

BEFORE THE GOVERNING BOARD OF THE  
IRVINE UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against:

CERTIFICATED EMPLOYEES,

By

IRVINE UNIFIED SCHOOL DISTRICT.

OAH No. 2009030745

**PROPOSED DECISION**

Daniel Juárez, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on April 22, 2009, in Irvine, California.

Anthony P. De Marco, Attorney at Law, Atkinson, Andelson, Loya, Ruud & Romo, represented the Irvine Unified School District (IUSD).

Carlos R. Perez, Attorney at Law, Reich, Adell, Crost & Cvitan, represented Erin Garcia, Samantha Lutz, Whitney Martin, Rachel Oh, Jay Olpin, Taylor Parker, Parastoo Shahabi, Suzanne Shoemaker, Amanda Smith, and Coleen Walsh (Respondents).

Other Respondents: Michelle August, Rhonda Covelman, Kristina Geronson, Larisa Hood, Kathleen Leavey, and Amberlee Toth (Other Respondents) were served with the jurisdictional documents in this case, including the Accusation and Notice of Hearing, but failed to file a notice of defense and were not present at hearing.

Respondents submitted a closing brief on April 22, 2009; it was marked as Exhibit B for identification. A Notice of Errata regarding Exhibit B was filed on April 29, 2009; it was marked for identification as Exhibit C. IUSD had submitted its briefing on the day of hearing, and that brief was marked for identification as Exhibit 10.

The matter was deemed submitted for decision on April 29, 2009.

**FACTUAL FINDINGS**

1(a). IUSD and Respondents stipulated to the facts set forth in Factual Findings 1(b) through 1(n):

1(b). On March 3, 2009, the IUSD Superintendent recommended, with regard to the ensuing school year, that the IUSD Governing Board (the Governing Board) reduce or

eliminate particular kinds of services provided by IUSD and that certain certificated employees be notified that their services would not be required.

1(c). On March 3, 2009, the Governing Board adopted the Superintendent's recommendation to reduce or discontinue particular kinds of services provided by IUSD, effective the 2009-2010 school year.

1(d). The resolution included a listing by type and full-time equivalent of those positions that the Governing Board resolved to reduce or eliminate no later than the beginning of the 2009-2010 school year.

1(e). The resolution also included a list by employee number of the certificated employees identified for release and layoff pursuant to the Resolution.

1(f). On or before March 15, 2009, IUSD served written notice pursuant to the Governing Board's direction that the services of certain certificated employees would not be reemployed in the upcoming 2009-2010 school year.

1(g). The written notices described in Factual Finding 1(f) included a request for hearing form that, if returned to IUSD by March 25, 2009, would constitute a hearing request.

1(h). Before March 25, 2009, sixteen individuals each returned a request for hearing form.

1(i). On or about March 26, 2009, IUSD's Superintendent filed and timely served the 16 individuals who had submitted a request for hearing form with an Accusation, Notice of Defense, Notice of Hearing, and related materials.

1(j). The certificated employees who were served with the Accusation and related materials were identified as Respondents.

1(k). The Accusation and related materials served on each Respondent included the Notice of Hearing, dated March 26, 2009, which noticed the instant hearing.

1(l). The Accusation and related materials included a notice of hearing, dated March 26, 2009, that set the hearing on the charges set forth in the Accusation for April 22, 2009.

1(m). The Accusation and related materials included a form, that if returned to IUSD within 10 days, would constitute a Notice of Defense.

1(n). Ten Respondents returned notices of defense timely.

2. IUSD employs Respondents as temporary employees. Respondents Michelle August, Kristina Geroncin, Whitney Martin, Rachel Oh, and Taylor Parker, are employed, pursuant to Education Code section 44920. That is, they are replacing other teachers who are on a leave of absence. (See Legal Conclusion 5.) Respondents Erin Garcia, Samantha Lutz, Jay Olpin, Parastoo Shahabi, Suzanne Shoemaker, Amanda Smith, Coleen Walsh, Rhonda Covelman, Larisa Hood, Kathleen Leavey, and Amberlee Toth are employed, pursuant to Education Code section 44909. That is, they are categorically funded employees. (See Legal Conclusion 6.) A categorically funded employee is one who is employed in a program that is funded under contract with public or private agencies, for an indeterminate duration. IUSD further explained that these Respondents employed pursuant to Education Code section 44909 (hereafter referred to as “categorically funded Respondents”) were those who had filled the positions left by probationary and permanent teachers whom IUSD had placed in categorically funded positions.

