

BEFORE THE GOVERNING BOARD OF THE
HAYWARD UNIFIED SCHOOL DISTRICT

In the Matter of the Reduction or
Termination of Certain Certificated
Employees for the 2010-2011 Year,

Respondents.

OAH No. 2010020967

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in Hayward, California, on April 26, 2010.

James R. Lynch and Nitasha K. Sawhney, Attorneys at Law, GCR LLP, represented the Hayward Unified School District.

Dale L. Brodsky and Dusty L. Collier, Attorneys at Law, Beeson, Tayer & Bodine, represented all of the respondents except Ashley Alsdorf, Gerald Fain, Rainbow Lobo, Karen Marino, Sylvia Orr, Thomas Parker, Amy Tamosunas, and Charmaine Wood.

There was no appearance by or on behalf of respondents Ashley Alsdorf, Gerald Fain, Rainbow Lobo, Karen Marino, Sylvia Orr, Thomas Parker, Amy Tamosunas, and Charmaine Wood.

The matter was submitted on April 26, 2010.

FACTUAL FINDINGS

1. Donna Becnel issued the accusation in her official capacity as Assistant Superintendent for Human Resources of the Hayward Unified School District (district).
2. Respondents are listed on Appendix A, attached hereto and incorporated herein by this reference. Each respondent is a certificated employee of the district.
3. On February 24 and March 10, 2010, the district's governing board adopted Resolution No. 0910-34 and Resolution No. 0910-41, respectively, authorizing the reduction of particular kinds of services for the 2010-2011 school year and directing the superintendent of the district to give appropriate notices to certificated employees whose positions will be affected by the actions.

4. On or before March 15, 2010, the district gave written notice to respondents of the recommendation that their services will not be required for the 2010-2011 school year. The reasons for the recommendation were set forth in these preliminary layoff notices.

5. Respondents filed timely requests for hearing to determine if there is cause for terminating their services for the 2010-2011 school year. An accusation was served on respondents, all of whom filed or are deemed to have filed timely notices of defense. All prehearing jurisdictional requirements have been met.

6. On February 24, 2010, the board took action to reduce or discontinue the following particular kinds of services for the 2010-2011 school year:

<u>K-6 Classroom Teachers</u>	69.00
<u>Elementary Preparation Teachers</u>	
Art	1.60
Computer	0.70
Library	5.85
Music	10.90
PE	18.42
Science	<u>7.60</u>
Total Full Time Equivalent Reductions	45.07
<u>Elementary Music</u>	4.20
<u>High School Teachers</u>	
Art	4.00
Music	2.00
English	5.20
Math	6.80
PE	1.80
Health	0.60
Social Science	1.80
Science	2.20
Spanish	4.00
French	0.40
Home Economics	<u>2.00</u>
Total Full Time Equivalent Reductions	30.80
<u>Counselors</u>	20.00
<u>Nurses</u>	8.25
<u>School Psychologists</u>	4.00

ROP Teachers

Home Economics	1.60
Physical Science	0.40
Business	1.40
Fine Arts	1.00
Photography	1.00
Wood Shop	<u>0.80</u>
Total Full Time Equivalent Reductions	6.20

Adult School

Coordinators	3.40
Teachers	14.00
Student Support Programs	1.00
Counselor	<u>1.00</u>
Total Full Time Equivalent Reductions	19.40

Administration

Associate Superintendent of Educational Services	1.00
Administrator at District Office	1.00
Adult School Principal	1.00
Adult School Assistant Principal	1.00
Adult School Assistant Principal/Summer School Coordinator	1.00
Elementary School Assistant Principals	6.50
High School Assistant Principals	3.00
Principal on Special Assignment	2.00
Total Full Time Equivalent Reductions	16.50

Alternative Ed Teacher	3.00
Child Development	1.00
ELD Coordinator	1.00
ELL Specialist/PRT	0.80
Intervention Teacher	0.40
Intervention/ELL Coordinator	0.60
LA Specialist	1.00
New Beginning Teacher	0.40
Program Resource Teacher-BILI/ESL	1.00
Program Resource Teacher (Title 1)	4.50
Program Resource Teacher (Economic Impact Aid)	3.00
Reading Specialist	1.00
SETPD Grant Coordinator	0.50
TSA (Secondary – Title 1)	1.00
TSA (District Office – Teacher Quality)	1.00
TSA (District Office – SETPD Grant)	1.00
TSA – Assessment Specialist	1.00

employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

11. Board Resolution No. 0910-34 calls for reductions of 2.00 FTE in high school music, 4.20 FTE in elementary music, and 10.90 FTE in elementary music preparation. The resolution authorizes the district to skip the following employees when it implements the reductions:

Employees who possess a Music Credential who have been teaching a music course at the high school level in the District in 2009-2010, and who will be assigned to teach in such a course in the District in 2010-2011.

