2009-XVII, determined that it had a specific need for qualified personnel to provide special education services and directed the superintendent to identify such teachers and to maintain those teachers over teachers with higher seniority who do not possess special education training, certification and experience.

8. At hearing, Superintendent Presta testified that it is not in the best interest of students to split teaching positions, i.e., to have more than one teacher share a 1.0 FTE position. The district's practice, however, both before and after Presta became superintendent in July 2008, has been to split numerous positions.

9. In its post-hearing brief, the district noted that it had rescinded the layoff notices of Jeannette Shereda, Megan Martins and Lynn Howe. The accusations against them will be dismissed.

10. Respondents do not dispute the layoff of Paul Luperini (1.0 FTE), Krystin Simmons (1.0 FTE) and Jeff Torres (.6 FTE).

11. Cynthia Dalmacio is a probationary teacher with an August 18, 2008 seniority date. She holds a 1.0 FTE position. The district noticed Dalmacio for a .2 FTE layoff but at hearing sought to amend its accusation to propose a 1.0 FTE layoff for Dalmacio.

12. Donna Hong is a permanent teacher with a September 1, 1990 seniority date. She holds a .9 FTE assignment, including .3 FTE BTSA and .2 FTE Homework Center. The district seeks to eliminate the BTSA and Homework Center positions.

Ms. Ferguson (first name not in evidence) is a probationary teacher with an August 17, 2007 seniority date. She holds a .8 FTE position that Hong is qualified and competent to teach.

13. Felipe Macay is a permanent teacher with an August 22, 2001 seniority date. He holds a 1.0 FTE ELD (English Language Development) position. The district seeks to reduce the 1.0 FTE ELD position by .5 FTE and to subject Macay to a .5 FTE layoff.

Billie Yogi is a probationary teacher with a July 2, 2007 seniority date. Yogi holds a 1.0 FTE fourth grade position that Macay is qualified and competent to teach.

14. Holly Rios is a permanent teacher with an August 22, 2001 seniority date. She holds a .5 FTE position. The district sent her a “precautionary layoff notice” but does not seek her layoff.

LEGAL CONCLUSIONS

1. The district has rescinded the layoff notices of Jeannette Shereda, Megan Martins and Lynn Howe. The accusations against them will be dismissed.

2. Respondents do not dispute that cause exists for the elimination of 2.6 FTE positions or that Paul Luperini (1.0 FTE), Krystin Simmons (1.0 FTE) and Jeff Torres (.6 FTE) are properly subject to layoff.

3. At hearing the district sought to amend the accusation to reduce Cynthia Dalmacio’s services by 1.0 FTE as opposed to the .2 FTE reduction previously proposed. The district asserts that the accusation may be amended pursuant to Government Code section 11516. Although that statute – found in the Administrative Procedure Act – allows accusations to be amended even after submission of a case for decision, respondents correctly contend that Education Code section 44949, subdivision (a), requires districts to notify teachers by March 15 of the intended reduction of their services. The district notified Dalmacio that it intended to reduce her services by .2 FTE, not 1.0 FTE. Government Code section 11516 does not relieve the district from its obligations under Education Code section 44949, subdivision (a). The district’s request to amend the accusation as to Dalmacio is denied. She remains subject to a .2 FTE reduction.

4. The district did not establish that the services of Donna Hong and Felipe Macay may be reduced. Hong is qualified and competent to teach in the .8 FTE position currently held by Ms. Ferguson, who has less seniority than Hong. Macay is qualified and competent to teach in the 1.0 FTE position currently held by Billie Yogi, who has less seniority than Macay. Education Code section 44955, subdivision (c), requires the district “to 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.” *Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334, involved a different situation – the splitting of a full-time position to accommodate a part-time senior employee. Such is not the case with regard to Hong or Macay. The accusations against them will be dismissed.

5. The district does not seek to layoff Holly Rios, and respondents concur. The accusation against Rios will be dismissed.

6. Any contentions raised by respondents and not discussed above are found to be without merit and are hereby rejected.

7. In accordance with Education Code sections 44949 and 44955, cause exists to give respondents whose accusations are not dismissed that, to the extent shown in the layoff

notices sent them, their services will not be required for the 2009 – 2010 school year. This cause relates solely to the welfare of the schools and pupils within the meaning of Education Code section 44949.

ORDER

1. The accusations against Jeannette Shereda, Megan Martins, Lynn Howe, Donna Hong, Felipe Macay, and Holly Rios are dismissed.

2. Notice may be given to the remaining respondents that, to the extent shown in the layoff notices sent them, their services will not be required for the 2009 – 2010 school year.

DATED: _____

STEVEN C. OWYANG
Administrative Law Judge
Office of Administrative Hearings