3. At hearing, IUSD explained that, pursuant to the Governing Board, it intended to include its temporary employees in the hearing process, even though it argues that none of its temporary employees, including categorically funded Respondents, are entitled to the protections afforded by Education Code sections 44949 and 44955.

4. The funding for each categorical program that relates to the categorically funded Respondents has not yet expired, though it has been reduced by approximately twenty percent.

5. The recommendation that Respondents be terminated from employment was not related to their competency as teachers.

6(a). The Governing Board’s resolution number 08-09-44 proposed a reduction or elimination of 131.28 full-time equivalent (FTE) positions and release of temporary certificated employees.

6(b). Regarding its action as to the categorically funded Respondents, resolution number 08-09-44 stated in pertinent part, “the Superintendent has indicated that the reduction in particular kinds of services is related to the potential for loss of funding of certain categorical or specially-funded programs, the possibility of probationary and permanent employees returning from leaves of absence, and other considerations that related directly to the justifications for employment of temporary certificated employees.”

6(c). Through competent testimony, IUSD identified the certificated employees providing the particular kinds of services that the Governing Board directed to be reduced or discontinued.

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

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

9. No probationary and permanent certificated employee is affected by the reduction in particular kinds of services sought by IUSD.

10. Because IUSD identifies Respondents and Other Respondents as certificated temporary employees, it does not determine a relative seniority between any of them.

11. No Respondent proffered testimony or evidence on his or her behalf.

12. No certificated employee junior to any Respondent or Other Respondent was retained to render a service that any Respondent or Other Respondent is certificated and competent to render.

#### LEGAL CONCLUSIONS

1. The parties met all notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945.

2. Cause exists to sustain IUSD's action to reduce or discontinue 131.28 full-time equivalent positions, as set forth in IUSD's resolution number 08-09-44 for the 2009-2010 school year, pursuant to Education Code sections 44949 and 44955, as set forth in Factual Findings 1-12, 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 Governing Board's resolution number 08-09-44 are particular kinds of services that the Governing Board can reduce or discontinue under Education Code section 44955. The Governing 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 IUSD's schools and pupils within the meaning of Education Code section 44949.

8. IUSD identified the certificated employees providing the particular kinds of services that the Governing 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. IUSD argues that the issue in this case is not whether Respondents and Other Respondents will be released from employment, but whether those employed pursuant to Education Code section 44909, have the right to participate in this proceeding, as temporary employees. IUSD argues that categorically funded Respondents are temporary employees that can be dismissed without the requirement of this hearing.

11. Categorically funded Respondents argue that they are, by definition, probationary employees, and are entitled to receive a layoff notice as such. Saliently, categorically funded Respondents do not specifically argue that they are not subject to layoff, but they seek to be treated as probationary employees.

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, IUSD 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).” Here, the categorical programs have not expired yet. However, 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.)<sup>1</sup> 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 [for additional support through analysis of 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 who replace other teachers, as the categorically funded Respondents did here, 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 are treated as temporary employees.

15. Thus, all Respondents in this matter are temporary employees. IUSD may dismiss them in the manner the law allows of temporary employees. It is noted that IUSD served Respondents with the jurisdictional documents and provided them the opportunity to participate in the instant hearing. Respondents 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, IUSD established cause to not reemploy 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.

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<sup>1</sup> IUSD’s counsel aptly argues in his briefing “if Respondents’ argument is accepted, [IUSD] would be prohibited from terminating categorically funded employees until the contract or funding had expired. In the case of a contract or program that expires shortly after the commencement of the succeeding school year, [IUSD] could be in the position of retaining the temporary employee, and laying off the permanent or probationary employee in her stead.”

ORDER

1(a). The Accusation served on Respondents Erin Garcia, Samantha Lutz, Whitney Martin, Rachel Oh, Jay Olpin, Taylor Parker, Parastoo Shahabi, Suzanne Shoemaker, Amanda Smith, and Coleen Walsh, Michelle August, Rhonda Covelman, Kristina Geroncin, Larisa Hood, Kathleen Leavey, and Amberlee Toth, providing the particular kinds of services that the Governing Board directed to be reduced or discontinued, is sustained.

1(b). Notice shall be given to those Respondents identified above, as required by law for temporary employees, that their services will be terminated at the close of the 2008-2009 academic year.

Dated: May 4, 2009

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DANIEL JUAREZ  
Administrative Law Judge  
Office of Administrative Hearings