The same credential is required to teach elementary and middle school music as high school music: a single subject music credential. Since assignments for the 2010-2011 school year are in the control of the district, the heart of this skipping provision is whether the employee was assigned to teach a high school music course during the 2009-2010 school year.

Based on this skipping provision, the district did not issue preliminary layoff notices to those music teachers who are currently teaching a high school music course. The evidence does not establish how many teachers were skipped or what their current assignments are. It is clear, however, that Bruce Haines (seniority date September 2, 1994), John Orosco (September 3, 1999), Kevin Cato (September 1, 2000), and Bryan Holbrook (August 30, 2004) are among the teachers who were skipped. They are all permanent employees. It is possible that Earl Cato, Kevin Cato's brother, was also skipped; he is a probationary employee. The district acknowledged at hearing that the teachers were skipped without regard to the number of high school music sections they teach; some of the skipped teachers teach only one or two music sections per day in the high school and spend the remainder of the day in middle school or elementary school. Orosco, for example, is assigned to "prep music" at Burbank Elementary School but was deemed eligible for a skip because he teaches one section of music in high school; Haines teaches one choir class in high school and the rest of his day is spent at an elementary school.

12. Assistant Superintendent Becnel is uncertain about the origins or the basis of the skip for current high school music teachers. She testified that "it was an issue last year" when teachers were recalled and "some elementary school teachers did not want to go to the high schools and felt they could not do it." Becnel believes that the purpose of the skip is to provide "consistency of program" at the high school. She notes that the high school music program includes choral music, orchestra, band and jazz band, and marching band, and that the high school teachers must organize several concerts during the school year. The district has never undertaken a study to determine whether the teachers who taught a high school music class during the 2009-2010 school year have special training and experience that their more senior colleagues do not possess. Before issuing preliminary layoff notices in March

2010, the district did not contact its middle and elementary school music teachers to see if any of them would be willing to teach a high school music course.

13. Respondents Diane Tiller, Beverly Johnson and Victoria Schmidt challenge the validity of the skip for current high school music teachers. They are permanent employees assigned to teach music in the district's middle and/or elementary schools. Each of them possesses a single subject music credential. Each of them has been identified for layoff. Tiller's seniority date is September 13, 1995; Johnson's is August 26, 1998; and Schmidt's is September 1, 1987. Tiller, Johnson and Schmidt would each be willing to accept a high school music assignment.

14. The burden of proof is on the district to demonstrate that it has "a specific need for personnel to teach a specific course or course of study," and that the teachers it skipped have "special training and experience necessary to teach that course or course of study . . . which others with more seniority do not possess." (Ed. Code, § 44955, subd. (d)(1).)

The district did not meet its burden. The credential required to teach music at the elementary, middle and high school levels is the same. The district did not identify what special training and experience, if any, is necessary to teach a high school music course. The district did not establish that the junior employees it skipped possess that special training and experience and that their more senior colleagues do not possess it.

Although the burden of proof is on the district to establish the validity of its skipping provision, not on respondents to demonstrate their competence to teach high school courses, the professional experience of respondents Tiller, Johnson and Schmidt further illustrates the weakness of the board's skipping provision. Tiller currently teaches seventh grade strings and band and eighth grade orchestra at Chavez Middle School. She has taught music at Tennyson High School in the past, and she knows most of the Tennyson music students because they came through her middle school program. She has private students who are in high school. Johnson teaches instrumental music at Bret Harte Middle School and at each of the district's four, year-round elementary schools. She teaches marching band and jazz band after school. Johnson has experience teaching at the high school level, and she teaches concert band and applied flute at Chabot College. For the past 26 years, she has taught summer music to students in grades seven through 12. Schmidt spends 60 percent of her day teaching "music prep" in elementary schools and, for the remaining 40 percent of her day, she is the choral director at Ochoa Middle School.

The district failed to demonstrate a sufficient basis to deviate from seniority when implementing the reductions in music. The district's skipping provision does not comply with the requirements of Education Code section 44955, subdivision (d), and is not valid.

15. Because the number and identities of the teachers who were skipped is not known, it is not possible to determine which senior employees, and how many senior employees, were prejudiced by the skips. It appears, however, that at least some of the

teachers who were skipped should have received layoff notices. (It may be that Haines, with a seniority date of September 2, 1994, was not exposed to layoff, but the evidence on that point is not clear.) The appropriate remedy, which will be ordered, is to direct the district to identify the teachers who were improperly skipped and then to rescind the layoff notices of a corresponding number of the most senior teachers who were prejudiced by the skips. (See *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567, 576.)

