

BEFORE THE
GOVERNING BOARD OF THE
EL MONTE CITY SCHOOL DISTRICT

In the Matter of the Accusation Against:

30 Certificated Employees of the El
Monte City School District,

Respondents.

OAH No. 2009030577

PROPOSED DECISION

This matter came on for hearing before Administrative Law Judge Timothy S. Thomas, Office of Administrative Hearings, at El Monte, California, on April 9, 2009.

Sharon J. Ormond, Atkinson, Andelson, Loya Ruud & Romo, Attorneys at Law, represented the El Monte City School District (hereinafter the District).

Daniel J. Kolodziej, Trygstad, Schwab & Trygstad, Attorneys at Law, represented 30 certificated employees of the District (hereinafter Respondents). A complete list of the individual respondents is attached hereto as Exhibit A.¹ All of the Respondents attended the hearing.

Prior to the taking of evidence, by stipulation of the parties, the Accusation was dismissed as against two of the Respondents, Benson Kwok and Hilda Perez.

Oral and documentary evidence was received and argument was heard and considered. At the request of the District, additional briefing was permitted and received from the parties on or before April 21, 2009. The matter was submitted for decision on April 21, 2009.

FACTUAL FINDINGS

1. The District operates 18 elementary and middle schools that serve 10,145 children. Due to an expected and unprecedented budget shortfall, the District

¹ The numbers following the names of Respondents on Exhibit A refer to each individual's position on the District's seniority list.

currently plans to close two schools and reduce its teaching and administrative workforce accordingly.

2. On March 9, 2009, the District's Superintendent, Jeff Seymour, recommended that the District's Board of Education (the Board) approve a resolution to reduce particular kinds of services and decrease the number of certificated employees by 30 full-time equivalent (FTE) positions. On March 9, 2009, the Board passed Resolution No. 08-09:19, authorizing the reductions. Specifically, the reductions were authorized as follows:

Speech and Language Disorder Teaching Services	1.0 FTE
Kindergarten through 8th Grade Self-Contained Classroom Teaching Services	22.0 FTE
Assistant Principal	6.0 FTE
Administrator of Alternative Education	<u>1.0 FTE</u>
Total	30.0 FTE

3. On March 10 and March 11, 2009, principals of the District's schools personally served on each Respondent a written notice that the Superintendent had recommended that notice be given to Respondents pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year. Each notice set forth the reasons for the recommendation and noted that the Board has passed a resolution reducing the certificated staff by 30 FTE.

4. All 30 Respondents timely filed written requests for a hearing to determine if there is cause for not re-employing them for the next school year.

5. The Superintendent made and timely filed the Accusation against Respondents. The Accusation was personally served on each Respondent on March 23, 24 or 25, 2009. All Respondents timely filed Notices of Defense.

6. Respondents are probationary or permanent certificated employees of the District.

7. Prior to and subsequent to the adoption of Resolution 08-09:19 by the Board, the District identified vacancies expected in school year 2009-2010 due to retirements, resignations and the release of teachers. Those vacancies have been taken into account as part of the District's process to identify the teachers to be laid off.

8. On March 9, 2009, the Board adopted Resolution No. 08-09:21, which established tie-breaking criteria for determining the relative seniority of certificated employees who first rendered paid service to the District on the same date. It provided that the order of termination shall be based on the needs of the District and its students in accordance with the following:

(a) Certificated employees possessing and working under a clear professional, standard or general teaching credential have greater seniority over employees possessing and working under a preliminary or intern credential, or short-term staff permit, provisional internship credential or waiver.

(b) Assuming that reference to criterion (a) does not break all ties, employees who possess and work under a preliminary credential shall have seniority over employees possessing and working under an intern credential, short-term staff permit, provisional internship credential or waiver.

(c) Assuming that reference to criteria (a) and (b) does not break all ties, employees who possess and work under an intern credential shall have seniority over employees possessing and working under a short-term staff permit, provisional internship credential or waiver.

