

BEFORE THE GOVERNING BOARD OF THE
BURBANK UNIFIED SCHOOL DISTRICT

In The Matter Of The Accusation Against:

OAH No. 2009031192

Cynthia Almeida, Shake Balian, Joan
Becker, Heather Beckmann, Tracy Black-
son, Gretchen Buers, Bonnie Burrow, Cath-
erine Celaya, Matthew Chambers, Brianne
Chandler, Carrie Cisneros, Nancy Colman,
Ellen Craig, Katie Crawford, Timothy
Crawford, Gregory Everhart, Tamara Fiola,
Joshua Fischbach, Colleen Flores, Elisa
Freeman, Jennifer Gallego, Kristina Garcia,
Susan Glenn, Joseph Granish, Jamie Griffin,
Robert Hammell, Moira Hanson, Jose Her-
nandez, Kevin Hiatt, Hillary Iffrig, Kirsten
Jackson, Armineh Kasparian, Jeff Kay,
Meghan Keim, Caroline Keng, Deborah
Kubeczka, Cathryn Lawhead, Anna Le
Master, Tara Lowery, Sean Mc Callon,
Amanda Mc Mahon, Michelle Mehta,
Melissa Pamperin, Jill Pomfret, Danielle
Reynolds, Sarah Rounds, Liz Salazar –
Costella, Steven Schreck, Dylan Simmer –
Winfield, Janae Simmons, Jenna Stewart,
Cheryl Stone, Sarah Suddleson, Daniel
Swartz, Elyse Thompson, Marisa Torres,
Henry Wadsworth, Melissa Waters, Morgan
Wijay, Erin Willson,

Respondents.

PROPOSED DECISION

Julie Cabos-Owen, Administrative Law Judge, Office of Administrative Hearings,
State of California, heard this matter on April 22, 2009, in Burbank, California.

Jeff C. Marderosian, Attorney at Law, represented the Burbank Unified School Dis-
trict (District). Richard Schwab of Trygstad, Schwab & Trygstad represented all Respon-
dents.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on April 22, 2009.

FACTUAL FINDINGS

1. Complainant, Gregory Bowman, Ed.D., filed the Accusation while acting in his official capacity as the Superintendent of the District.
2. Respondents are certificated employees of the District.
3. On March 9, 2009, the Governing Board (Board) of the District adopted a resolution to reduce and discontinue the following particular kinds of services provided by the District no later than the beginning of the 2009-2010 school year:

<u>Position</u>	<u>FTE</u>
Librarian	2.0
K-3 Class Size Reduction	64.0
Elementary PE	5.0
Elementary Music	2.0
English CSR: 9th Grade	5.0
Math CSR: 9th Grade	5.0
Counselors (General and Categorical)	4.0
Secondary English	4.0
Secondary Math	3.0
Health	3.0
PE	4.0
Social Science	1.0
Auto Shop (ROP)	.6
Speech and Debate	.2
Academic Decathlon	.2
Web Design	.2
Finance Academy Leadership	.2
Sports Medicine (ROP)	.2
Athletic Director	.4
Athletic Training	.2
Video Production	.4
Computer Science	2.0
Art	1.0
Technology Services	.4
Photo	.8
Student Technicians	.2
Fresh Start	.4
Curriculum Specialist	6.5
ELD Specialist	5.0

TOSA: Art	1.0
TOSA: BTSA	2.0
TOSA: Assessment	1.0
TOSA: After School Program	1.0
Nurses	.8
Elementary Asst. Principal	1.0
Coordinator Safety, Outreach	1.0
Total FTE:	128.7

4. The Board further determined that the reduction in services necessitated a decrease in the number of certificated employees at the close of the 2009-2010 school year by a corresponding number of FTE positions, and directed the Superintendent to notify the appropriate employees to implement the Board's determination.

5. On or before March 15, 2009, the District gave notice to each Respondent of the potential elimination of his/her position for the 2009-2010 school year. On April 1, 2009, the District served the Accusation on each Respondent.

6. All Respondents, except Bonnie Burrow, Jeff Kay, Meghan Keim, Jenna Stewart, Elyse Thompson, Morgan Wijay, Tiffany Yule, Gretchen Buers and Sarah Rounds timely filed requests for hearing and Notices of Defense to determine if there was cause for not reemploying them for the 2009-2010 school year.

