

BEFORE THE  
GOVERNING BOARD  
DOS PALOS-ORO LOMA JOINT UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Non-Reemployment of:

KIMBERLY BAKKER, et al.,

Respondents.

OAH No. 2009031358

**PROPOSED DECISION**

This matter was heard before Administrative Law Judge Dian M. Vorters, State of California, Office of Administrative Hearings, on April 16, 2009, in Dos Palos, California.

Kevin R. Dale, Attorney at Law,<sup>1</sup> represented complainant, Dr. Brian Walker, Superintendent, Dos Palos-Oro Loma Joint Unified School District.

Ernest H. Tuttle, III, Attorney at Law,<sup>2</sup> represented respondents. There are seven respondents who requested a hearing and returned a Notice of Defense. (See Exhibit A)

The matter was submitted on April 16, 2009.

**FACTUAL FINDINGS**

*General Findings Concerning Statutory Requirements*

1. Respondents are certificated district employees.
2. Not later than March 15, 2009, the superintendent of the school district caused the governing board of the district and respondents, with the exception of respondent Trisha Tatarakis, to be notified in writing of his recommendation that notice be given respondents, pursuant to Education Code sections 44949 and 44955,<sup>3</sup> that the district would not require

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<sup>1</sup> Kevin R. Dale, Attorney at Law, 555 West Shaw Avenue, Suite C-1, Fresno, California 93704.

<sup>2</sup> Ernest H. Tuttle, III, Attorney at Law, 750 East Bullard Avenue, Suite 101, Fresno, California 93710.

<sup>3</sup> All references to the Code are to the Education Code unless otherwise specified.

their services for the 2009-2010 school year. The notice stated the reasons for the recommendation. In recommending reductions in certificated staff, the superintendent considered the district's declining student enrollment and the qualified condition of the district's budget. The recommendation was not related to respondents' performance as certificated employees.

3. A notice was delivered to each respondent, either by personal delivery or by depositing the notice in the United States mail, registered, postage prepaid, and addressed to respondent's last known address.

4. The notice advised each respondent of the following: He or she had a right to a hearing. In order to obtain a hearing, he or she had to deliver a request for a hearing in writing to the person sending the notice. The request had to be delivered by a specified date, which was a date that was not less than seven days after the notice of termination was served.<sup>4</sup> And the failure to request a hearing would constitute a waiver of the right to a hearing.

5. Respondents timely filed written requests for a hearing to determine whether there was cause for not reemploying them for the ensuing year. An accusation was timely served on respondents. Respondents were given notice that, if they were going to request a hearing, they were required to file a notice of defense within five days after being served with the accusation.<sup>5</sup> Respondents filed timely notices of defense. All prehearing jurisdictional requirements were met.

6. The governing board of the district resolved to reduce or discontinue particular kinds of services. Within the meaning of Code section 44955, the services are "particular kinds of services" that can be reduced or discontinued. The decision to reduce or discontinue these services was not arbitrary or capricious but constituted a proper exercise of discretion.

#### *Services the District Intends to Reduce or Discontinue*

7. The governing board of the district determined that, because particular kinds of services are to be reduced or discontinued, it is necessary to decrease the number of permanent employees in the district by 10.6 full-time equivalents (FTE). The service reductions were passed by the governing board in Layoff Resolution No. 08-09-13, on March 10, 2009.

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<sup>4</sup> Employees must be given at least seven days in which to file a request for a hearing. Education Code section 44949, subdivision (b), provides that the final date for filing a request for a hearing "shall not be less than seven days after the date on which the notice is served upon the employee."

<sup>5</sup> Pursuant to Government Code section 11506, a party on whom an accusation is served must file a notice of defense in order to obtain a hearing. Education Code section 44949, subdivision (c)(1), provides that, in teacher termination cases, the notice of defense must be filed within five days after service of the accusation.

8. The particular kinds of services the governing board of the district resolved to reduce or discontinue are:

<b>Principal</b>	1.00 FTE
<b>High School Classroom Teaching Positions</b>	
Physical Education	1.00 FTE
<b>Middle School Classroom Teaching Positions</b>	
English/Language Arts – Grades 6-8	1.00 FTE
<b>Elementary Classroom Teaching Positions</b>	
Multiple Subjects - Grades K-8	5.00 FTE
<b>Other Teaching Positions</b>	
Program Improvement Coach	0.60 FTE
Student Support Specialist	2.00 FTE
<b>Total:</b>	<b>10.60 FTE</b>

*Findings Regarding Noticing*

9. The district mailed eleven (11) notices of layoff to employees before March 15, 2009. The district mailed a notice of layoff to respondent Trisha Tatarakis, on March 17, 2009.<sup>6</sup> Shirleen Stanley is the human resources manager for the district. Ms. Stanley testified that Sheila Rayskamp (union site present for the teachers association) informed Ms. Stanley that Ms. Rayskamp was present when Terri Gill (high school principal) told Ms. Tatarakis that she was “being laid off.” This conversation, at which Ms. Stanley was not present, took place on March 15, 2009. No other district representative testified on this issue.