(d) Assuming that reference to criteria (a) through (c) does not break all ties, then employees possessing a BCLAD certification shall have seniority over employees possessing any other certification/authorization to teach English language learners. Similarly, employees possessing any certification/authorization to teach English language learners, other than BCLAD, will have seniority over employees lacking such other certification/authorization.

(e) Assuming that reference to criteria (a) through (d) does not break all ties, then employees possessing multiple credentials shall have seniority over employees having only a single credential with multiple subject matter or supplemental authorizations on the credential. Employees having only a single credential with multiple subject matter or supplemental authorizations on the credential shall be ranked by the number of authorizations for purposes of determining their relative seniority.

(f) Assuming that reference to criteria (a) through (e) does not break all ties, then employees with a Ph.D/Ed.D from an accredited institution of higher education shall have seniority over employees with a masters degree. Similarly, employees with a masters degree shall have seniority over employees with a bachelors degree.

(g) Assuming that reference to criteria (a) through (f) does not break all ties, then employees shall be ranked by verified years of certificated employee

experience as determined by actual step placement on the District certificated salary schedule.

(h) Assuming that reference to criteria (a) through (g) does not break all ties, then certificated employees shall be ranked by total semester credits earned at an accredited institution of higher education after earning a bachelors degree.

(i) Assuming that reference to criteria (a) through (h) does not break all ties, then certificated employees shall be ranked by their School Max ID.

9. The District maintains a seniority list, which lists all certificated employees in the District in order, based on their first date of paid service with the District. The chart also lists each employee's title (e.g., "principal," "teacher," "psychologist"), grade taught (if applicable), current assignment (e.g., "principal," "self-contained," "algebra/math departmentalized"), tenure status, school location, credentials held and lastly provides a column for "comments." To complete the chart, the District consulted the employees' personnel files, the county human resources system and other sources. Additionally, the District sent all teachers forms and asked them to verify the information gathered about them. Where teachers were shown to have the same first dates of paid service, the tie-breaking criteria were used to determine the teachers' place on the list.² A separate list of certificated employees the District deemed temporary employees was maintained. Each of those teachers received notices that they would be released from their employment at the end of the current school year.

10. The District used the seniority list to develop a proposed layoff list of the least senior employees currently assigned in the various services being reduced. In making this determination for each kind of service to be reduced, the District counted the number of reductions not covered by known vacancies and determined the impact on incumbent staff in inverse order of seniority. The District then determined whether any of the employees were entitled to "bump" less senior employees who had not been identified to be laid off, that is, whether by reason of their credentials and experience they could teach in areas of service not scheduled for reduction. By this method, Respondents Mejia (employee number 573), Sais (564), Syrja (561), Healy (560) and Mendoza (549) were "bumped" and identified for layoff. The remaining Respondents were identified for layoff as being the least senior employees working in the areas of service scheduled for reduction who were without any "bumping" rights.

² Subsequent to the passage of Resolution No. 08-09:19 and the service of the Accusation with Exhibit A's list of employees identified for layoff, and prior to the hearing, the District became aware of information that caused them to change the seniority list to reflect the new information. Thus, the following changes are reflected: Aldrete (changed from employee #552 to #548), Casado (564 to 562), Edpao (554 to 562), Healy (562 to 560), Lopez (555 to 552), Mejia (576 to 573), Montoya (551 to 547), Najera (556 to 553), Sais (566 to 564), Serrano (545 to 544), Sleight (547 to 546), Syrja (563 to 561), and Tran (544 to 550). At the hearing, Respondent Mendoza was moved from #553 to #547A.

11. Board Resolution No. 08-09:19 provided:

[T]hat due to specific need of the District to hire and retain teachers who possess credentials or certifications authorizing instruction in Algebra and Science, the Superintendent and/or his designee is authorized to deviate from terminating certificated employees in order of seniority in instances where the less senior employee possesses a currently valid preliminary or clear California teaching credential authorizing instruction in one or more of the foregoing specialties.

