

BEFORE THE BOARD OF TRUSTEES  
OF THE ANAHEIM CITY SCHOOL DISTRICT

In the Matter of the Accusation Against:

Maryann Armen, et al.,

Respondents.

OAH Case No. 2009030735

**PROPOSED DECISION**

Daniel Juárez, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on May 1, 2009, in Anaheim, California.

Cathie L. Fields, Attorney at Law, Atkinson, Andelson, Loya, Ruud & Romo, represented the Anaheim City School District (ACSD).

Carlos R. Perez, Attorney at Law, Reich, Adell, Crost & Cvitan, represented all Respondents listed in Appendix I, except those noted directly below.

Respondents Lisa Estrada (Respondent Estrada) and Jeremy Davis (Respondent Davis) were present at hearing and represented themselves.

The parties submitted the matter on May 1, 2009. However, on March 20, 2009, Respondents had moved for, and were granted a continuance. The originally set hearing date of April 2, 2009, was consequently continued to May 1, 2009. Accordingly, and pursuant to Education Code section 44949, subdivision (e), the dates mandated by the Legislature, and set forth in Education Code section 44949, subdivision (c)(3), are extended by a period of time equal to the continuance.

**FACTUAL FINDINGS**

1. On or about March 9, 2009, by resolution (resolution number 2008-09/27), the Board adopted the Superintendent's recommendation to reduce or discontinue particular kinds of services provided by ACSD, effective the 2009-2010 school year.

2. Resolution number 2008-09/27 included a listing by type and full-time equivalent (FTE) of those positions (214.7 FTE) which the Board resolved to reduce or eliminate no later than the beginning of the 2009-2010 school year.

3. The Board adopted another resolution (resolution number 2008-09/31) that included a list and description of the criteria used by ACSD to determine the order of

termination of certificated employees who first rendered paid service to the Board on the same date.

4. On or about March 10, 2009, ACSD served written notice on certain probationary and permanent certificated employees, pursuant to the direction of the Board, that they would not be reemployed in the ensuing 2009-2010 school year.

5. The written notices described directly above included a request for hearing form that, if returned to ACSD by March 20, 2009, would constitute a hearing request.

6. The parties proceeded as if all individuals listed in Appendix I returned request for hearing forms timely.

7. ACSD's Assistant Superintendent filed and timely served the individuals who had submitted a request for hearing form with an Accusation, Notice of Defense, Notice of Hearing, and related materials. The Accusation and related materials served on each Respondent included the Notice of Hearing, which noticed the instant hearing. The Accusation included a form, that if returned by a date certain, would constitute a Notice of Defense.

8. The parties proceeded as if all Respondents in Appendix I returned notices of defense timely.

9. The certificated employees who were served with the Accusation and related materials were identified as Respondents. (See Appendix I.) However, the Board pled and argued at hearing that those individuals listed in Appendix I, Section II were only provided with all jurisdictional documents in this proceeding as a precaution to enable them to participate and exercise arguable rights in this matter. ACSD argued that those in Appendix I, Section II are temporary employees, and as such are not entitled to participate in this proceeding. ACSD requests an order in conformance with its position that it may non-re-elect these temporary employees separately and independently from the instant process, a process meant solely for its probationary and permanent employees.

10. On March 9, 2009, the Board adopted a third resolution (resolution number 2008-09/29) that included a list of those temporary employees in positions requiring certification qualifications that the Board determined not to re-elect for the ensuing 2009-2010 school year.

11. Some of the temporary employees are employed in categorically funded positions, pursuant to Education Code section 44909. Other temporary employees are employed pursuant to Education Code section 44920.

12. The recommendation that Respondents be terminated from employment was not related to their professionalism and dedication as teachers.

13. ACSD identified the certificated employees providing the particular kinds of services that the Board directed to be reduced or discontinued.

14. The services at issue were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The Board’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

15. The reduction or discontinuation of particular kinds of services related to the welfare of ACSD and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of ACSD, as determined by the Board.

16. The Board considered all known attrition, including resignations, retirements, and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees. After such consideration, the Board determined that it need layoff only those Respondents listed in Appendix I.

17. In cases where several Respondents shared a first date of paid service, ACSD was required to apply the tie-breaker criteria approved by the Board. The Board’s resolution number 2008-09/31 established tie breaker criteria that were fair and reasonable. ACSD applied those tie-breaker criteria fairly and appropriately.

18. ACSD argued at hearing that though it noticed Respondent Davis for layoff, Respondent Davis should be skipped because he provides unique services that its pupils need and no one else within the school district has the qualifications to provide the same services. Respondent Davis holds the position of Instructional Technology Coordinator. His position requires knowledge of educational software applications and hardware, operating systems, among other things. Respondents did not contend that any of them had the unique qualifications required of the position held by Respondent Davis.

19. Respondents Allison Potenza (Respondent Potenza) and Anne Russell (Respondent Russell) separately argued at hearing that ACSD has inappropriately kept each of them as temporary employees for too long, and failed to inform each of them of the process by which a temporary employee can become probationary employees. Respondents Potenza and Russell failed to present evidence that would shield them from layoff.

