

BEFORE THE
GOVERNING BOARD OF THE
SAN MARINO UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In The Matter Of The Accusation Against:

OAH No. 2009031193

Scott Barton, and Other Certificated
Employees of the San Marino Unified
School District,

Respondents.

PROPOSED DECISION

This matter was heard by Mark E. Harman, Administrative Law Judge (ALJ) of the Office of Administrative Hearings, on April 22, 2009, in San Marino, California.

Howard A. Friedman and Maggy M. Athanasious, Attorneys at Law, represented the San Marino Unified School District (District). Amanda R. Canning, Attorney at Law, represented Scott Barton, Nancy Beagle, Elise Brunner, Winlor Chang, Howard Cheung, Christina Chu, Joseph Claro, Michael Condie, Lisa Davidson, Gail Denham, Cecelia Dominguez, Frank Dooley, Elizabeth Drake, Rich Enright, Larry Fitzgibbons, Heather Floyd, Hannah Fong, Tammy Garcia, Emma Glenny, Joan Goebel, June Gonzalez, Diana Hang, David Irie, Laura Ives, Derek Jamieson, Kimberly Johns, Iris Kennedy, Melissa Kuhn, Lauren Leahy, Sherry Lee, Michelle Macedo, Bill McDaniel, Sarah Morris, Beth Negroe, Suzanne Nitta, Tina Nott, Beth Olszewsky, Christine Sohn, Izumi Suzuki, Janet Thayer Jackson, Melanie Thomas Whitehead, Stacy Travisano, Oliver Valcorza, Molly Wiebe, Blake Williams, and Karen Yung (collectively, Respondents).

The District decided to reduce or discontinue certain educational services and gave Respondents and other certificated District employees notice of its intent not to reemploy them for the 2009-2010 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2009-2010 school year.

Oral and documentary evidence was received. The record was left open until May 1, 2009, to allow the parties to file closing briefs. Both briefs were timely received and considered. The District's brief was marked for identification as Exhibit 15, and Respondents' brief was marked as Exhibit G. Pursuant to the parties' stipulation, Respondents have offered a new exhibit, which is attachment A of their brief. This document has been marked as Exhibit F and admitted in evidence. Furthermore, the ALJ on his own motion, and for good cause, deemed the nine days the matter was left open for briefing to be a continuance under Education Code section 44949, subdivision (e), and

Government Code section 11524. Therefore, the May 7th and May 15th dates prescribed in Education Code sections 44949, subdivision (c), and 44955, subdivision (c), are extended to May 18, 2009, and May 26, 2009.

FACTUAL FINDINGS

1. The District operates two elementary schools, one middle school, and one high school for approximately 3,200 students. There are 169 certificated employees. Linda de la Torre (de la Torre) is the District's Assistant Superintendent, Human Resources. She filed the Accusation in her official capacity.

2. Respondents are certificated employees of the District.

3. The Governing Board of the District (Governing Board) adopted Resolution No. 11 on February 23, 2009, reducing or eliminating the following services for the 2009-2010 school year:

PARTICULAR KINDS OF SERVICES	NO. OF FULL-TIME EQUIVALENT (FTE) POSITIONS
Middle School Assistant Principal	1.0
Athletic Director	.4
Secondary Band	1.0
Secondary Foreign Language-Spanish	1.0
Secondary Foreign Language-French	.2
Secondary Science-Physical	3.0
Secondary Science-Life	1.0
Secondary Social Science	3.0
Secondary English	4.0
Secondary ELD	1.2
Secondary Math	2.0
Secondary Speech and Debate	1.0
Secondary Music/Choir	1.6
Secondary Dance	.6
Secondary Visual Art	2.0
Secondary Counselor-Middle School	1.0
Secondary Counselor-High School	2.0
Secondary At Risk Counselor	1.0
Library Media Specialist	1.0
Middle School Boys PE	1.0
Elementary (K-5)	17.0

Elementary (6th Grade)	1.0
Program Specialist	1.0
<u>Total Net FTE Reduction</u>	48.0

4. On March 10, 2009, the District made two amendments to Resolution #11. The District rescinded the reduction of 1.0 FTE in Secondary Visual Art and reduced or eliminated additional particular kinds of services as follows: .6 FTE Secondary Drama. This modification resulted in a proposed reduction of 47.6 FTE positions.