The district argues that if its skipping provision is found invalid, the only teachers who should be affected are those who were laid off from middle school music assignments. There is no evidence, the district asserts, that the skill and experience necessary to teach music at the elementary level is the same as that at the high school level.

The district's argument improperly shifts the burden of proof onto the respondents. It is the district's burden to demonstrate the validity of its skipping provision, a burden that it failed to carry. Because the district improperly deviated from seniority when it implemented the reductions in music, it must now rescind the layoff notices issued to the most senior employees who were prejudiced by the district's action. Who those employees will be depends on the identity and number of the teachers who were retained, the particular service they were performing that made them susceptible to layoff under the board's resolution, and respondents' seniority.

16. In Resolution No. 0910-34, the board also authorized the district to skip the following employees:

Employees who possess a Bilingual Crosscultural Language Academic Development (CLAD) certificate or equivalent, whose experience includes teaching in a bilingual course in the District in 2009-2010 that requires possession of a BCLAD, and who will be assigned to teach in such a course in the District in 2010-2011.

Respondent Guadalupe Santoyo is a bilingual counselor. She contends that she should be skipped under this provision. Santoyo, however, is a counselor, not a classroom teacher. Santoyo is not entitled to be skipped.

17. In Resolution No. 0910-34, the board also authorized the district to skip the following employees:

Employees who possess the necessary credentials to teach Special Education courses, whose experience includes teaching Special Education course [*sic*] in the District in 2009-2010, and who will be assigned to teach in such a course in the District in 2010-2011.

Respondent Cecilia Vitug is a nurse who spends 80 percent of her time on special education issues. She contends that she should be skipped under this provision. Vitug, however, is not a classroom teacher. She is not entitled to be skipped.

Seniority issues

18. Respondent Alice Gibson is a permanent teacher in the adult school. She has been assigned a seniority date of September 20, 1999, for a 0.40 FTE position, and a seniority date of November 26, 2001, for a 1.00 FTE position. She contends that she is entitled to a seniority date of “November 1999” for a 0.60 position. Gibson, however, does not claim that any junior employee is being retained for services that she is certificated and competent to render; it appears that all of the adult school teachers junior (and senior) to Gibson have been noticed for layoff. It is not necessary in this proceeding to address the issue of Gibson’s seniority date for a 0.60 FTE position.

19. The parties stipulated that respondent Amy Kohl’s seniority date is August 21, 2006.

Bumping issues

20. Respondents Elaine Kanakis and Tatiana Roganova are permanent employees in the adult school with seniority dates of August 30, 2004, and September 3, 2002, respectively. Neither Kanakis nor Roganova has ever taught in the district’s regular education program, but both of them hold credentials that would allow them to do so. (Kanakis holds a multiple subject credential and a single subject credential in social science, and Roganova holds single subject credentials in English and French.) They contend that they should be given the right to bump less senior employees in the district’s regular education program.

Although Education Code section 44955, subdivision (b), does not distinguish between adult school and regular school teachers, section 44929.26 of that code does. It states, in relevant part, that “service in the evening school [adult school] shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee in the day school [regular education program].” By the same token, service in the regular school program does not count toward becoming a permanent employee in the adult school. Section 44929.26 goes on to state that if a permanent teacher in adult school later becomes eligible for classification as a permanent teacher in the regular education program “by reason of having served the probationary period therein,” the teacher must choose which classification to take. Since service in the adult school program does not count toward achieving permanent status in the regular education program (and vice versa), a teacher in the adult school should not be able to assert seniority rights over a teacher in the regular education program. Respondents Kanakis and Roganova are not entitled to bump less senior teachers in the regular education program.

Challenges to the validity of the district's decisions

21. Respondents argue that the district's decision to reduce counseling services is "arbitrary and capricious" and therefore invalid. Their argument is based on the fact that, after the reductions, the district will be left with one counselor for each of its high schools and one half-time counselor for each middle school. The district will also lose two valuable programs that encourage high school students to go on to college, AVID and Puente, because these programs must be administered by trained counselors and those counselors are being laid off.

Provided that it does not reduce services below any legally mandated level, it is within the governing board's discretion to determine the extent to which any service will be reduced. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.) The validity of the board's decision "is measured by the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject." (*Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796, 808.)

The evidence does not support a conclusion that the board acted unreasonably in reducing counseling services. There is no claim that counseling services have been reduced below any legally mandated level. The district readily acknowledges that the reduction is undesirable. Assistant Superintendent Becnel testified that the district does not want to lose the counselors or their programs, and continues to look for funds that will allow the district to rehire the counselors. Faced with an \$18 million budget shortfall, however, the board could reasonably conclude that service reductions in other areas would be even less desirable. The evidence does not establish that the board acted arbitrarily or capriciously in reducing counseling services, and its decision to do so is not invalid.

22. Respondents make the same argument concerning the district's decision to reduce nursing services. At the present time, the district has approximately 10 FTE nurse positions. Under the board's resolution, the district would be left with about 1.75 or 2.00 FTE positions. The nurse-respondents point out that they perform valuable services, such as hearing and vision screening, and that some of the services they perform, such as administering injections to diabetic students, can be performed only by a licensed health care professional.

The evidence does not establish that the board acted unreasonably in reducing nursing services. Respondents do not claim that nursing services have been reduced below a legally mandated level. Assistant Superintendent Becnel testified that the district will contract for some nursing services and is in discussions with public health officials about the provision of other services. It is within the governing board's discretion to reduce a particular kind of service and have that service performed in a different manner. (*Campbell Elementary Teachers Assn. v. Abbott, supra*, 76 Cal.App.3d at p. 812.) The evidence does not establish that the board acted arbitrarily or capriciously in reducing the nursing staff, and its decision to do so is not invalid.

23. Respondents argue that the district acted arbitrarily and capriciously in eliminating the positions of eight respondents in the adult school, positions which are wholly funded by federal funds under the Carl D. Perkins Vocational and Technical Education Act and the Workforce Investment Act of 1998. These federal funds will be available, and will increase, for the 2010-2011 school year, and may not be used by the district for any purpose other than adult education. For these reasons, respondents argue, there is no need to lay off the employees whose positions are federally-funded.

Although the positions of these eight respondents are federally-funded, they work at an adult school that is supported by the district. The district must use its own funds to provide administration, supervision, security, facility maintenance, and advertising for the adult school. The board has decided to close the adult school and put the district's funds to other uses. Assistant Superintendent Becnel testified that the district has been unable to determine how the eight federally-funded employees could continue to function without the support provided by the district. Her testimony was credible and persuasive. It is within the board's discretion to conclude that it cannot continue to support the adult school, even though the district will lose certain restricted federal funds in the process. The evidence does not establish that the board acted arbitrarily to eliminate federally-funded positions in the adult school, and its decision to do so is not invalid.

Other matters

24. The cause for the reduction in particular kinds of services relates to the welfare of the schools and the pupils thereof.

25. Except as to those music teachers who have been prejudiced by the district's decision to skip employees who teach a music course at the high school level (Findings 10 through 15), no permanent employee is being terminated while any probationary employee, or any other employee with less seniority, is being retained to render a service which the permanent employee is certificated and competent to render.

26. Any contentions raised by respondents and not discussed above have been found to be without merit and are hereby rejected.

LEGAL CONCLUSIONS

1. By reason of the matters set forth in Findings 10 through 15, cause exists to require the district to identify the most senior employees who have been prejudiced by the district's invalid skips and to rescind the layoff notices issued to those employees.

2. Cause exists because of the reduction or elimination of particular kinds of services pursuant to Education Code section 44955 to give notice to all other respondents in 290.24 FTE positions (264.52 FTE in the February 24, 2010 resolution and 25.72 FTE in the March 10, 2010 resolution) that their services will not be required for the 2010-2011 school

year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

ORDER

1. The district shall identify the most senior employees who were prejudiced by the district's invalid skips, as set forth in Legal Conclusion 1. Final layoff notices may not be given to those employees.

2. Notice may be given to all other respondents in 290.24 FTE positions that their services will not be required for the 2010-2011 school year because of the reduction or elimination of particular kinds of services.

DATED: _____

DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings

Appendix A

1. Abrams, Linda
2. **Alsdorf, Ashley**
3. Antaki, Jeanette
4. Avila, Mercedes
5. Aylward, Michael
6. Azad, Fatemeh
7. Azania, Aquene
8. Bains, Jagdeep
9. Baptista, Sandra
10. Barakzoy, Zarlisht
11. Benki, Michelle
12. Bishr, Muna
13. Bolender, Gregory
14. **Bonilla, Silvia**
15. Borges, Carol
16. Brown, Crystal
17. Came, Kathryn
18. Canada, Michelle
19. Carbajal, Mirtha
20. Carlos, Carmela
21. **Carter, Sally**
22. Chapman, Kelly
23. Chen, Limin
24. Chenault, Adriana
25. Chiem-Guan, Giale
26. Choe Mitchell, Yoon
27. Christoffersen, Desirae
28. Clark, Jaye
29. Coleman, Giavanni
30. Connolly, Dena
31. **Council Jr, Robert**
32. De Arce-Garcia, Carmen
33. De La Rosa-Martin, Alma
34. Delaney, Danielle
35. Dias, Sarah
36. Diaz Villegas, Miriam
37. Dijulio, Karen
38. Dixon, Evangela
39. Donovan, Jennifer
40. Duenas, Arselia
41. Duong, Jade
42. Erends, Carol
43. Estes, Melissa
44. Ewing, Veronica
45. **Fain, Gerald**
46. Fanvu, Sara
47. Fauntleroy, Chantaine
48. Felix-Ibarra, Jose
49. **Flores, Alicia**
50. Fobbs, Gregory
51. Frame, Marisa
52. Frank, Teresita
53. Freels, Danielle
54. Gibson, Alice
55. Godwin, Margaret
56. **Gonsalves, Paul**
57. Gonzales, Jennifer
58. Gonzalez Jr, Carlos
59. Gregory, Kathryn
60. **Gurley, David**
61. Hansen, Rose
62. Hemmig, Gail
63. Hernandez, Janett
64. Holmes, Angela
65. Huynh, Hue
66. Jackson, Amy
67. Jackson, Sharon
68. James, Lance
69. Jenkins-Parish, Mary
70. Johnson, Beverly
71. Kairys, Amanda
72. Kamimura, Risa
73. Kanakis, Elaine
74. Kim, Ryun
75. Knight, Andrew
76. Koehler, Mark
77. Kohl, Amy
78. Kronenberg, Madeline
79. Lagdamen, Tina
80. Lai, Elaine
81. Lee, Jack
82. Lizarraga, Linda
83. **Lobo, Rainbow**
84. Logan, Curlette
85. Lucero, Arnette
86. Lucero, Rae-Francine

87. Lumia, Marisa
88. Mankins, Lenore
89. **Marino, Karen**
90. Marlow-Torres, Karen
91. Marshall, Courtney
92. Martin, Sonja
93. Martin, Teresa
94. MCGarry, Kristen
95. Mchugh, Sean
96. Meehan, Sharon
97. Mielke, Joseph
98. Mikal-Heine, Scott
99. Moore, Laura
100. **Moyle, Robin**
101. Munoz Hughes, Gloria
102. Murayama, Deborah
103. **Nand, Yashoda**
104. Noble-Maxwell, Janet
105. **Oh, Denise**
106. O'Hare, Michael
107. Oksol, Constance
108. Oliveras, Christine
109. **Orr, Sylvia**
110. Ortiz, Aaron
111. Osborne, Larry
112. Parcher, Heather
113. **Parker, Thomas**
114. Peknik, George
115. Pence, Christina
116. Peugeot, Sonia
117. Peugeot, Tatiana
118. Philis, Mary
119. Pletcher, Angela
120. Prasad, Kristy
121. Pugh, Charlene
122. Raab, Sarah
123. Ralls, Marion
124. Reinos, Linda
125. Reyes-Saldana, Ignacio
126. Richardson, Samantha
127. Riggs, Erendira
128. **Roache, Phillip**
129. Roberts, Monica
130. Roganova, Tatiana
131. Romero, Juan
132. Santiago, Irlanda
133. Santoyo, Guadalupe
134. Schmidt, Mark
135. Schmidt, Victoria
136. Schmitz, Jennifer
137. Schuerman, Rose
138. Scott, Rachelle
139. Smith, Chrystina
140. Spinnato, Alexis
141. Stewart, Peter
142. Stokamer, Elana
143. Sutcliffe, Stacy
144. Tamosunas, Amy
145. Taylor, Kathleen
146. Terrasas, Ann
147. Thaning, Rachel
148. Thomas Jr, Murphy
149. Thompson, Winifred
150. Tiller, Diane
151. Tirrell, Melanie
152. Topete, Hector
153. Trame, Linda
154. Triviso, Mariana
155. Trumbull, Alison
156. Turner, Lisa
157. Uranga Gomez, Ana
158. Vail, John
159. Vazquez, Diana
160. Vazquez, Susie
161. Vitug, Cecilia
162. Waite, Cynthia
163. **Walker, Shoshannah**
164. Walton, Monique
165. Watson, Denise
166. Weeks, Bonita
167. Whitehead, Blake
168. **Winder, Raymond**
169. **Wood, Charmaine**
170. Zahniser, Shireen
171. Zegarra, Sarah
172. Zentner, John