7. The services set forth in Factual Finding 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. The Board's decision to reduce or discontinue the identified particular kinds of services was neither arbitrary nor capricious, and constituted a proper exercise of discretion.

8. The reduction or discontinuation of particular kinds of services was related solely to the needs and welfare of the District and its pupils.

9. The Board considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

10. The District maintains a Seniority List which contains employees' seniority dates, current assignments, permanency description and credential and certificate information.

11. Respondent Amanda McMahon challenged the seniority date assigned to her by the District. Respondent Amanda McMahon began working as a long term substitute on August 27, 2007. Her seniority date is October 15, 2007, the date when she was admitted into the intern program and began working as a probationary employee. Although

Respondent Amanda McMahon argued that her seniority dates should be the date she first worked with the District, this argument was not persuasive. Respondent Amanda McMahon did not establish that her months of substitute teaching (which did not constitute at least 75 percent of the days in the prior school year), mandated an earlier seniority date. (See Legal Conclusion 4(a).) Therefore, the District properly determined the seniority date for Respondent Amanda McMahon.

12(a). Respondents Tracy Blackson, Melissa Waters, Dylan Simmer-Winfield, Daniel Swartz, Jill Pomfret, Melissa Pamperin and Elisa Freeman challenged the seniority dates assigned to them by the District.

12(b). Tracy Blackson began working for the District as a long term substitute beginning October 2005, and was offered a temporary contract on January 29, 2006. She worked in the same assignment from October 2005, until the end of the 2005-2006 school year. She remained a temporary employee until August 2008, when she was hired as a probationary 2 employee. At the commencement of her probationary contract, the District credited her with an additional year of probationary service, based on her prior year of temporary teaching, and assigned her the seniority date of August 20, 2007.

12(c). Respondent Melissa Waters began working for the District as a long term substitute in 2004, and then signed temporary contracts for the 2004-2005 and 2005-2006 school years. She was hired as a probationary employee for the 2006-2007 school year. At the commencement of her probationary contract, the District credited her with an additional year of probationary service, based on her prior year of temporary teaching, and assigned her the seniority date of August 25, 2005.

12(d). Respondent Dylan Simmer-Winfield worked for the District as a temporary employee for the 2005-2006 and 2006-2007 school years. He became a probationary employee for the 2007-2008 school year. At the commencement of his probationary contract, the District credited him with an additional year of probationary service, based on his prior year of temporary teaching, and assigned him the seniority date of August 21, 2006.

12(e). Respondent Daniel Swartz worked for the District as a temporary employee for the 2006-2007 and 2007-2008 school years. He became a probationary 2 employee in August 2008. At the commencement of his probationary contract, the District credited him with an additional year of probationary service, based on his prior year of temporary teaching, and assigned him the seniority date of August 20, 2007.

12(f). Respondent Jill Pomfret was hired as a long term substitute in September of 2005. After two weeks she began employment as a temporary teacher for the 2005-2006 and 2006-2007 school years. At the commencement of her probationary contract in 2007, the District credited her with an additional year of probationary service, based on her prior year of temporary teaching, and assigned her the seniority date of August 21, 2006.

12(g). Respondent Melissa Pamperin worked for the District as a temporary employee for the 2005-2006 and 2006-2007 school years. She began a probationary 2 employment contract at the beginning of the 2007-2008 school year. At the commencement of her probationary contract in 2007, the District credited her with an additional year of probationary service, based on her prior year of temporary teaching, and assigned her the seniority date of August 21, 2006.

12(h). Respondent Elisa Freeman was hired by the District as a long term substitute on August 19, 2005, and served in that assignment for the 2005-2006 school year. Thereafter, she signed a contract for a temporary assignment for the 2006-2007 school year. She was hired as a probationary employee for the 2007-2008 school year, and the District credited her with an additional year of probationary service, based on her prior year of temporary teaching, and assigned her the seniority date of August 21, 2006.