5. On or before February 23, 2009, de la Torre notified the Governing Board that she recommended that notice be provided to certificated employees of the District, including Respondents, that their services would not be required for the next school year because of the elimination or reduction of particular kinds of services.

6. On March 5, 2009, the District served a written “reduction in force” notice (RIF notice) on certificated employees, including Respondents, that the Superintendent recommended that their services would not be required for the 2009-2010 school year due to the elimination or reduction of particular kinds of services.

7. Respondents requested a hearing to determine if there was cause for not reemploying them for the 2009-2010 school year.

8. On or about March 17, 2009, the District issued the Accusation and served it on Respondents. Respondents filed their notices of defense in a timely manner.

9. All prehearing jurisdictional requirements have been met.

10. The services set forth in factual finding number 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code (the Code) section 44955.¹

11. The Governing Board took action to reduce the services set forth in factual finding number 3 primarily because of the uncertainty surrounding State funding. The decision to reduce or discontinue the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District’s discretion.

12. The reduction or discontinuance of services set forth in factual finding number 3 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 Governing Board.

¹ All further statutory references are to the Education Code.

13. On February 23, 2009, the Governing Board adopted Resolution No. 12, which includes criteria for determining order of seniority of those employees with the same date of first paid service (tie-breaking criteria). Respondents did not raise any particular issues with these criteria or the manner in which they were applied.

14. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments, and credentials. The District used the seniority list to develop a proposed lay-off list of the least senior employees currently assigned to the various services being reduced. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority. The District then determined whether these employees held credentials in another area and were entitled to "bump" other employees.

Respondents' Contentions and other Relevant Evidence

15. The parties stipulated that Hannah Fong should have a seniority date of September 12, 2005. The parties stipulated that Elizabeth Drake should be noticed for a .6 FTE layoff (she is retained for a .4 FTE position).

16. Dr. Nancy Beagle is a permanent English teacher. Her seniority date is August 30, 2000. Dr. Beagle is being bumped by Ryan Tu, who has a seniority date of September 3, 1998. Mr. Tu holds a single subject credential in Chinese with a supplemental authorization in Introductory English. He currently teaches English Language Development, but this position is being discontinued. Dr. Beagle argues that Mr. Tu should be reassigned to the position held by a junior probationary employee, Kenneth Dee; however, the District specifically determined to retain Mr. Dee in his position as "Teacher/Teacher Leader-Mandarin" because Mr. Dee has special training and experience for this position.² More specifically, Mr. Dee was hired for this specialized position funded by a Foreign Language Assistance Program federal grant. Mr. Dee's duties are multi-faceted and require substantially more than basic qualifications to teach the Mandarin language. Mr. Dee has had extensive training required of all federal grant recipients to comply with a grant's many rules and policies. As the District will be entering the third year of a three-year grant, it appears Dee is the only person able to satisfy the accountability requirements of the grant.

17. Respondent Melanie Thomas-Whitehead has a multiple subject credential. She teaches third grade at Carver Elementary. She disputes her District-assigned seniority date of August 23, 2006, claiming that she was hired to be a long-term substitute teacher in December 2005, but since the District did not give her a written notice of her classification on or before the date she was hired, she should be deemed a probationary employee from that

² Known as "skipping," it is allowed as long as the District can justify a "specific need for personnel to teach a specific course or course of study . . . and the certificated employee has special training and experience necessary to teach that course." (Code, § 44955, subd. (d)(1).)

point forward under Code section 44916 and the *Kavanaugh* case. Ms. Whitehead is currently in position 148. If granted the requested seniority date, she would move to position 134; however she would still be subject to the layoff, since seven elementary school teachers who are being discharged would still be senior to her.³

18 Respondent Beth Olszewsky is the District's only certificated Library Media Specialist (LMS). The District intends to discontinue her position and to provide limited library services next year. The District will not provide services specified in the LMS credential authorization using classified, administrative, or non-LMS credentialed personnel.

19a. Three teachers with single subject credentials, Michelle Macedo (Art), Suzanne Nitta (Science), and Michael Condie (Science), were given notices for layoff of their entire positions (each was noticed for 1.0 FTE). All three have .8 FTE assignments in departmentalized classes to teach Art and Science, but each is assigned also to teach one period (.2 FTE) outside of his or her subject, e.g., Ms. Macedo teaches a Reading class, Ms. Nitta teaches Physical Education, and Mr. Condie has been teaching a computer applications class during the current semester. The District has characterized these assignments as "electives" or "mis-assignments," i.e., these assignments are outside the specific areas these teachers are credentialed to teach. The Governing Board's resolution and the District's notices to these teachers specified only that the District was reducing or discontinuing 1.0 FTE in the subjects in which these teachers hold single subject credentials.

19b. The District maintains such notice is sufficient to discharge these teachers to satisfy the intended reduction. Neither the Governing Board resolution nor the District's notices stated specifically that there would be a reduction of .2 FTE in Reading, Physical Education nor Computer by .2 FTE each. But there is no indication, as well, that the District intends to maintain these single-period classes, or that it is surreptitiously saving them for other teachers who hold credentials that enable them to teach in these areas. Respondents argue that, since the notices are technically defective, they must be rescinded. Respondents believe the District must retain Ms. Macedo, Ms. Nitta, and Mr. Condie, "at a minimum," to teach these three .2 FTE assignments. Respondents also maintain the District must retain any senior teachers who are subject to layoff and who are certificated and competent to teach these subjects. Respondents argue that to do otherwise would defeat the objective of providing employees with a means to challenge an improper layoff.

³ It is not necessary to address the correctness of the seniority list for the purpose of establishing rehire rights, because this proceeding is to determine whether cause exists to reemploy certificated employees for the ensuing school year (See Code, §§ 44949 and 44955). The plain meaning of these statutes directs review of the order of termination, not the order of reemployment. Preferential rehiring is the subject of other statutory provisions, such as Code sections 44956 and 44957. The ALJ declines to make a factual finding regarding Ms. Thomas-Whitehead's seniority date because it will not affect the order of termination, and therefore, it is not a material issue in this proceeding.

19c. Respondent Beth Negroe is a six-grade multiple subject core teacher, who teaches .2 FTE in computers. The District intends to discharge her in order to satisfy a reduction of 1.0 FTE of K-6, multiple subject credentialed, teaching (generally, multiple subject credentialed teachers teach in self-contained classrooms in the elementary school setting). Respondents makes a similar argument for Ms. Negroe as was made for the teachers teaching in departmentalized classes, that since the District did not specifically notice Ms. Negroe it was reducing her .2 FTE in computers, it must retain her for this one-period assignment.

20. The District did not retain any certificated employee junior to Respondents Scott Barton, Nancy Beagle, Elise Brunner, Winlor Chang, Howard Cheung, Christina Chu, Joseph Claro, Michael Condie, Lisa Davidson, Gail Denham, Cecelia Dominguez, Frank Dooley, Elizabeth Drake, Rich Enright, Larry Fitzgibbons, Heather Floyd, Hannah Fong, Tammy Garcia, Emma Glenny, Joan Goebel, June Gonzalez, Diana Hang, David Irie, Laura Ives, Derek Jamieson, Kimberly Johns, Iris Kennedy, Melissa Kuhn, Lauren Leahy, Sherry Lee, Michelle Macedo, Bill McDaniel, Sarah Morris, Beth Negroe, Suzanne Nitta, Tina Nott, Beth Olshewsky, Christine Sohn, Izumi Suzuki, Janet Thayer Jackson, Melanie Thomas Whitehead, Stacy Travisano, Oliver Valcorza, Molly Wiebe, Blake Williams, and Karen Yung to render a service which these Respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to Code sections 44949 and 44955, by reason of factual finding numbers 1 through 9.