Education Code sections 44955, subdivision (c) and 44949 subdivision (a) provide that written notice of termination of services shall be given before the 15th of May. “When it becomes necessary, as the result of a reduction or discontinuation of services within a district, to reduce the number of permanent or probationary employees, the district must give notice to the affected employees, setting out reasons for the action and the employees’ right to a hearing, no later than March 15.” (*Bakersfield Elementary Teachers Assoc. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1272.) “That written notice is necessary, irrespective of the actual knowledge by a teacher of the action of the board of school trustees in voting for [her] dismissal, has been so often affirmed by the courts of this

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<sup>6</sup> Tricia Tatarakis is also referenced as Tricia Mello. Her district start date is August 6, 2007. She was a high school physical education teacher during the 2008-2009 school year, holds a preliminary single subject credential in physical education, and a supplemental credential in speech.

state as to become well-settled law, and needs no citation of the authorities.” (*Darby v. Biggs School Dist. of Butte county* (1936) 15 Cal.App.2d 218, 223.)<sup>7</sup>

In the present matter, there is no dispute that Ms. Tatarakis was not provided written notice of layoff before March 15th, as is required by statute. The district argued that Ms. Tatarakis received actual notice of layoff and that any error should be found to be “nonsubstantive procedural error” pursuant to Code section 44949, subdivision (c)(3). Even if there were direct evidence of verbal notice of layoff given to Ms. Tatarakis on March 15, 2009, which there is not, this cannot be deemed statutory notice. Further, Ms. Tatarakis, through counsel, specifically objected to the board’s failure to timely notice her, and opposed the district’s argument that the failure should be deemed a “nonsubstantive procedural error.” (Ed. Code, § 44949, subd. (c)(3).)

The board failed in a material way to fulfill its statutorily mandated noticing requirements as to Ms. Tatarakis. There is no waiver by respondent. Consequently, Ms. Tatarakis is deemed reemployed for the 2009-2010 school year.

10. Of the remaining eleven (11) teachers served with valid notices of layoff, two individuals, Sharla Griffin and Christy Tatum, failed to return a Notice of Defense and as such are not respondents in this matter. Beverly Schultz did not file a request for hearing and as such is also not a respondent in this matter. These three teachers were not present or represented at hearing.

11. Finally, on March 24, 2009, the district served Notices of Rescission on two teachers, Celine Casteneda and Allison Dossetti. As such, they are not respondents in this matter. The remaining six respondents were validly served with a notice of layoff and requested a hearing in this matter.

*Use of Tie-Breaking Criteria Based on the Current Needs of the District and Students*

12. Pursuant to Education Code section 44955, subdivision (b), the governing board of the district established criteria for determining the order of termination as among employees who first rendered paid service on the same day. The tie-breaking criteria are as follows:

- a. Possession of a currently valid and properly filed regular clear or professional clear credential
- b. Possession of a currently valid and properly filed regular preliminary credential

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<sup>7</sup> The district’s testimony that oral notice was provided to Ms. Tatarakis on March 15th, amounted to layered hearsay, which did not support or explain any other direct evidence. (Gov. Code, § 11513, subd. (d); Evid. Code, §1200, 1201.) As such, the hearsay account of the conversation is inherently unreliable.

- c. Possession of a currently valid and properly filed BCLAD certificate
- d. Possession of a currently valid and properly filed CLAD, EL, SDAIE, or other valid certificate authorizing instruction to English Language Learners
- e. The certificated employee is “Highly Qualified” within the meaning of the No Child Left Behind Act.
- f. The certificated employee whose currently valid and properly filed credentials authorize a broader scope of service. (This tie-breaker is to be repeated as applicable.)
- g. The certificated employee holding the highest current placement on the salary schedule. (This tie-breaker is to be repeated as applicable.)
- h. In any case where a tie results after calculating the cumulative points for each of the above criteria, then the tie shall be broken by ranking the tied employees from lowest to highest according to the last four digits of their social security number, with the lower number deemed less senior than the next higher number.

