

BEFORE THE  
BOARD OF EDUCATION  
OF THE  
COACHELLA VALLEY UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OAH No. 2010030140

Respondents listed in Appendix A.

**PROPOSED DECISION**

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Thermal, California on April 27, 2010.

Mark W. Thompson, Atkinson, Andelson, Loya, Ruud & Romo, Attorneys at Law, represented the Coachella Valley Unified School District.

Jon Y. Vanderpool, Tosdal, Smith, Steiner & Wax, Attorneys at Law, represented the respondents listed in Appendix A., except for respondents Adriana Garcia and Kelly Reilly.

No appearance was made on behalf of respondents Adriana Garcia and Kelly Reilly.

The matter was submitted on April 27, 2010.

**FACTUAL FINDINGS**

1. Ann Reinhagen, Executive Director, Personnel Services of the Coachella Valley Unified School District, made and filed the accusation dated March 11, 2010, in her official capacity as the designee of Ricardo Z. Medina, District Superintendent.

2. Respondents<sup>1</sup> are certificated district employees.

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<sup>1</sup> The district initially identified 51 certificated employees as respondents designated for layoff or (in four instances) for precautionary layoff. The district subsequently dismissed one respondent (Debra Baltes), and four other employees (Bobbie Bustamante, Armando Gamboa, Asalia Mendoza, and Irene Zamora) did not request a hearing. By the conclusion of the hearing, 46 respondents remained, including the four initially designated for precautionary layoff. These 46 respondents are identified in Appendix A.

3. In early 2010, in accordance with Education Code sections 44949 and 44955, the superintendent notified the Board of Education of the Coachella Valley Unified School District in writing of his recommendation to reduce or discontinue particular kinds of services for the upcoming school year. The recommendation that respondents be terminated from employment was not related to their competency as teachers.

4. At a board meeting held on February 18, 2010, the board adopted Resolution No. 2010-96, determining that it would be necessary to reduce or discontinue particular kinds of services at the end of the current school year. The district's initial proposal to the board was that the following particular kinds of services be reduced or eliminated:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
K-6 Elementary Classroom Teachers	85
Middle School Physical Education	1
Middle School Social Science	6
Middle School Language Arts	6
High School English	4
High School Physical Education	1
High School Spanish	1

The reductions proposed by the district to the board totaled 104 full-time-equivalent (FTE) positions.

However, at the February 18, 2010 board meeting, one of the board members moved to amend the PKS to a total of 50 FTE positions. The motion was seconded. The district superintendent then requested a clarification, as follows:<sup>2</sup>

“For point of clarification, Madame President, the resolution before you has specific reductions in specific areas, so if you go from 104 to say 52 hypothetically, then the resolution that we have on there, we would just be able to split each category in half, if that is your pleasure. If you make it 50, it will make it difficult, so if you understand where I'm going with that. There are different categories of positions on this resolution so it's hard to put an arbitrary number up there because there is was some time and thought to process that went into figuring out how many positions of which kind; middle school teachers, sciences teachers, P.E. teachers, high school math teachers, etc. So if it is the pleasure of the board to reduce it in half, then a motion for 52 would be appropriate.”

In response, the board president stated, “I will amend the motion to make it 52, if that is a more workable number for everyone. So I'll strike the previous motion and make a new

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<sup>2</sup> The quoted matters in this Finding were taken from a transcript of the board meeting, which was received in evidence.

motion to accept the recommendation proposing the total number of certificated positions at 52.” The amended motion was seconded, voted upon, and carried. By interlineation, the number 104 (total certificated FTE positions) was stricken from the original written resolution and replaced with the number 52. No changes by interlineation to the number of FTEs assigned to the specific PKS categories were made, however.

Reinhagen, the district’s Executive Director, Personnel Services, understood the amended motion to constitute a straight 50 percent reduction of not only the total FTEs, but also of each PKS category identified in the original board resolution. Reinhagen viewed the failure to physically record by interlineation the specific reductions in the PKS categories to be a clerical error.