2. The services listed in factual finding number 3 are particular kinds of services that could be reduced or discontinued under Code section 44955.

3. Cause exists for the District to reduce or discontinue the particular kinds of services listed in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils within the meaning of Code section 44949, as set forth in factual finding numbers 1 through 12.

4. The District has adequately supported its justification for skipping Mr. Dee, and for not reassigning Mr. Tu into Mr. Dee's position, in order to meet the needs of its education program.

5. The arguments of Respondents, Ms. Macedo, Ms. Nitta, Mr. Condie, and Ms. Negroe, that they must be retained for .2 FTE to teach specified subjects because they did not receive notice of the basis for the layoff, are not persuasive. The District provided sufficient notice to these teachers that their services were not needed for the 2009-2010 school year because the District was reducing 1.0 FTE of the particular credentialed teaching services that these teachers have provided.

6. Cause exists to terminate the services of Respondents, Scott Barton, Nancy Beagle, Elise Brunner, Winlor Chang, Howard Cheung, Christina Chu, Joseph Claro, Michael Condie, Lisa Davidson, Gail Denham, Cecelia Dominguez, Frank Dooley, Elizabeth Drake (.6 FTE), Rich Enright, Larry Fitzgibbons, Heather Floyd, Hannah Fong, Tammy Garcia, Emma Glenny, Joan Goebel, June Gonzalez, Diana Hang, David Irie, Laura Ives, Derek Jamieson, Kimberly Johns, Iris Kennedy, Melissa Kuhn, Lauren Leahy, Sherry Lee, Michelle Macedo, Bill McDaniel, Sarah Morris, Beth Negroe, Suzanne Nitta, Tina Nott, Beth Olszewsky, Christine Sohn, Izumi Suzuki, Janet Thayer Jackson, Melanie Thomas Whitehead, Stacy Travisano, Oliver Valcorza, Molly Wiebe, Blake Williams (.6 FTE), and Karen Yung, for the 2009-2010 school year due to the reduction of particular kinds of services, by reason of factual finding numbers 1 through 20, and legal conclusion numbers 1 through 5.

ORDER

The Accusation is sustained and the District may notify Respondents, Scott Barton, Nancy Beagle, Elise Brunner, Winlor Chang, Howard Cheung, Christina Chu, Joseph Claro, Michael Condie, Lisa Davidson, Gail Denham, Cecelia Dominguez, Frank Dooley, Elizabeth Drake, Rich Enright, Larry Fitzgibbons, Heather Floyd, Hannah Fong, Tammy Garcia, Emma Glenny, Joan Goebel, June Gonzalez, Diana Hang, David Irie, Laura Ives, Derek Jamieson, Kimberly Johns, Iris Kennedy, Melissa Kuhn, Lauren Leahy, Sherry Lee, Michelle Macedo, Bill McDaniel, Sarah Morris, Beth Negroe, Suzanne Nitta, Tina Nott, Beth Olszewsky, Christine Sohn, Izumi Suzuki, Janet Thayer Jackson, Melanie Thomas Whitehead, Stacy Travisano, Oliver Valcorza, Molly Wiebe, Blake Williams, and Karen Yung, that their services will not be needed during the 2009-2010 school year due to the reduction of particular kinds of services.

Dated: May 11, 2009

MARK E. HARMAN
Administrative Law Judge
Office of Administrative Hearings