13. Two elementary classroom teachers originally identified for layoff, Ms. Castendeda and Ms. Dossetti, first rendered paid service on August 6, 2009. Notices of Rescission were served on these two respondents making the issue of tie-breaking moot as to them. One notice of rescission was issued based on over-noticing of multiple subject teachers by the district. The other notice of rescission was issued based on positively assured attrition.

*Positively Assured Attrition*

14. As set forth in the layoff resolution, the governing board “considered all positively assured attrition including all deaths, resignations, retirements, non-reelections, and other permanent vacancies for 2009-2010 and, but for attrition already assured, the Governing Board would have found it necessary to reduce additional services.”

15. Complainant noted that one high school teaching position became vacant after notices of layoff were served on identified employees. One notice of rescission was mailed based on this known attrition.

*Individual Bumping/Skipping/Seniority Issues - Elementary*

16. Skipping describes the process by which the district may deviate from the order of seniority when there is an identified need for a particular type of service, there is a junior employee who is uniquely qualified to provide that service or teach a subject, and there is no senior employee who is certificated and competent to provide the service.

Complainant noted that no skipping was employed by the district for the 2009-2010 school year.

17. Bumping describes the process by which the district identifies those employees who are more senior and who are competent to perform a particular kind of service or teach a particular subject. The two factors used by the district in making bumping determinations were credentials (entitling the employee to actually teach a particular subject) and experience (determined by whether the employee has taught the particular subject within the last five years/not grade level specific). Complainant employed bumping to achieve a proper list of employees to receive layoff notices.

18. The governing board originally determined it was necessary to reduce five FTE Elementary Classroom Teaching Positions. Complainant noted that due to “over noticing,” only four FTE elementary classroom positions are being sought.<sup>8</sup> The district implemented the reduction of four Kindergarten through eighth grade (K-8) elementary teachers by first looking at the seniority chart and identifying which employees held a multiple subject credential. Complainant noted that no junior employee was retained when a senior employee competent to perform that particular kind of service was laid off. Of the least senior teachers who hold multiple subject credentials, no bumping was necessary or employed. The four elementary teachers properly identified to receive final layoff notices are:

- *Deborah Neal*. Ms. Neal’s seniority or district start date is August 11, 2008. She holds a multiple subject credential and no supplemental credentials.
- *Inez Ruiz*. Ms. Ruiz’s seniority date is August 7, 2008. She holds a multiple subject credential and no supplemental credentials.
- *Sharla Griffin*. Ms. Griffin’s seniority date is August 7, 2008. She holds a multiple subject credential and no supplemental credentials.
- *Anna Fimbrez*. Ms. Fimbrez’s seniority date is September 24, 2007. She holds a multiple subject credential and no supplemental credentials.

#### *Individual Bumping/Skipping/Seniority Issues - Secondary*

19. The governing board determined it was necessary to reduce one FTE Middle School Classroom Teaching Position, in English/Language Arts. The middle school consists of grades six through eight. The District implemented the reduction of one middle school teacher by first looking at the seniority chart. No bumping was necessary or employed.

- *Aaron Devrick*. Mr. Devrick is the middle school teacher properly identified to receive a final layoff notice. Mr. Devrick’s seniority date is August 4, 2008.

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<sup>8</sup> The total reduction in particular kinds of services sought by the district at the time of hearing was 9.60 FTE.

He holds a multiple subject credential and a supplemental credential in English/Theatre Arts.

*Individual Bumping/Skipping/Seniority Issues – High School*

20. The governing board determined it was necessary to reduce one FTE High School Classroom Teaching Position, in Physical Education. The district implemented the reduction of one high school teacher by first looking at the seniority chart. No bumping was necessary or employed.

- *Trisha Mello (aka Tatarakis)*. Ms. Mello was the high school teacher properly identified to receive a final layoff notice. Ms. Mello's seniority date is August 6, 2007. She holds a preliminary single subject credential in physical education and a supplemental credential in speech. However, she was not timely served with statutory notice of layoff. Hence, she is deemed reemployed for the 2009-2010 school year.

*Individual Bumping/Skipping/Seniority Issues – Student Support Specialists*

21. The governing board determined it was necessary to reduce two FTE Student Support Specialists. The two student support specialists properly identified to receive final layoff notices are:

- Ofelia Ramirez
- Christy Tatum

The district implemented the reduction of two student support specialists by first looking at the seniority chart. Of the least senior support specialists, bumping was employed as follows:

22. *Kim Ballinger*. Ms. Ballinger's district start date is August 18, 1997. She taught third grade during the 2008-2009 school year. She holds a preliminary administrative services credential and a multiple subject credential. She is qualified to teach K-8. Ofelia Ramirez's district start date is August 6, 2008. She taught fifth grade during the 2008-2009 school year and holds a preliminary multiple subject credential. Ms. Ballinger's seniority and qualifications allow her to bump Ms. Ramirez in the elementary school.

23. *Kandy Ballinger*. Ms. Ballinger's district start date is August 16, 1989. She holds a preliminary administrative services credential and a clear multiple subject credential. She is qualified to teach K-8. Christy Tatum's district start date is August 4, 2008. She taught seventh grade during the 2008-2009 school year and holds a preliminary multiple subject credential. Ms. Ballinger's seniority and qualifications allow her to bump Ms. Tatum in the elementary school.

*Individual Bumping/Skipping/Seniority Issues – Program Improvement Coach*

24. The governing board determined it was necessary to reduce .60 FTE Program Improvement Coaches. The district implemented the reduction of .60 FTE program improvement coaches by first looking at the seniority chart. No bumping was necessary or employed. Bev Schulz is the part-time program improvement coach properly identified to receive a final layoff notice. Mr. Schultz's seniority date is August 14, 2008.<sup>9</sup> She holds a clear multiple subject credential and a clear administrative services credential.

*Individual Bumping/Skipping/Seniority Issues – Principal*

25. The governing board determined it was necessary to reduce one FTE Principal Position. The district implemented the reduction of one FTE principal by first looking at the seniority chart. Of the least senior principals, bumping was employed as follows:

- *Bronson Lo Bue.* Mr. Lo Bue's district start date is August 19, 1994. He was a principal during the 2008-2009 school year. He holds a clear administrative services credential and a clear multiple subject credential. He is qualified to teach K-8. Kimberly Bakker's district start date is August 4, 2008. She taught fourth grade during the 2008-2009 school year and holds a preliminary multiple subject credential. Mr. Lo Bue's seniority and qualifications allow him to bump Ms. Bakker in the elementary school.

## LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists pursuant to Education Code sections 44949 and 44955. All notices and jurisdictional prerequisites required by those sections were satisfied, with the exception of notice to Ms. Tatarakis.

2. The services the district seeks to eliminate in this matter, as set forth in Layoff Resolution 08-09-13, are particular kinds of services that may 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 the Board's discretion. Pursuant to Education Code sections 44949 and 44955, legal cause exists for the district to reduce or discontinue the particular kinds of services set forth in the layoff resolution. The reduction or discontinuance of these identified particular kinds of services relates solely to the welfare of the district and its pupils.

3. No certificated employee with less seniority than any respondent is being retained to render a service that any respondent is certificated and competent to render.

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<sup>9</sup> Ms. Schultz's original start date was August 6, 2007. She subsequently resigned and was rehired by the district on August 14, 2008.

Legal cause exists pursuant to Education Code sections 44949 and 44955 to give respondents, with the exception of Ms. Tatarakis, who was not served timely notice of layoff (Factual Findings 2, 9, and 20), final notice that their services will not be required for 2009-2010 school year.

#### RECOMMENDATION

1. The Dos Palos-Oro Loma Joint Unified School District's action to reduce or eliminate the particular kinds of services identified in Layoff Resolution 08-09-13, for the 2009-2010 school year is AFFIRMED.

2. The Accusation against respondents, excepting Ms. Tatarakis, is SUSTAINED. The Dos Palos-Oro Loma Joint Unified School District may give final notices to respondents, with the exception of Trisha Tatarakis, pursuant to Legal Conclusion 3, that their services will not be required for the 2009-2010 school year. Notices shall be given in inverse order of seniority.

DATED: April 29, 2009

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DIAN M. VORTERS  
Administrative Law Judge  
Office of Administrative Hearings

**EXHIBIT A**  
**DOS PALOS ORO-LOMA JOINT UNIFIED SCHOOL DISTRICT**  
**Named Respondent Teachers**

1	Kimberly Bakker	
2	Patrick A. Devrick	
3	Anna Fimbrez	
4	Sharla Griffin	*did not return Notice of Defense
5	Deborah Neal	
6	Ofelia Ramirez	
7	Inez Ruiz	
8	Trisha Tatarakis (aka Mello)	*not validly served with layoff notice
9	Christy Tatum	*did not return Notice of Defense