By virtue of this authority, the District proposed to “skip” teacher Hilda Perez (516) over more senior teachers by virtue of her math credential. The District nevertheless noticed Perez for layoff as a precaution in the event the decision to “skip” her was not sustained. The issue became moot, however, when at hearing the District and Respondents reached a stipulation to dismiss the Accusation as against Perez and Respondent Benson Kwok (515) due to attrition identified by the District after March 15, 2009.

12. Subsequent to the passage of Board Resolution No. 08-09:19 and service of the Accusation on the Respondents, the District discovered that six teachers working pursuant to long-term, but temporary assignments had not signed contracts indicating their assignments were temporary. Therefore, the District correctly reasoned, those teachers should have been classified as enjoying probationary status. As the individuals teaching under the long-term assignments did not receive notices of layoff, the District moved to dismiss the Accusation as to more senior Respondents certificated and competent to render the services for which the temporary teachers were being retained: Pinedo (513), Ponce (514), Morris (519), Hall (520), De Belius (521) and Aviles (522). The motion was granted.

13. The District did not serve layoff notices on teachers Jeff Ha (517) or Laura Jasso (554). Those individuals hold multiple subject credentials but are teaching science and physical education (Ha) and social science (Jasso) in the current school year pursuant to “special authorizations” granted by the Board. In other words, the teachers are not qualified by virtue of their credentials to teach the subjects in the “departmentalized” environment, but due to a perceived need to fill teaching positions in those fields at the middle school level, they were selected, and they agreed, to fill the need. Their selections were made following recommendations from their respective principals and a vetting process conducted by a committee of teachers. The authorizations granted by the District were for the 2008-2009 school year only. It has not been decided whether the authorizations will be offered Ha and/or Jasso for the next school year, nor has Ha or Jasso yet agreed to fill those positions if they are again offered. Respondents do not contend that they are

certificated or competent to render the services currently being rendered by Ha and Jasso.

14. The teaching positions of employees who were “bumped,” as set forth in Finding 10, are to be taken by the six assistant principals and one administrator otherwise designated for layoff. All seven of the administrators have prior teaching experience with the District and for seniority purposes their positions were established by their first dates of paid service as teachers. Those dates ranged from 1985 to 2001, and the dates when they first served as administrators ranged from 2001 to 2008. By assigning the administrators seniority dates commensurate with their first dates of paid service as teachers, all of the administrators are senior to all of the Respondents.

15. Respondents offered evidence by way of stipulations of the parties with regard to four individual Respondents who have rendered service as long-term substitutes and claim they should be credited with earlier seniority dates than the District assigned, which, in all four cases, was September 6, 2005. Respondent Blanco (524) filled in for another teacher on January 24, 2005, and completed that school year. Respondent Gamboa (511) filled in for another teacher on February 18, 2005, and completed that school year. Respondent Rivas (510) filled in for another teacher on April 16, 2005, and completed that school year. Respondent Syrja (561) filled in for another teacher on April 10, 2005, and completed that school year.

16. Four Respondents testified that they should not have been noticed for layoff because they do not teach in any of the areas of service designated for layoff. The District considered them eligible for layoff as teachers in “self-contained” classrooms, one of the particular kinds of service scheduled for reduction.

(A) Bertha Rodriguez (523) teaches at the sixth grade level. She holds a multiple subject credential. She testified that her first year of probationary service began in September 2005. For the first week or two of the current year, Ms. Rodriguez taught the same group of children all day long. During that time, the children were tested and thereafter grouped differently. Her “home room” lasts the first six minutes of every day and the same children stay with her for language arts for nearly two hours. Ms. Rodriguez then teaches mathematics for one and one-half hours. In that class, six to eight of her original, home room students stay with her and they are joined by new students who had different home room assignments. Next, Respondent Rodriguez teaches English language development (ELD) to four of her original students and a mixture of others for 45 minutes. After lunch, Ms. Rodriguez conducts a “prep” period and teaches social studies and science to her original home room group.

(B) Oscar Lopez (552) also teaches sixth graders. He holds a multiple subject credential and his schedule is exactly the same as that of teacher Rodriguez.

(C) Joanne Tran (550) also teaches at the sixth grade level and holds a multiple subject credential. Her schedule begins with her home room group, but moves into science with a different mixture of children. She keeps the same children during subsequent periods devoted to language arts and grammar. A different group then comes to her for language arts and writing/reading classes. Yet another different group then comes to her classroom for ELD instruction. Ms. Tran ends the day with her original home room group.

(D) Sylvia Najera (553) also teaches sixth graders and holds a multiple subject credential. She starts with a home room group, but then teaches social science and science to a new, second group of students. A third group arrives in her classroom for math instruction, followed by another, different group of sixth as well as fifth graders for ELD instruction. Ms. Najera's original home room group then finishes the day with her.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met.
2. A 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."
3. The services identified in Board Resolution 08-09:19 are particular kinds of services that could be reduced or discontinued under Education Code 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 District's schools and pupils within the meaning of Education Code section 44949.
4. As set forth in Finding 12, the District classified six teachers (not Respondents) as temporary, and thus did not serve them with preliminary layoff notices. Those teachers had become probationary teachers as a matter of law by virtue of the failure of the District to obtain signed contracts establishing the temporary nature of their employment before that employment began last fall. (See Ed. Code, § 44916, and *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911.) As those teachers are all junior to all Respondents, it is argued that all Respondents must be retained, since "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." (Ed. Code, § 44955, subd. (b).) This "domino theory" represents a response

to the District's error that is too harsh and rigid. The purpose of the entire teacher layoff statutory scheme is better promoted by adopting the District's suggestion to the effect that only the six most senior Respondents, that is, those who would be prejudiced by the procedural error, be retained. This conclusion is supported by the reasoning in *Alexander v. Board of Trustees of the Delano Joint Unified High School District* (1983) 139 Cal.App.3d 567, at page 576: "Because at least some of the persons skipped should have received the notices, a *corresponding number* of the most senior of the employees who were not reemployed must have been improperly given notices. The trial court must determine which of the teachers suffered prejudicial error in this case." (Emphasis added.) The conclusion is also supported by reference to Education Code section 44949, subdivision (c)(3), which provides that "[n]onsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors." The error in this case was prejudicial only to the six most senior Respondents who are certificated and competent to render the services being rendered by the six temporary teachers not noticed.

5. Respondents next contended that the seven administrators who bumped a corresponding number of Respondents (see Finding 14) were assigned incorrect seniority dates. The claim is that the administrators were not entitled to more than three years of credit toward seniority pursuant to Education Code section 44956.5, which reads:

For a certificated employee initially employed in an administrative position on or after July 1, 1983, who transfers to a teaching position, the period of employment in the administrative position shall not be included in determining seniority for purposes of Sections 44955 and 44956, except for school site administrators who shall earn up to a maximum of three years seniority while serving as site administrators.

The fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 777.) It is likewise well settled that in the interpretation of a statute, effect should be given to every word and clause thereof, "leaving no part of the provision useless or deprived of meaning." (*Weber v. County of Santa Barbara* (1940) 15 Cal.2d 82, 86.) The cited section does not, on its face, cover the case of a site administrator who was initially employed as a teacher in the District, as opposed to an initial hire as an administrator who later transfers to a teaching position. The administrators involved here all were "initially employed" as teachers within the District. (In fact, all of the administrators had served a number of years as teachers in the District before they accepted the administrative positions.) Had the legislature intended the result urged by Respondents, it would not have inserted the qualifier "initially." Deleting that word would change the meaning

entirely in the context of the seniority rights of these administrators under Education Code section 44955. Respondents have not provided support for an interpretation of section 44956.5 that would require that the literal language be ignored.

6. Respondents next argued that teachers Blanco (524), Gamboa (511), Rivas (510) and Syrja (561) were misclassified for purposes of seniority and should be given earlier seniority dates than the one assigned (September 6, 2005) by the District's seniority list (see Finding 15). The basis for the argument is that the named Respondents began what they characterize as "long-term assignments" in January, February or April of 2005. The District countered that those Respondents were substitute teachers in the spring of 2005 and not teachers on temporary assignments.