12(i). Respondents Tracy Blackson, Melissa Waters, Dylan Simmer-Winfield, Daniel Swartz, Jill Pomfret, Melissa Pamperin and Elisa Freeman's assertion that they should have been credited for all of their years of temporary service, and thus have seniority dates reflecting their first date of substitute or temporary service, was unpersuasive. Respondents did not establish that they were entitled to more than one year's credit for their years of temporary service. (See, Legal Conclusion 4.) Therefore, the District properly determined the seniority date for Respondents Tracy Blackson, Melissa Waters, Dylan Simmer-Winfield, Daniel Swartz, Jill Pomfret, Melissa Pamperin and Elisa Freeman.

13. Respondent Kristina Garcia asserted that her September 5, 2006 seniority date should be earlier because she helped prepare a classroom prior to September 5, 2006. Although she was supposed to fill a position for a retiring teacher, the retirement was delayed, and she was not "hired" until September 5, 2006. Prior to that date, she shared the classroom with a substitute teacher. She was unsure if she was paid for the time prior to September 5, 2006. Respondent Kristina Garcia did not establish that she should have been credited for her time in the classroom prior to September 5, 2006. Therefore, the District properly determined the seniority date for Respondent Kristina Garcia.

14(a). Respondent Jose Hernandez challenged his assigned a seniority date of September 9, 2008. Prior to that, he had been employed by the District beginning in August 2003, and he became a probationary employee. On April 20, 2006, the District sent Respondent Hernandez a "Non-Reelection Notice as a Probationary Certificated [Employee]." The notice stated:

Please be advised that the Board of Education of the Burbank Unified School District has determined that you shall not be reelected as a certificated employee for the 2006-2007 school year. Your employment with the District, therefore, will end at the conclusion of the 2005-2006 school year.

You are being sent this notice of non-reelection because you are not fully credentialed, and the District in accordance with California law, including Education Code section 44300(a)(3)(A), desires to conduct a diligent search to find fully credentialed teachers.

14(b). Respondent Jose Hernandez did not work for the District during the 2006-2007 and 2007-2008 school years. He was rehired in 2008. Although he believes he began working in August 2008, he did not furnish any evidence to support this assertion.

14(c). Following his non-reelection and re-employment, Respondent Jose Hernandez's date of employment is the date on which he first rendered paid service in a probationary position. (See Legal Conclusion 5.) Respondent Jose Hernandez did not establish that he should have been assigned an earlier seniority date. Therefore, the District properly determined the seniority date for Respondent Jose Hernandez.

15(a). Respondent Tara Lowery challenged her assigned August 28, 2008 seniority date. On August 18, 2008, she was tentatively offered a position with the District, and on August 19, 2008, she went to the Human Resources (HR) Department to sign a contract and to obtain a recommendation for a Livescan fingerprinting facility. Although she anticipated receiving fingerprint clearance by the first instructional day of the school year, her clearance was delayed when the Livescan facility lost her fingerprints and she had to resubmit her fingerprints for clearance. Respondent Tara Lowery understood that the District could not employ her without valid fingerprint clearance. After she resubmitted her fingerprints for clearance, her original contract was replaced with a contract indicating her hire date of August 28, 2008, the date she received fingerprint clearance.

15(b). Respondent Tara Lowery asserts she should have an earlier seniority date because her hire date was delayed by the fingerprint laboratory's mistake. On August 29, 2008, Respondent Tara Lowery received a memorandum from Marjorie Fuchs, District HR Technician, which stated:

[I]f you can get a letter from the livescan facility that took your prints and they state that the delay in getting the clearance was their fault, whether human or machinery, then we can backdate your date of hire. The letter must be clear with a detailed explanation.

15(c). Respondent Tara Lowery did not submit a letter from the Livescan facility. Respondent Tara Lowery did not establish that she should have been assigned an earlier seniority date. Therefore, the District properly determined the seniority date for Respondent Tara Lowery.

16. Respondent Jamie Griffin began paid probationary employment with the District on August 20, 2007, the first instructional day of that school year. Although she received pay for her services beginning August 20, 2007, the District did not have the paperwork for her to sign until August 23, 2007. Therefore, her employment paperwork reflects

the wrong seniority date, which should be August 20, 2007. Nevertheless, this does not affect her layoff notice status.

17. The District used its Seniority List to develop a proposed layoff list of the least senior employees currently assigned in the services being reduced. The District determined that nobody less senior than Respondents was being retained to render services Respondents are certificated and competent to render.