20. Respondent Sheri Wersky (Respondent Wersky) argued at hearing that she should be converted to a probationary employee because, for the current school year, she began working on September 3, 2008, yet she did not sign a temporary certificated employee contract to work for ACSD until September 11, 2008. She was told she would start her employment as a long-term substitute teacher for the current school year. Respondent Wersky has worked as a temporary employee for ACSD since approximately 2001. Each year, she has signed a contract as a temporary employee. Respondent Wersky provided insufficient evidence to establish her assertion of her actual start date in September 2008.

21. Respondent Lisa Flores (Respondent Flores) argued at hearing that she should be a probationary employee because, for the current school year, she began working before she signed a temporary certificated employee contract to work for ACSD. Respondent Flores's contract shows her signature, dated June 27, 2008. However, Respondent Flores asserted that she actually signed the contract in December 2008, and back-dated the contract, in accordance with directions from ACSD administrators. Respondent Flores provided insufficient evidence to establish her assertions.

22. The parties stipulated that Respondent Jennifer Harrison and Respondent Shannon Johnson are probationary employees, level II, with seniority dates of July 1, 2007. The stipulation does not shield them from layoff.

23. No junior certificated employee is scheduled to be retained to perform services that a more senior employee is certificated and competent to render.

### LEGAL CONCLUSIONS

1. The parties met all notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955.

2. Cause exists to sustain ACSD's action to reduce or discontinue particular kinds of services, as set forth in ACSD's resolution number 2008-09/27 for the 2009-2010 school year, pursuant to Education Code sections 44949 and 44955, as set forth in Factual Findings 1-23, and Legal Conclusions 1, and 3-17.

3. Education Code section 44955 states, in pertinent part:

[¶] . . . [¶]

(b) whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or . . . when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as 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.

[¶] . . . [¶]

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed.

The governing board shall 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.

4. Education Code section 44949 states, in pertinent part:

(a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

[¶] . . . [¶]

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

[¶] . . . [¶]

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition.

5. Education Code section 44920 states, in pertinent part:

The governing board of a school district may employ as a teacher, for a complete school year . . . any person holding appropriate certification documents, and may classify such person as a temporary employee. The employment of such persons shall be based upon the need for additional certificated employees during a particular semester or year because a certificated employee has been granted leave for a semester or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board.

6. Education Code section 44909 states, in pertinent part:

The governing board of any school district may employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted under contract with public or private agencies, or categorically funded projects which are not required by federal or state statutes. The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the governing board and such agreement shall be reduced to writing. Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of the district by which he is employed are maintained and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications. Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees other than Section 44918.

Whenever any certificated employee in the regular educational program is assigned to a categorically funded project not required by federal or state statute and the district employs an additional credentialed person to replace that certificated employee, the replacement certificated employee shall be subject the provisions of Section 44918.

7. The services identified in the Board's resolution number 2008-09/27 are particular kinds of services that the Board can reduce or discontinue under Education Code section 44955. The Board's decision to reduce or discontinue the identified services was not arbitrary or capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of ACSD's schools and pupils within the meaning of Education Code section 44949.

8. ACSD identified the certificated employees providing the particular kinds of services that the Board directed to be reduced or discontinued.

9. A school 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.” (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

10. As to Respondent Davis, and saliently, with no argument to the contrary by other Respondents, it is appropriate to skip Respondent Davis, because of his unique qualifications. (*Santa Clara Federation of Teachers v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 843.)

11. Categorically funded Respondents, those employed pursuant to Education Code section 44909, argue that they are, by definition, probationary employees, and are entitled to receive layoff notices as such. ACSD argues that categorically funded Respondents are temporary employees that can be dismissed without the requirement of this hearing.

12. There is no question that Respondents employed pursuant to Education Code section 44920 are temporary employees and can be dismissed without a right to participate in this proceeding. As to those Respondents, ACSD may take action to dismiss them as the law allows regarding temporary employees.

13. A review of case law finds that other categorically funded teachers have been treated like temporary employees. (*Zalac v. Ferndale Unified School District* (2002) 98 Cal.App.4<sup>th</sup> 838, 840-841 [A kindergarten teacher’s first two years of employment was as a temporary employee in a categorically funded program pursuant to Education Code section 44909].) In *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4<sup>th</sup> 1260, the Court of Appeal found that teachers in categorically funded positions “are treated in much the same way [as temporary employees] in that they may be dismissed without the formalities required for probationary and permanent employees in the event the program expires or is terminated, and their service does not count toward acquiring permanent status (unless they are reemployed the following year in a probationary position).” The *Bakersfield* Court, citing *Zalac*, noted the purpose of Education Code section 44909 was “‘to prevent a person from acquiring probationary status solely through teaching in a categorically funded program. This permits the hiring of qualified persons for categorically funded programs of undetermined duration without incurring responsibility to grant tenured status based on such teaching services alone.’ [Citation.] The section ‘was intended to give school districts flexibility in the operation of special educational programs to supplement their regular program and to relieve them from having a surplus of probationary or permanent teachers when project funds are terminated or cut back.’ [Citation.]” (*Bakersfield Elementary Teachers Association v. Bakersfield City School District, supra*, 145 Cal.App.4<sup>th</sup>

1260, 1286.) To characterize categorically funded Respondents as probationary employees here would go against that purpose. (See also *Haase v. San Diego Community College District* (1980) 113 Cal.App.3d 913 [a certificated employee in a categorically funded position in a community college district not found to be a probationary employee].)