The "default" classification for a teacher confers probationary status (*California Teachers Assn. v. Vallejo City Unified School District* (2007) 149 Cal.App.4th 135, 146), so that if these Respondents did not clearly fall within any other statutory definition for classification in the latter half of service in the 2004-05 school year, they would be entitled to probationary status and an earlier seniority date than assigned by the District.

A substitute teacher is defined by Education Code section 44917 as one who is employed in a position requiring certification qualifications, to fill the position of a regularly employed person absent from service. Respondents offered no evidence that would lead to the conclusion that they were anything other than substitute teachers other than the length of their service during the relevant time. Indeed, the stipulation offered by the parties included the information that each of the teachers "filled in" for a permanent teacher. Section 44917 does not distinguish between short and long periods of absence of the person regularly employed. And substitutes do not accrue time toward tenure unless they worked more than 75 percent of the school days of the school year, performed duties normally required of a certificated employee and were hired the following school year as probationary employees. (Ed. Code, § 44918, subd. (a).) The named Respondents satisfied the latter two of the prongs of the test, but do not make the claim that they worked more than 75 percent of the school days. Therefore, they are deemed to have served as substitute teachers during the latter part of the 2004-05 school year. Their first date of paid service as probationary employees was correctly designated as their seniority date.

7. Respondents Rodriguez (523), Lopez (552), Tran (550) and Najera (553) contend that they were improperly served with layoff notices in that their assignments are not accurately defined as a particular kind of service identified by the Board resolution and scheduled for reduction. The District included these individuals as subject to layoff within the category, "Kindergarten through 8th Grade Self-Contained Classroom Teaching Services." These Respondents all hold multiple subject credentials, authorizing them to teach in the "self-contained" environment, and each teaches at the 6th grade level. But these named Respondents claim their

classrooms are not “self-contained” in that they do not teach the same children in all subjects during the day.

The phrase “self-contained” is not defined in the Education Code, although the Code utilizes the phrase in several contexts. Even though teaching in a “self-contained” classroom is not a type of credential found in the Code,³ Education Code section 44258.1 reads:

The holder of a credential authorizing instruction in a self-contained classroom may teach in any of grades 5 to 8, inclusive, in a middle school, provided that he or she teaches two or more subjects for two or more periods per day to the same group of pupils, and, in addition, may teach any of the subjects he or she already is teaching to a separate group of pupils at the same grade level as those pupils he or she already is teaching for an additional period or periods, provided that the additional period or periods do not exceed one-half of the teacher’s total assignment.

The phrase “self-contained” is prominent within the District’s seniority list and appears to describe the duties of classroom teachers who teach more than one subject, not necessarily to describe whether the same group of children stays with the same teacher throughout the school day. This conclusion is inferred by reference to the other assignment descriptions provided in the document for 6th, 7th and 8th grade teachers, which include, for example, “Algebra Departmentalized,” “Social Studies Departmentalized,” “Science/PE Departmentalized,” or “Social Science Departmentalized.” No teacher currently working under a “departmentalized” assignment was noticed for layoff. Teachers in the departmentalized environment generally teach but one subject and hold single subject credentials. But for Education Code section 44258.1, the named Respondents could not teach single subjects in the same or similar manner as those holding single subject credentials in those subjects.

It appears that the named Respondents are teaching pursuant to multiple subject credentials but in other than strictly “self-contained” classrooms by authority of Education Code section 44258.1. The District has utilized the phrase “self-contained” to group teachers holding multiple subject credentials and who teach in the traditional elementary school setting (one class, same students all day) with teachers who, under the authority of section 44258.1, also hold multiple subject credentials but teach subject to the hybrid schedules described in Finding 16. While the District might have provided more clarity by avoiding the catch-all phrase, “self-contained,”

³ The Education Code provides for four kinds of credentials: single-subject, multiple subject, specialist instruction and designated subject. (Ed. Code, § 44256.)

the intent of the Board's action is consistent with the requirements of the Education Code and is sustained.

8. Finally, Respondents contend that the failure to give notice of layoff to teachers Ha (517) and Jasso (554) was in error. As set forth in Finding 13, those two teachers are currently assigned to teach science and PE and social science, respectively, under special authorizations granted by the Board. Their assignments are not guaranteed for the next school year, but absent the special authorizations to teach in the departmentalized environment, both would have been subject to layoff as multiple subject credentialed teachers in self-contained classrooms.

Respondents cite Education Code section 44258.3 in support of this argument. That section reads, in pertinent part:

(a) The governing board of a school district may assign the holder of a credential, other than an emergency permit, to teach any subjects in departmentalized classes in kindergarten or any of grades 1 through 12, inclusive, provided that the governing board verifies, prior to making the assignment, that the teacher has adequate knowledge of each subject to be taught and the teacher consents to that assignment. The governing board shall adopt policies and procedures for the purpose of verifying the adequacy of subject knowledge on the part of each of those teachers.

[¶] . . . [¶]

(c) Nothing in this section shall be construed to alter the effect of Section 44955 with regard to the reduction by a school district governing board of the number of certificated employees.

The District correctly points out that no Respondent is currently qualified by credential or experience to teach science, PE or social science as a single subject. Therefore, the argument continues, Education Code section 44955's prohibition that "the services of no permanent employee may be terminated . . . while any . . . other employee with less seniority is retained to render a service which said permanent employee is certificated and competent to render" is not violated by the District's action. This conclusion, however, is based on the assumption that Ha and Jasso will be assigned in 2009-10 to teach in their current assignments. If not, they will revert to the same assignments as Respondents by virtue of their multiple subject credentials. The District's evidence was that a decision has not been made to issue another authorization for Ha or Jasso. Therefore, it cannot be concluded that those teachers

are being retained to render the services that Respondents are admittedly not certificated or competent to render within the meaning of section 44955.

With regard to subsection (c) of Education Code section 44258.3, the District urges a reading that would merely protect a senior employee who also has a board authorization from being laid off when a junior teacher with a special authorization is being retained. This interpretation is contrary to the plain language of the subsection, the intent of which is to leave unaltered the seniority-driven priorities of section 44955. In other words, while the holder of a multiple subject credential may qualify for special authorization to teach outside of his or her credential by board action, such action may not be used to alter the effect of the applicable law at layoff time. The governing board of a school district, which is tightly constrained in the ways it may reduce its teaching workforce other than by seniority, cannot circumvent the rules by means of the special authorization procedure provided by Education Code section 44258.3.

Consistent with the determination of the issue reached in Legal Conclusion 4, above, the appropriate remedy for the District's failure to serve Ha and Jasso with layoff notices is an order that the District shall retain the two most senior Respondents who are certificated and competent to render the services that Ha and Jasso are certificated to render.

ORDER

1. Pursuant to stipulation of the parties, the Accusation as to Respondents Benson Kwok and Hilda Perez is dismissed.
2. Pursuant to granting of a motion of the District, the Accusation as to Respondents Janet Pinedo, Betty Ponce, Nicole Morris, Demetria Hall, Kara De Belius and Michelle Aviles is dismissed.
3. Based on Legal Conclusion 8, the District improperly failed to provide notice of layoff to employees Jeff Ha and Laura Jasso. Therefore, the Accusation is not sustained as to the two remaining, most senior Respondents who are certificated and competent to render the services that Ha and Jasso are certificated to render.

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4. The Accusation served on the remaining Respondents listed on Exhibit A is sustained. Notice shall be given to each of those Respondents before May 15, 2009, that his or her services will not be required for the 2009-10 school year because of the reduction of particular kinds of services. Notice shall be given in the inverse order of seniority.

DATED: April 24, 2009

TIMOTHY S. THOMAS
Administrative Law Judge
Office of Administrative Hearings