With regard to the middle school social studies, middle school language arts, and high school English teaching positions, Reinhagen implemented the board resolution by simply dividing the original proposed number of FTEs in half, i.e., from 6 to 3, and from 4 to 2. With regard to P.E. teachers, and because the credential required to teach middle and high school P.E. is the same, and employees could bump from either PKS category to the other, Reinhagen viewed the middle school and high school positions collectively to constitute 2 FTEs, and simply deleted the PKS as to one of them. With regard to the 85 elementary teaching FTEs, Reinhagen cut the number to a rounded-down 42, instead of cutting the number precisely in half, i.e., to 42.5. With regard to high school Spanish, Reinhagen left the 1 FTE reduction as it was, instead of eliminating the reduction or reducing it precisely in half, i.e., to 0.5.

In essence and effect, the district implemented the board resolution by dividing each original FTE category precisely in half, when the result of that division was a whole number of FTE positions; in the two instances when a whole number would not have thereby been attained, the district rounded down in one case (elementary teachers, from 42.5 to 42), and rounded up in the other (high school Spanish teachers, from 0.5 to 1.0). Reinhagen did not explain why she decided to round down in one instance and up in the other, or why she decided to round off the numbers instead of leaving them precisely at one-half the original numbers.

On March 11, 2010, under Reinhagen’s direction, the district prepared and submitted to the board a “Notice of Recommendation Concerning Certificated Layoff Notices.” The notice identified the 51 certificated employees to receive layoff notices. The notice also included an amended specification of the number of FTEs to be reduced or eliminated within each PKS category, as described above, and an amended total of 52 FTEs. Reinhagen never heard any concerns from any board member about the PKS reductions reflected in the notice. The PKS reductions set forth in the March 11, 2010, notice were as follows:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
K-6 Elementary Teaching Services	42
Middle School P.E. Teaching Services	1

Middle School Social Studies Teaching Services	3
Middle School Language Arts Teaching Services	3
High School English Teaching Services	2
High School Spanish Teaching Services	1

The reductions proposed by the district to the board totaled 52 full-time equivalent (FTE) positions.

5. The board further determined in Resolution No. 2010-96 that “competency,” as described in Education Code section 44955, subdivision (b), for the purposes of bumping, “shall necessarily include possession of: (1) a valid credential in the relevant subject matter area; (2) ‘highly qualified’ status under the No Child Left Behind Act in the position to be assumed; (3) an appropriate EL authorization, if required by the position to be assumed; and at least one year of experience in the District within the last five years in the subject matter area to be assumed.”

6. The board further determined in Resolution No. 2010-96 that it would be necessary to retain certificated employees who possess special training and competency that other certificated employees with more seniority might not possess, to wit: (1) certificated employees who possess or are making progress towards formal (not emergency) authorization to teach English Learner (EL) students, as determined by the California Commission on Teaching Credentialing, and the special training and experience that comes therewith; (2) certificated employees who possess Bilingual Cross-cultural Learning and Academic Development (“BCLAD”) certification; (3) certificated employees who are “highly qualified” under the No Child Left Behind Act (NCLB) in their subject matter areas and who possess the training and experience that comes therewith.

The district implemented the skipping criteria via a two-step process. First, working its way up from the bottom of the seniority list, the district identified all certificated employees who were not highly qualified in their subject matter areas under NCLB *or* who did not possess EL authorization. All employees who were not compliant in *both* of these respects were assigned for layoff first. Next, and again working its way from the bottom of the seniority list, the district skipped (exempted from layoff) all remaining certificated employees who held specifically a BCLAD EL certification.

The district explained the retention of NCLB compliant teachers on the basis that the district is a program improvement district, subject to state monitoring to ensure that the district is making adequate progress toward 100% compliance, i.e., that each classroom is staffed by a highly qualified teacher. The district explained the retention of EL authorized teachers on the basis that 60% of its student body consists of English learners. The district’s particular concern to retain teachers with BCLAD certification was based on the fact that the district presently has substantially more bilingual classrooms than EL-authorized teachers to fill them.

Based on the evidence presented at the hearing, the board's identification and implementation of its skipping criteria was neither arbitrary nor capricious, and constituted a reasonable exercise of the board's discretion.<sup>3</sup>

7. The board directed the superintendent or his designee to determine which employees' services would not be required for the 2010-2011 school year as a result of the reduction of the foregoing particular kinds of services. The board further directed the superintendent or his designee to send appropriate notices to all certificated employees of the district who would be laid off as a result of the reduction of these particular kinds of services.

8. On or before March 15, 2010, the district timely served on respondents a written notice that the superintendent had recommended that their services would not be required for the upcoming school year, along with the related accusation. The notice set forth the reasons for the recommendation. The notice advised respondents of their right to a hearing, that each respondent had to deliver a request for a hearing in writing to the person sending the notice by the date specified in the notice, a date which in each case was more than seven days after the notice was served, and that the failure to request a hearing would constitute a waiver of the right to a hearing.

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

Respondent Luis Martinez testified that he never received a preliminary layoff notice, either by mail or by personal delivery. The district proffered a proof of personal service of the preliminary notice, accusation, and other related documents on Martinez, executed by Martinez's school principal under penalty of perjury. Martinez initialed the proof of service. Martinez also signed both a notice of defense and a request for a hearing.

In an attempt to explain these documents, Martinez testified that he had a meeting with his principal about the impending layoff, that his principal handed him the proof of service and asked him to initial it, and that he did so without reading it, and under the mistaken impression that the document merely acknowledged that he had had a meeting with

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<sup>3</sup> Respondents challenged the board's exemption of BCLAD certified teachers, in part on the basis that a number of such teachers are in assignments that do not require such certification, and on the further basis that a number of BCLAD waivers and emergency authorizations have been granted. Based on these considerations, respondents argued in essence that district policy is inconsistent with its asserted need to retain BCLAD certified teachers. This argument ignores that BCLAD certification cannot be viewed in isolation—it is, instead, one factor among others that a district must take into account in making teaching assignments. Further, that the district resorts to such expedencies as emergency BCLADS and waivers actually supports its claim that it has a shortage of BCLAD-certified teachers and thus needs to retain them.

Respondents challenged the board's exemption of NCLB-compliant teachers in part on the basis that even if it retains such teachers in the PKS positions, the district will still be out of compliance in other areas. However, it is surely better that a district attempt to reduce the level of non-compliance with NCLB requirements to the extent that it can, rather than take an impractical all-or-nothing approach. Further, in the context of a PKS layoff proceeding, the district can only address non-compliance with NCLB as to positions within the scope of the PKS reduction.

the principal. Martinez testified that his principal did not give him a copy of the preliminary notice or the accusation. Martinez's testimony was not credible, and the proof of service executed by Martinez's principal under penalty of perjury (and which Martinez initialed) is credited over the testimony of Martinez. Accordingly, it is found that Martinez was timely personally served with all relevant jurisdictional documents.

9. Respondents timely filed written requests for hearing and notices of defense. All pre-hearing jurisdictional requirements were met.

10. Respondents are probationary or permanent certificated employees of the district.

11. The services the board addressed in Resolution No. 2010-96 were "particular kinds of services" that could 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, and constituted a proper exercise of discretion. No particular kinds of services were lowered to levels less than those levels mandated by state or federal law.

12. The reduction or discontinuation of particular kinds of services related to the welfare of the district and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the district as determined by the board.

13. The board considered all positively assured attrition, including resignations, retirements, and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees.

14. Respondent Maria Mares-Mendoza is an elementary school teacher in a bilingual class assignment. She has a clear multiple subject credential, but is not NCLB compliant. Mares-Mendoza testified that she has had several opportunities to take the CSET (California Subject Examinations for Teachers) exam, in order to secure highly qualified status. She testified further that on one occasion, apparently in mid-2009, she expressed concern about her non-compliance to Reinhagen, who told her that it would not be a problem, and that she would not lose her job as long as she was making progress toward passing the CSET exam. Mares-Mendoza is also pursuing a master's degree. She has about a year to go to complete that program, which would result in a higher salary. Based on what Reinhagen told her, Mares-Mendoza made the deliberate decision to pursue completion of her master's degree, instead of highly qualified status. Mares-Mendoza also noted that during the 2008-2009 layoff process, NCLB was not identified as a layoff criterion.

Even if Reinhagen made the statements attributed to her by Mares-Mendoza, Mares-Mendoza did *not* in fact attempt to make progress toward passing the CSET exam within the past year. Instead, she opted to pursue completion of her master's degree. That was certainly a reasonable decision on her part. However, the evidence did not establish that she

relied (i.e., acted) upon any representations of Reinhagen in making this decision. Accordingly, principles of estoppel do not apply.

15. Respondent Jason Lynn is an elementary teacher. The district assigned him a seniority date of August 15, 2007. Lynn believes that his seniority date should be July 30, 2007, because of training he stated that he attended beginning on that date relating to the adoption of a science curriculum. Lynn testified that the training lasted two weeks, and that he was paid \$2,000 (i.e., \$1,000 per week), which is about the same as his salary. He testified at one point that, as a new district employee, his school principal “directed me to go.” At another point, he testified that his principal “needed” him to go, and stated it would be a good learning experience. In fact, his principal signed him up for the training before telling him about it. Over 100 other district teachers also attended this training. The training was sponsored by the K-12 Alliance, a group of science and math teachers and administrators who discuss math and science teaching and curriculum matters. Lynn did not know who paid for this training. Lynn provided no documentation concerning the training.

The parties stipulated that another employee, respondent Bianca Guerrero, if called to testify, would have proffered the same testimony as that of Lynn set forth above.<sup>4</sup>

Reinhagen testified that the district does determine seniority based on dates of mandatory new-teacher training, but it had no record of Lynn or Guerrero having taken any such training.

The testimony of Lynn was somewhat vague and on the whole insufficient to establish that he was required and paid to attend the training as part of his district employment, especially in light of Reinhagen’s testimony that the district had no record of such training. It was thus not established that the training in question constituted paid service with the district within the meaning of Education Code section 44845.

16. Respondent Nancy Rosas Lopez is an elementary school teacher in a bilingual assignment. She does not yet have BCLAD certification, but was given a BCLAD waiver so that she could teach her bilingual class. She is in the process of securing her BCLAD, but needs to pass two more examinations before it can be conferred. Accordingly, she is not currently BCLAD certified.

Rosas Lopez has a master’s degree, which was not included in the district’s tiebreaker determination for August 15, 2007. While the district did not dispute this, the district also established that even if it had taken Rosas Lopez’s master’s degree into account, it would not have put her in a position such that she would have avoided being laid off.

17. Respondent Gisela Olguin is, like Rosas Lopez, an elementary school teacher in a bilingual assignment, has a BCLAD waiver, and is working toward securing her BCLAD. She does not yet, however, hold such certification.

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<sup>4</sup> Lynn testified that he believed a change in his seniority date might save him from layoff; Guerrero, on the other hand, as a probationary employee, would be laid off regardless of the change in her seniority.

Olguin believes that the district did not take her clear credential and her master's degree into account in connection with its tiebreaker determination. Olguin's testimony concerning her clear credential was not entirely clear as to when the district had what information. The district did not dispute that Olguin holds a master's degree. However, the district demonstrated that even if Olguin were correct as to both of her assertions, and even if the district had taken these matters into account when making its tiebreaker determination, Olguin would still be subject to layoff.

18. Respondent Jessica Chess is an elementary school teacher with an August 15, 2007 seniority date. She is still a probationary employee, since she was an intern during her first year with the district. She believes that her seniority date should be August 13, 2007, because she attended a training session. Insufficient information was provided to permit a determination as to whether her seniority date should be changed. Even if it were, her layoff status would be unaffected.

Chess also testified that she received her master's degree on March 17, 2010, and plans to take several CSET exams. These matters likewise do not affect Chess's layoff status.

19. Respondent Luis Martinez teaches high school Spanish (three periods), social science (one period), and English Language Development (one period). He has been designated for complete layoff, with 0.6 FTE corresponding to his three Spanish teaching periods, and the remaining 0.4 FTE resulting from bumping by a more senior employee, Arthur Kimball, who is currently in a middle school language arts/social studies assignment, but who has a clear single subject credential in social studies, and is NCLB compliant in social studies. Martinez has a 30-day substitute credential.

Martinez testified that he has been NCLB compliant in Spanish since 2007. He also testified that he has just finished his coursework necessary to achieve CLAD certification and is waiting for that coursework to be graded.

The district's seniority list states that Martinez is not NCLB compliant in any subject. The district offered no testimony in this regard. Neither party proffered any documentation pertaining to Martinez's credential or NCLB status. However, even assuming *arguendo* that Martinez, holding a substitute credential, could be and is NCLB compliant, he does not presently have EL authorization. Accordingly, the district properly applied the board's skipping criteria<sup>5</sup> to Martinez with regard to his Spanish teaching position.<sup>6</sup>

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<sup>5</sup> The district did not of course "skip" Martinez, but it applied the skipping criteria by designating him for layoff in the first step of the two-step process described in Finding 7.

<sup>6</sup> Martinez did not challenge the district's determination that Kimball could bump him with regard to his ELD and social studies (0.4 FTE collectively) teaching positions. Further, the district correctly explained that Kimball was competent to bump Martinez with regard to the social studies position, because Kimball is highly qualified in that field. Kimball is also competent to bump Martinez with regard to the ELD position, because highly qualified status does not apply to that position.

20. Respondents contended that the district failed to advise certain employees of the need to secure NCLB compliance, and suggested that this failure constituted in essence an attempt to lure employees into a false sense of security. However, the evidence did not support this claim. To the contrary, it appears that the district had a vested interest in securing NCLB compliance on the part of its certificated staff, and that it has attempted to facilitate the achievement by its staff of that compliance. Finally, assuming arguendo the district did not consistently advise its employees of the importance of NCLB compliance, such a failure would not constitute non-compliance with the layoff statute, give rise to estoppel, or provide other legal grounds to set aside the district's proposed layoff of any of the respondents.

21. 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. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. A district may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. Pursuant to section 44995, 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.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393 v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843; *Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 134-135.)

The district has an obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. (*Bledsoe v. Biggs Unified School Dist., supra* at 136-137.)

4. The decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. It is within the governing authority's discretion to determine the amount by which a particular kind of service will be reduced or discontinued

as long as the district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.) A school district has wide discretion in setting its budget and a layoff decision will be upheld unless it was fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. (*California Sch. Employees Assn. v. Pasadena Unified Sch. Dist.* (1977) 71 Cal.App.3d 318, 322.)

5. School districts have broad discretion in defining positions within the district and establishing requirements for employment. This discretion encompasses determining the training and experience necessary for particular positions. Similarly, school districts have the discretion to determine particular kinds of services that will be eliminated, even though a service continues to be performed or provided in a different manner by the district. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.)

6. While skipping a junior employee under Education Code section 44955, subdivision (d), does not require a written board resolution, the district must nevertheless demonstrate a specific need for junior personnel to teach a specific course<sup>7</sup> or course of study<sup>8</sup> and the district must demonstrate that the junior employee being skipped possesses special training or experience necessary to teach that course or course of study which others with more seniority do not possess.

7. Respondents contended that EL authorization and NCLB highly qualified status do not constitute a “course of study” and thus are not properly deemed particularly kinds of services within the meaning of section 44955, subdivision (d). However, this statutory provision by its terms states that a district may exempt certificated employees from layoff if the district demonstrates a specific need for personnel “to teach a specific course or course of study.” The statute does not require that the skipping criteria must themselves constitute a “specific course or course of study.” EL authorization and EL compliance both unquestionably relate to the need for teaching courses and courses of study; accordingly, a district may appropriately use those statuses as skipping criteria.

8. Pursuant to Education Code section 44845, certificated employees are deemed “to have been employed on the date upon which he first rendered paid service in a probationary position.”

9. Promissory estoppel is a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced. A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. To be binding, the promise must be clear and unambiguous. (*Cotta v. City and County of San*

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<sup>7</sup> Education Code section 51016 defines “course” as “an instruction unit of an area or field of organized knowledge, usually provided on a semester, year or prescribed length-of-time basis.”

<sup>8</sup> Education Code section 51015 defines “course of study” as “the planned content of a series of classes, courses, studies, or related activities.”

*Francisco* (2007) 157 Cal.App.4th 1550, 1566.) The elements of a promissory estoppel claim are: (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.” (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901.)

10. On the basis of the matters set forth above in Finding 4, respondents contended that the board failed to decide, either pursuant to Resolution No. 2010-96, or by subsequent action, how the 52 FTE positions were to be reduced among the particular kinds of services identified for reduction or elimination. However, viewing the resolution in the context of what occurred at the February 18, 2010, board meeting, the intent of the board was quite clear: to cut both the total number of FTEs, and the number of FTEs in each PKS category, in half. That the board resolution was only partially interlineated does not change that fact. In fact, no interlineation was necessary to effectuate the amendment to the district’s original recommendation. What is ultimately of legal significance is whether the board made a decision, and what that decision involved, not the manner in which the decision was memorialized.

That having been said, an issue does arise with regard to the elementary school and high school Spanish FTEs. In both instances, the original number of FTEs proposed for reduction was an odd number (85 and 1.0 respectively), and thus straight division in half of those FTEs would have yielded fractional amounts (42.5 and 0.5). It does not appear that the board perceived this when it approved the resolution at the February 18 meeting. It also does not appear that the board reached any determination as to what to do about those fractional FTEs, i.e., whether to round up, round down, or leave them precisely as they were. Moreover, no evidence was presented that the board at any subsequent time exercised its discretion with regard to this issue. Reinhagen’s decision to round down with regard to one and round up with regard to the other was not an inherently unreasonable resolution of this problem. However, her testimony did not reflect a clear rationale for her decision to implement the board resolution in this manner, or that her decision was based on any inquiry she made of the board as to how the board wanted to handle the division of PKS categories initially containing an odd number of FTEs.

Accordingly, it was not established that the board, or the district acting on the board’s behalf, properly exercised its discretion—or exercised it at all—with regard to the decision to reduce the elementary school PKS category by 42, instead of 42.5 or 43 FTE positions, and the decision to reduce the high school Spanish PKS category by 1.0, instead of by 0.5, or to 0 FTE positions.

No prejudice resulted from the board’s failure to exercise its discretion as to the elementary school PKS reduction, since its decision to reduce only 42 FTE positions was the most favorable one for district teachers of the three apparent options (i.e., 42, 42.5, or 43). On the other hand, leaving the high school Spanish FTE PKS at its original 1.0 FTE level, instead, for example, of dividing it precisely in half to 0.5, or rounding down to zero, and thus, in effect, rescinding that PKS category from layoff, did appear to prejudice two respondents, Luis Martinez and Sherry Penaflor. Martinez has been slated for complete

layoff, with 0.6 FTE of that layoff corresponding to the three periods of Spanish that he teaches. Penaflor, a high school biology teacher, was partially bumped (to the extent of 0.4 FTE) as a result of a bumping chain that began with another Spanish teacher, Morella Baltazar.

Because it was not established that the board eliminated the high school Spanish PKS through the exercise of its discretion, the accusation against Martinez must be dismissed in part, i.e., to the extent of the 0.6 FTE reduction in his Spanish teaching position. The accusation against Penaflor must be dismissed in its entirety, since it was only proposed as a partial layoff to begin with, i.e., the ultimate result of the remaining 0.4 FTE PKS reduction in high school Spanish.

11. The district noticed four individuals, all elementary teachers, for precautionary layoff. Of those four, two (Daniel Agoot and Cheri Diaz) remained on the district's final proposed layoff list, due to two expected administrative reassignments to the classroom. The other two (Vernette Jackson and Maria Marquez-Michel) were issued precautionary layoff notices for reasons unrelated to the matters that have led to the partial and full dismissals of the accusations against high school teachers Penaflor and Martinez. Accordingly, the accusations against Jackson and Marquez-Michel are to be dismissed.

12. Except as to respondents Luis Martinez, Sherry Penaflor, Vernette Jackson and Maria Marquez-Michel, a preponderance of the evidence sustained the charges set forth in the accusation. Cause exists under Education Code sections 44949 and 44955 for the district to reduce or discontinue particular kinds of services. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. Cause exists to reduce the number of certificated employees of the district due to the reduction and discontinuation of particular kinds of services. The district identified the certificated employees providing the particular kinds of services that the board be directed be reduced or discontinued. Except as provided below concerning respondents Luis Martinez and Sherry Penaflor, it is recommended that the board give respondents notice before May 15, 2010, that their services are no longer required by the district.

It is recommended that the board give respondent Luis Martinez notice before May 15, 2010, that his services are no longer required by the district with regard to the 0.4 FTE portion of his assignment corresponding to ELD and social studies.

It is recommended that the board not give respondent Sherry Penaflor notice that her services are no longer required by the district.

It is recommended that the board not give respondent Vernette Jackson notice that her services are no longer required by the district.

It is recommended that the board not give respondent Maria Marquez-Michel notice that her services are no longer required by the district.

## ADVISORY DETERMINATION

The following advisory determination is made:

1. Except as provided below, the accusations served on respondents are sustained, and notice may be given to respondents before May 15, 2010, that their services will not be required because of the reduction or discontinuation of particular services as indicated.
2. The accusations against respondent Sherry Penaflor, Vernetta Jackson, and Maria Marquez-Michel are dismissed.
3. The accusation against respondent Luis Martinez is dismissed in part, to the extent of his 0.6 FTE high school Spanish teaching position.

DATED: \_\_\_\_\_

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DONALD P. COLE  
Administrative Law Judge  
Office of Administrative Hearings

## Appendix A

1. Daniel Agoot
2. Carla Alvarado
3. Daniel Barroso
4. Jacqueline Browner
5. Sara Carranza
6. Jessica Chess
7. Guadalupe Coyt
8. Alisha Daniels
9. Cheri Diaz
10. Mery Espinoza
11. Rosalie Felix
12. Karen Frank
13. Adriana Garcia
14. Krysten Gonda
15. Megan Gonyeau
16. Bianca Guerrero
17. Veronica Gutierrez
18. Maricela Hernandez
19. Graciela Hinojosa (0.2)
20. Elmy Hopper
21. Marcy Konlon
22. Denise Lamper
23. Doris Lopez
24. Jason Lynn
25. Jayme Maguire
26. Maria Mares-Mendoza
27. Luis Martinez (0.4)
28. Monica Martinez
29. Sara Medina
30. Aaron Montoya
31. Gisela Olguin
32. Sarah Parker
33. Sherry Penaflo
34. Deborah Powell
35. Kelly Reilly
36. Erika Rivera
37. Luzmaria Rodriguez
38. Nancy Rosas Lopez
39. Luis Rubio
40. Pedro Ruiz
41. Angela Sanchez
42. Erica Sanchez
43. Mindy Shea
44. Margarita Valdez
45. Vernet Jackson
46. Maria Marquez-Michel