14. Furthermore, in Education Code section 44909, the Legislature directed categorically funded employees to be subject to the provisions of Education Code section 44918, but “without regard to other requirements of this code respecting the termination of probationary or permanent employees.” This direction provides further support for the conclusion reached here, that categorically funded employees may be treated as temporary employees.

15. Thus, ACSD may dismiss its temporary employees, including those categorically funded pursuant to Education Code section 44909, in the manner the law allows for temporary employees. It is noted that ACSD served its temporary employees with the jurisdictional documents and provided them the opportunity to participate in the instant hearing. Those temporary employees participated in the hearing to the fullest extent possible, as if probationary employees. Had the Administrative Law Judge concluded that categorically funded Respondents were probationary, they would have been entitled to the hearing that was had and in which they participated.

16. Nevertheless, ACSD established cause to not reemploy all noticed Respondents for the ensuing school year and Respondents did not establish facts or sufficient legal argument to the contrary.

17. No junior certificated employee is scheduled to be retained to perform services that a more senior employee is certificated and competent to render.

## ORDER

1. The Accusation served on those Respondents identified in Appendix I is sustained, with the exception of Respondent Jeremy Davis.

2. Other than to Respondent Jeremy Davis, notice shall be given to Respondents in Appendix I, Section I, as required by law, that their services will be terminated at the close of the 2008-2009 academic year. Notice shall be given in inverse order of seniority.

3. Notice shall be given to those Respondents identified as temporary employees, in Appendix I, Section II, as provided for by law for temporary employees, that their services will be terminated at the close of the 2008-2009 academic year.

Dated: May 19, 2009

---

DANIEL JUAREZ  
Administrative Law Judge  
Office of Administrative Hearings

APPENDIX I  
RESPONDENTS IN OAH CASE NO. 2009030735, BY ALPHABETICAL ORDER

**Section I      Permanent and Probationary Employees**

1	Armen	Maryann	10	Mullen	Sandra
2	Aro	Tanya	11	Robertson	Cory
3	Brown	Megan	12	Rodriguez	Jenny
4	Chwan	Jennifer	13	Rodriguez	Magaly
5	Dunn	Kristin	14	Shumate	Stephanie
6	Esmaeili	Carmen	15	Sinclair	Tiffany
7	Good	Taeler	16	Timmermans	Cindy
8	Hughes	Morgan	17	Turrietta	Kelly
9	Khan	Saeed	18	Brott	Amber
19	Davis	Jeremy	20	Lantis	Sabrina
21	Nguyen	Julie Trang			

APPENDIX I—continued  
 RESPONDENTS IN OAH CASE NO. 2009030735, BY ALPHABETICAL ORDER

**Section II    Temporary Employees**

1	Acevedo	Paul			
2	Alegria	Tatiana	31	Lewis	Diane
3	Aurang	Mahnaz	32	Lupica	Jana
4	Bowne	Jennifer	33	Macias	Patricia
			34	Mandalia	Naseem
5	Bui	Jimmy	35	Manzo	Geovannia
6	Burke	Alison	36	Martin	Allison
7	Chavez	Diane	37	Martinez	Gina
8	Chen	Michael	38	Park	Sarah
9	Cortes-Degante	Maria	39	Peters	Ellen
10	Dolter	Elizabeth	40	Potenza	Alison
11	Eclarinal	Arnold	41	Price	Naomi
12	Eelkema	Jenessa			
13	Elliott	Katie	42	Rivas	Aida
			43	Russell	Anne
14	Estrada	Lisa	44	Santiago	Pearl
15	Flores	Lisa	45	Sato	Christine
16	Giron	Yvonne	46	Shaban	Rosaline
17	Guerrero	Patricia	47	Shipcott	Lisa
18	Harrison	Jennifer	48	Skratulia	Sarah
19	Hernandez	Debra	49	Thompson	Patricia
20	Hernandez	Karen	50	Valencia	Valerie
21	Hulme	Lauren	51	Veltz	Shauna
22	Hyde	Anne Marie	52	Visser	Kristin
23	Hyde	Jason	53	Wersky	Sheri
24	Jaime-Rodriguez	Theresa	54	Whipple	Lindsey
25	Jans	Christina	55	Wood	Lara
26	Johnson	Shannon	56	Woods	Linda
27	Keithly	Tiffany	57	Zavala	Nidia
28	Kim	Esther			
29	Kim	Helen			
30	Koizumi	Clara			