18. In making this determination, the District skipped less senior employees whose particular kind of service was being reduced, but who were rendering services the District determined Respondents were not certificated and competent to render. These skipped employees included: Robert Berger, a Teacher on Special Assignment (TOSA) employed as a Curriculum Specialist (#56 on Exhibit H); Crystal Smiecinski, a Math 6 and 7 and Science 6 teacher (#68 on Exhibit H), and Jacklyn Strongin, a Social Science 7 teacher (#74 on Exhibit H).

19. In making the determination to skip these three employees and disallow bumping by more senior employees, the District applied the legal competence standard adopted by the Board, as follows:

A certificated employee subject to layoff shall be considered competent to perform a service if and only if for secondary assignments the certificated employee has taught the subject at the secondary level for one complete school year within the last fifteen (15) years or for elementary assignments the certificated employee has taught any grade at the elementary level for one complete school year within the last fifteen (15) years. One complete school year is defined as actual service of at least 75% of the number of days the regular schools of the District are in session.

20(a). Robert Burger is employed by the District as a Curriculum Specialist. Burger was “skipped,” and not identified as subject to the reduction in force. According to the District’s job description:

A curriculum specialist serves as a teacher specialist who coordinates the distribution, administration and collection of State and District assessments, assists teachers in implementing standards-based curriculum and provides professional development focusing on student achievement.

20(b). The Curriculum Specialist must have certain knowledge, including:

- The California Standards for the Teaching Professions

- The K-5 Content Standards in English/Language Arts, ELD, Mathematics, History/Social Science and Science
- The identification, placement and instructional needs of special needs students (GATE, ELL, at-risk, special education)
- Assessment and evaluation of student progress/learning and the planning of instruction based on analysis of assessment data
- The provisions of the [District] LEA plan for NCLB.

20(c). The Curriculum Specialist must possess the following qualifications:

- Possession of a valid California credential – Multiple Subject and CLAD or SB 1969/395 certification
- Upper division or graduate work in academic areas for curricular and instructional practices
- Teaching experience at a variety of elementary grade levels
- Knowledge of and experience working with English learners and special needs programs and students

20(d). In order to obtain the position of Curriculum Specialist, a teacher must submit an application for the position and undergo an interview. Robert Burger underwent this application and interview process, and based on his qualifications and interview, he was hired as the Curriculum Specialist and has served in that capacity for the District.

20(e). A Curriculum Specialist is an elementary level, out-of-classroom assignment.

20(f). There are Respondents senior to Burger who hold the requisite credentials for the Curriculum Specialist position and who are competent to teach at the elementary level. However, there was no evidence that any Respondents senior to Burger possessed the special qualifications and experience necessary to hold the position of Curriculum Specialist. (See Legal Conclusion 6.)

21(a). Crystal Smiecinski teaches Math 6 and 7. Smiecinski was “skipped,” and not identified as subject to the reduction in force.

21(b). Respondent Joshua Fischbach (#154 on Exhibit H) is more senior to Smiecinski. Respondent Fischbach is a third grade teacher who holds a clear multiple subject credential and a preliminary single subject foundational mathematics credential. He argued that he should bump Smiecinski. According to the District, he would be able to bump Smiecinski if not for the Board-adopted competency criteria because Respondent Fischbach has not taught the requisite amount of foundational math at the secondary level. The District’s assessment is correct. Although Respondent Fischbach taught some secondary level mathematics from February 2005 to June 2005 at a parochial school prior to his employment with the District, the evidence did not establish that he taught the secondary level mathematics for 75% of the school year.

22(a). Jacklyn Strongin is a Social Science 7 teacher. Gregory Clark (#31 on Exhibit H) is a high school United States History and high school World History teacher. Strongin and Clark were “skipped,” and not identified as subject to the reduction in force.

22(b). Daniel Swartz (#102 on Exhibit H) is senior to Strongin. He is a first grade teacher with a clear multiple subject credential and supplementary authorization in social science. He argued that he should bump Strongin or Clark. According to the District, he cannot bump Strongin because he fails the Board-adopted competence standard in that he has not taught social science at the secondary level. Additionally, the District asserted that he cannot bump Clark because his supplemental authorization in social science only allows him to teach ninth grade and below, and Clark’s history classes are at the high school level. The District’s assessment is correct.

23. Pamela Collins (#69 on Exhibit H) is a secondary level Geoscience teacher who holds a clear single subject credential in health science and an authorization for Introductory Science. Collins was “skipped,” and not identified as subject to the reduction in force. Although Respondents Kristina Garcia (#113 on Exhibit H) and Elisa Freeman (#147 on Exhibit H) are senior to Collins and hold health science credentials, they do not hold introductory science credentials which would authorize them to teach Geoscience. Therefore, neither Respondent Garcia nor Respondent Freeman may bump Collins.

24. Respondent Tamara Fiola (#75 on Exhibit H) and Jim Bentley (#76 on Exhibit H) have the same seniority date of August 20, 2007. However, in formulating the seniority list, the District applied tie breaking criteria which placed Bentley senior to Respondent Fiola. Therefore, Bentley was retained and Respondent Fiola was subject to layoff. There was no evidence that the District failed to properly apply the tie breaking criteria. Consequently, the District’s assignment of seniority to Bentley and Respondent Fiola is deemed appropriate.

25. No certificated employee junior to any Respondent was retained to perform any services which any Respondent was certificated and competent to render.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met. (Factual Findings 1 through 6.)

2. The services listed in Factual Finding 3 are each determined to be particular kinds of services within the meaning of Education Code section 44955. (Factual Findings 3 and 7.)

3. Cause exists to reduce the number of certificated employees in the District due to the reduction and discontinuation of particular kinds of services. 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 sections 44955. (Factual Finding 8.)

4(a). Education Code section 44918 (Substitute or temporary employee deemed probationary employee; reemployment rights) provides, in pertinent part:

(a) Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year. (Emphasis added.)

4(b). Education Code section 44914 (Substitute and probationary employment in computation for classification as permanent employee), provides:

If an employee of a school district has served as a probationary employee of the district in a position requiring certification qualifications, for one complete school year, and in the year immediately preceding the service as probationary employee has served as a substitute employee, or as a substitute and probationary employee, serving in both capacities during the same school year in the schools of the district, at least 75 percent of the number of days the regular schools of the district were maintained, the governing board of the district may count the year of employment as a substitute or as a substitute and probationary employee as one year of the probationary period which he is required by law to serve as a condition to being classified as a permanent employee of the district. (Emphasis added.)

4(c). Education Code section 44814 does allow districts to count a year of substitute service and a year of probationary service as two years of probationary service in the computation of a teacher's classification as a permanent employee. However section 44814 does not mandate that an employee who has served two years as a substitute be credited two years of probationary service.

5(a). Education Code section 44848 provides:

When any certificated employee shall have resigned or been dismissed for cause and shall thereafter have been reemployed by the board, his date of employment shall be deemed to be the date on which he first accepted reemployment (if reemployed before July 1, 1947) or rendered paid service (if reemployed after June 30, 1947) after his reemployment.

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5(b). Education Code section 44845 (Employment dated from first acceptance of paid service in probationary position) provides:

Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position.

5(c). Taken together, sections 44848 and 44845 indicate that, when a teacher is non-relected and is reemployed, his/her date of employment shall be deemed the date after his/her reemployment on which he/she first rendered paid service in a probationary position.

6(a). Education Code section 44955, subdivision (b), provides, in pertinent part:

[t]he services of no permanent employee may be terminated . . . 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.

6(b). Education Code section 44955, subdivision (d)(1), allows the District to deviate from terminating a certificated employee in order of seniority, if the District demonstrates that there is a specific need for personnel to teach a specific course or course of study, and that the certificated employee has special training and experience necessary to teach that course or course of study which others with more seniority do not possess.

7(a). A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent 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.)

7(b). As set forth in the Factual Findings above, no Respondent is entitled to “bump” any junior employee in this case.

8. No employee with less seniority is being retained to render a service which any more senior employee is certificated and competent to render.

9. Cause exists within the meaning of Education Code section 44955 for terminating or reducing Respondents’ employment for the 2009-2010 school year, as set forth in Factual Findings 1 through 25.

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ORDER

The Accusations served on all Respondents are sustained. Notice may be given to those Respondents before May 15, 2009, that their services will be reduced or terminated for the 2009-2010 school year because of the reduction or discontinuation of particular kinds of services as indicated.

Dated: May 6, 2009

JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings