

**BEFORE THE
GOVERNING BOARD
OF THE ROWLAND UNIFIED SCHOOL DISTRICT**

In the Matter of the Accusation Against:

OAH Case No. 2009030579

Certain Certificated Employees of the
Rowland Unified School District,

Respondents.

PROPOSED DECISION

The hearing in the above-captioned matter was held on April 21, 2009, at Rowland Heights, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by Jonathan A. Pearl, Miller, Brown & Dannis. Respondents were represented by Jean Shin, Rothner, Seagall, Greenstone & Leheny.

Oral and documentary evidence was received, and argument was heard, and the case was submitted 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 Maria G. Ott, Ph.D., filed and maintained the Accusation¹ in the above-captioned matter while acting in her official capacity as Superintendent of the Rowland Unified School District (District).

2. The following persons are certificated employees of the District and are the Respondents in this case:

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.

Cynthia Alvarez, Margaret Frank, Monica Ordorica, Rocio Torres, Amy Frye, Astrid Gallon-Gonzalez, Shirley Yang, Catherine Blackler, Grace Voong, Jessica Valera, Kristin Hurst, Melody Vasquez, Olga Sosa, April Aleman, Rosanne Hoang, Desirie Fernandez, Jeanette Pena Godoy, Xochitl Sandoval, Aida Sandoval, Carrie Cleveland, Thao-Vi To, Sophia Hua, Lorena Ortiz-Rodriguez, and, Steve Krumbine.

3. (A) On March 3, 2009, the Governing Board of the District adopted a resolution entitled “Resolution to Decrease the Number of Certificated Employees Due to a Reduction in Particular Kinds of Services for the 2009-2010 School Year” (Reduction Resolution). (Ex. 2.) The purpose of the Reduction Resolution was to reduce and discontinue particular kinds of certificated services no later than the beginning of the 2009-2010 school year. Specifically, the resolution requires the reductions of 88.6 “FTE”—Full Time Equivalents—by reducing various types of services. This decision was based on the statewide fiscal crisis; the District already faces a budget shortfall of nine million dollars.

(B) The FTE’s that the Board determined to reduce are described in the Reduction Resolution, as follows:

Teacher (Elementary)	19.0 FTE
Teacher (Special Ed.)	1.0 FTE
Planning Specialist	13.6 FTE
Program Specialist	6.0 FTE
Teacher on Special Assignment (Site Based Elementary)	7.0 FTE
Teacher on Special Assignment (Elementary Coach)	5.0 FTE
Teacher on Special Assignment (Itinerent PE Elementary)	1.0 FTE
Teacher on Special Assignment (Site Based Secondary)	2.0 FTE
Building Counselor	2.0 FTE
Counselor (AB 1802)	6.0 FTE
School Psychologist	3.0 FTE
Nurse	1.0 FTE
Director (Student Assessment)	1.0 FTE
Vice Principal/Project Coordinator (Elementary)	9.0 FTE
Vice Principal (Intermediate)	3.0 FTE
Vice Principal (High School)	9.0 FTE

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

² All further statutory references are to the Education Code.

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 the 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. On March 3, 2009, the Board adopted a resolution entitled "Criteria for Determining Order of Seniority for those Employees With the Same Date of First Paid Service" (tie-breaking resolution). (Ex. 6.) The resolution established tie-breaking criteria for use in the event that two or more teachers facing layoff had the same seniority date. Seven criteria were set forth, with the proviso that if after all had been applied, teachers were still tied, then the tie would be broken by lot. The District did not abuse its discretion in the adoption of the tie-breaking criteria.

8. (A) On or about March 4, 2009, each Respondent and other certificated teachers were given written notice that pursuant to sections 44949 and 44955, their services would not be required in the 2009-2010 school year (hereafter the preliminary notices).³ Thereafter, Respondents requested a hearing, and on or about March 25, 2009, each was served with an Accusation and other documents. Each Respondent filed a notice of defense.

(B) Following the service of the preliminary notices, the District rescinded notices that had been served on 14 certificated employees, namely:

Cyndi Caffrey, Cristina Canales, Patricia Chinchilla, David Angel Cjaven, Irene Fang, Victor Guzman, Jacqueline Hill, Nancy Jim, Maria Jimenez, Diana Mendez, Earle Ousley, Patricia Reyes-Madrigal, Vanessa Salas, and Jose Torres.

(C) All jurisdictional requirements have been met.

9. At the time of the hearing, the District sought to lay off 24 employees, rather than 88.6 employees. In part this resulted from positively assured attrition (PAA), as some teachers had accepted retirement incentives or otherwise decided not to return to their positions. Furthermore, through re-assignments, and the decision not to re-employ some temporary employees, the number of permanent or probationary employees subject to lay off had decreased to 24.

10. (A) 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 the case

³ Exhibit 4 indicates that 103 certificated employees received preliminary notices.

of employees whose first date of paid service was August 27, 2007, there were five employees in that group who remained tied after the application of the tie-breaking criteria. However, a lottery was not held prior to the hearing. During the hearing, the parties held a lottery, and lots were drawn, so that the relative seniority of the five teachers could be established. As a result of the lottery, Jessica Valera was determined to be the most senior of the five, and in descending order of seniority follow Catherine Blackler, Melody Vasquez, Grace Voong, and Kristin Hurst, the most junior.⁴ The tie-breaking criteria were appropriately applied to the teachers listed on the final seniority list (Ex. 11).

(B) During the hearing, the District provided a list of the 24 Respondents it deemed subject to lay off, in order of seniority as previously determined by the District. That list was received in evidence as Exhibit 11. The list of Respondents set out in Factual Finding 2 is based on that list, which hereafter shall be referred to as the “abbreviated seniority list.”

11. Margaret Frank disputed the District’s right to lay her off. Ms. Frank has worked for the District since 1971, and is classified as a permanent or tenured employee. Due to a break in service, between approximately 2006 and August 2008, her seniority date is August 25, 2008, which date she does not dispute; the District does not dispute that she is a tenured employee despite the break in service. Ms. Frank holds a K-9 life elementary credential and an English authorization; she has taught English for five years. She is capable of taking the place of a number of probationary employees who hold multiple subject credentials, including Fain, Hill, Canales, Chinchilla, and several others who were dismissed by the District. (See Factual Finding 8(B).)

12. Cynthia Alvarez also disputed the District’s authority to lay her off. She is shown on the seniority list as having a seniority date of August 25, 2008, and the list classifies her as a “prob 2,” that is, a teacher in her second year of probation. She was employed during the prior school year for the entire year as a temporary employee. At the beginning of the 2008-2009 school year she was employed as a probationary employee. Her first date of employment during the 2007-2008 school year was August 27, 2007.

13. Amy Frye also asserted that she should have a seniority date of August 27, 2007. She is shown on the District’s seniority list as having a seniority date of January 1, 2008. She was first employed on August 27, 2007 as a temporary employee with an intern credential. She received a preliminary credential on or about

⁴ There were six Respondents remaining in the case who had the August 27, 2007 seniority date. However, Shirley Yang had seven points in the tie-breaker, and the five Respondents mentioned in Factual Finding 10 (A) each had six, and thus were forced into the lottery.

November 16, 2007, and continued to teach in the District after that date. She was made a probationary employee a few weeks later, effective January 1, 2008.

14. It was stipulated that if Ms. Frye and Ms. Alvarez were found to share the seniority date of August 27, 2007, Ms. Frye would be senior to Ms. Alvarez, as the former would have 8.5 points on the tie-breaking criteria, and Ms. Alvarez would have 8 points. The District, in closing argument, acknowledged that in such circumstances either Respondent would be senior to teachers who were not laid off.

15. Catherine Blackler asserted that she should not be laid off because she teaches in a departmentalized setting, or “core” setting. She teaches social studies and science in the fifth grade. She does not dispute her seniority date.

16. No Respondent was able to show that they could displace another teacher, with the exception of Ms. Frank. No Respondents were able to show that they should have been skipped because of their qualifications, training, or credential.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to sections 44949 and 44955, based on Factual Findings 1 through 8(C).

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 District’s schools and pupils within the meaning of section 44949. This Legal Conclusion is based on Factual Findings 3 through 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 Finding 16.

4. (A) Ms. Frank is not subject to lay off because of her permanent status. While her seniority date changed following her departure from the District, her return within 39 months gave her all her other rights and protections. (See § 44931.) Because of her permanent status, section 44955, subdivision (b), protects her position. There it is stated that “except as is 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.”

(B) The quoted material shows a preference for tenured teachers over probationary teachers, which is not solely a function of seniority; it can be read as providing that no permanent teacher may be terminated where a probationary teacher is retained to render a service which the tenured teacher can provide. And, the history of the statutory scheme is consonant with this reading; probationary teachers, for many years, were not provided with the protection of the statutes pertaining to a reduction in force.⁵

(C) The District asserted that the proviso “except as is otherwise provided by statute” provided that seniority date alone controlled, and that the traditional distinction between permanent and probationary teachers was essentially meaningless. Recent case law was cited for the proposition. However, the holding in *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, and the other cases cited by the District do not go so far as it

⁵ It appears that this protection was expanded to include the probationary teachers in 1977. (See Historical and Statutory Notes, 27B West’s Ann. Ed. Code (2006 ed.) foll. § 44955, p. 506.)

asserts. Those cases are better read for the proposition that within each class seniority is generally controlling

(D) Ms. Frank must be dismissed from the proceeding, based on Factual Finding 11 and the foregoing.

5. (A) Ms. Alvarez is entitled to the earlier seniority date of August 27, 2007, based on Factual Finding 12. It was established that she had worked in a temporary assignment for a full year prior to the year in which she was made a probationary employee, and that she taught in the summer prior to August 27, 2007. When she received a probationary contract at the beginning of the 2008-2009 school year, she was classed as a second-year probationary teacher.

(B) Section 44917, third paragraph, provides that where a person is employed for a full year as a temporary employee, and hired the next year as a probationary employee, then that prior year shall be deemed a year of employment as a probationary employee. Ms. Alvarez indeed served as a temporary employee for a full year, and is entitled to have August 27, 2007, as her seniority date, as that was her first paid date of service as a probationary employee.

(C) Because the District acknowledges that Ms. Alvarez is senior to teachers who were not laid off (Factual Finding 14), she must be dismissed from the proceeding, pursuant to section 44955, subdivision (b), and the other authorities previously cited.

6. Ms. Frye is not entitled to a different seniority date. Unlike Ms. Alvarez, she did not serve for a full year in a temporary capacity, nor even 75 percent of a year. Thus, sections 44917 and 44918 do not avail her. Instead, she served for one-half of a year. She does not tack the first semester of the 2007-2008 school year to her probationary period, and hence can not utilize August 27, 2007, as her first date of paid service in a probationary status. This Legal Conclusion is based on Factual Finding 13.

7. Ms. Blackler did not establish that her prior assignment gave her such qualifications that she could bump a more junior employee, or that she should somehow have been skipped. This Legal Conclusion is based on Factual Finding 15.

8. In light of the dismissals that must be ordered based on Legal Conclusions 4 and 5, it may be concluded that no junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

9. The District may lay off the remaining Respondents, in reverse order of seniority, as set forth on Exhibit 11, less Respondents Margaret Frank and Cynthia Alvarez, and subject to changing the relative seniority of the five respondents who

participated in the lottery during the hearing. Therefore, the abbreviated seniority list must be modified to make Monica Ordorica the most junior of the remaining respondents, and the persons holding the seniority dates of August 27, 2007 must be ranked so that Ms. Hurst is the most junior, then Ms. Voong, Ms. Vasquez, Ms. Blackler, Ms. Valera, with Ms. Shirley Yang being the most most senior of the persons holding the August 27, 2007 seniority date. (See Factual Finding 10 (A) and fn. 4.) This Conclusion is based on all the foregoing.

ORDER

1. The Accusations are sustained, except as to Respondents Margaret Frank and Cynthia Alvarez, who are dismissed.

2. Notice shall be given to the remaining Respondents that their services will not be required for the 2009-2010 school year because of the reduction and discontinuance of particular kinds of services. Specifically, 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 Ms. Ordorica being the most junior, and Mr. Krumbine being the most senior:

Monica Ordorica, Rocio Torres, Amy Frye, Astrid Gallon-Gonzalez, Kristin Hurst, Grace Voong, Melody Vasquez, Catherine Blackler, Jessica Valera, Shirley Yang, Olga Sosa, April Aleman, Rosanne Hoang, Desirie Fernandez, Jeanette Pena Godoy, Xochitl Sandoval, Aida Sandoval, Carrie Cleveland, Thao-Vi To, Sophia Hua, Lorena Ortiz-Rodriguez, Steve Krumbine.

May 5, 2009

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings