

BEFORE THE GOVERNING BOARD OF THE  
ALAMEDA UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against:

BROOKE SUSSMAN, et al.

Respondents.

OAH No. 2010030531

**PROPOSED DECISION**

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in Alameda, California, on April 28, 2010.

Elizabeth B. Mori, Attorney at Law, Fagen Friedman & Fulfroost LLP, represented the Alameda Unified School District.

Dale L. Brodsky, Attorney at Law, Beeson, Tayer & Bodine, represented all of the respondents except Hank Duderstadt, Bianka Hamill, and Tara Yudenfreund.

There was no appearance by or on behalf of respondents Hank Duderstadt, Bianka Hamill, or Tara Yudenfreund.

The matter was submitted on April 28, 2010.

**FACTUAL FINDINGS**

1. Kirsten Vital issued the accusation in her official capacity as Superintendent of the Alameda 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 March 9, 2010, the district's governing board adopted Resolution No. 10-0032 (the PKS resolution). In that resolution, the board determined that it is necessary to decrease certain programs and services no later than the beginning of the 2010-2011 school year. The resolution states that the particular kinds of services to be reduced or eliminated are as follows:

<u>SERVICES</u>	<u>F.T.E.</u> <sup>1</sup>
<u>Elementary Teaching Services:</u>	40.20
<u>Middle and High School:</u>	
Physical Education	2.63
English	8.50
Social Science	1.33
Mathematics	10.40
Humanities	1.00
Science:	
Life	2.67
Physical	2.67
CORE – Eng/LangArt/History	11.50
Foreign Language	
Spanish	1.00
Art	1.00
Music	1.00
<u>Administrative Services:</u>	
Principal	1.00
Assistant Principal	1.00
<u>Counselors</u>	5.40
<b>SUBTOTAL</b>	<b>91.30</b>
East Bay ROP Coordinator	1.00
ROP Teaching Services:	
Web/Game/Design/Animation/Computers	1.00
TV Media	0.80
Auto Technology	0.60
Developmental Psychology of Children	2.20
Marketing	1.60
Sound Engineering	0.40
Fashion Design and Merchandising	1.40
Construction	0.80
Medical Occupations	0.80

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<sup>1</sup> “F.T.E.” means full-time equivalent.

<u>SERVICES</u>	<u>F.T.E.</u>
Journalism	0.20
Media Studies	0.40
Biology Tech	0.20
<b>SUBTOTAL</b>	<b>11.40</b>
<b>TOTAL</b>	<b>102.70 <sup>2</sup></b>

The resolution directs the superintendent to send appropriate notices to all employees whose positions may be lost by virtue of the board’s action.

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. The district and the represented respondents reached stipulations on various matters, including the rescission of certain layoff notices, the proper seniority dates and classification of certain respondents, the application of tie-breaking criteria, the reemployment rights of respondents in the ROP program, and the reemployment rights of respondents in categorically-funded positions. Those stipulations are set out in the parties’ Joint Exhibit I.

7. The district has rescinded the layoff notices it issued to Steven Allen, Grace Liu-Smith and Stephen Ramos. The accusation against these employees will be dismissed.

8. The district has not applied any tie-breaking criteria to date. It concluded that it was not required to determine the relative seniority of teachers with the first date of paid service to implement the PKS resolution.

Skip of Romeo Ponsaran

9. Under Education Code section 44955, subdivision (c), probationary and permanent employees must be laid off in the inverse order of their seniority. Subdivision (d)(1) of that section provides, however, that a district may deviate from terminating an employee in order of seniority and “skip” that employee if

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<sup>2</sup> The resolution contains cost data associated with these services, which has been omitted.

[t]he district demonstrates a specific need for personnel to teach a specific course or course of study . . . and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

10. In this case, the board’s PKS resolution establishes skipping criteria. It states:

[I]t will be necessary to retain the services of certificated employees in the 2010-2011 school year regardless of seniority, who possess the qualifications needed for the following programs and/or subject matters:

- A. Special Education Mild to Moderate
- B. Special Education Moderate to Severe
- C. Clinical of [*sic*] Rehabilitative – Language, Speech, Hearing or Visual Impairment
- D. Multiple Science Certification within single subject Authorizations of Biology, Chemistry, Physics, Earth Science, Integrated, General, and Introductory Life or Physical Science.

11. The district skipped Romeo Ponsaran and did not issue him a preliminary layoff notice; he is not a respondent in this proceeding. Ponsaran holds a multiple subject credential and a CLAD and is currently assigned to teach middle school (seventh grade) core.

12. Laurie McLachlan-Fry is the Chief Human Resources Officer for the district; her office administered the layoff.

McLachlan-Fry testified that Ponsaran was not issued a preliminary layoff notice because, prior to March 15, he presented evidence satisfactory to the district that he had passed the California Subject Examination for Teachers (CSET) Multiple Subject examination. Passing this test, McLachlan-Fry states, “established his competence” to teach middle school core. She states that Ponsaran has been “tentatively assigned” to teach seventh grade core next year. Ponsaran has not yet registered a new credential with the district. (A teacher who passes a CSET examination can expect to receive a single subject credential or a supplemental credential from the California Commission on Teacher Credentialing.)

McLachlan-Fry testified that there are no other employees who are being laid off who are “qualified to teach seventh grade core under No Child Left Behind.” One of the goals of NCLB is to provide students with “highly qualified teachers.” A teacher can demonstrate that he is highly qualified to teach middle school core by passing the CSET examination, as Ponsaran has done. McLachlan-Fry feels that it would be a “misassignment” if she were to

assign a teacher to seventh grade core who has not passed the CSET. She did not state what she means by a “misassignment” and did not state the basis for her opinion.

Prior to sending out preliminary layoff notices in March, the district did not inform its core teachers that they should take the CSET examination if they wished to avoid layoff. McLachlan-Fry does not know if all core teachers in the district have passed CSET, but stated that it is the district’s “intention” that they pass it.

13. Respondents challenge the validity of the skip. They emphasize that the board’s resolution does not justify skipping Ponsaran, and that Ponsaran has not yet registered a new credential with the district. Neither of these facts, standing alone, makes the skip invalid. There is no legal requirement that skipping criteria be stated in a resolution. Education Code section 44955, subdivision (d), requires only that the district “demonstrate” the basis for the skip. And section 44955 does not state that skips must be based on a credential. Employees may be skipped by virtue of “special training and experience.”

The skip is invalid, however, because the district failed to demonstrate that passing the CSET is necessary to teach middle school core. There is no evidence that a teacher must pass the CSET to teach middle school core. On the contrary, the evidence establishes that it is not necessary: Ponsaran taught middle school core this year, and it appears that there are other teachers in the district, assigned to teach core, who have not passed the CSET. Similarly, the evidence fails to establish that it is necessary to be highly qualified under NCLB to teach middle school core. It may be desirable for many reasons to attract and retain teachers who are highly qualified under NCLB, but the statutory standard for deviating from seniority in an economic layoff is higher. The district must show that such special training or experience is necessary to teach middle school core. (Ed. Code, § 44955, subd. (d)(1); *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567.) The district did not meet its burden of proof on this issue.

14. Ponsaran should have received a layoff notice. It is not clear from the evidence who, if anyone, was prejudiced by the district’s decision to skip him. Ponsaran’s seniority date is August 23, 2006. There are other teachers with the same seniority date who hold a multiple subject credential and a CLAD who have been issued preliminary layoff notices. Whether they have greater or less relative seniority than Ponsaran is not known, because the district has not applied its tie-breaking criteria to these employees. There is one respondent, Diane Alexander, who possesses a preliminary multiple subject credential and who has an earlier seniority date than Ponsaran’s. She holds an elementary school assignment; it is not clear whether she would have avoided layoff if Ponsaran had been noticed. It is not clear from the evidence whether there are other employees who were given preliminary notices, and who are not respondents, who might have avoided layoff had Ponsaran been noticed.

The appropriate remedy, which will be ordered, is to direct the district to take the necessary steps to identify the most senior teacher who was prejudiced by the decision to

skip Ponsaran. If there was such a teacher, the district may not lay off that employee. (See *Alexander v. Board of Trustees, supra*, 139 Cal.App.3d at p. 576.)

### Temporary employees

15. The district has classified certain certificated employees as temporary employees. Temporary employees are not entitled to the due process protections afforded by Education Code sections 44949 and 44955. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916-918.) Nevertheless, the district sent “precautionary” layoff notices to at least some of its temporary employees in the event any such employee wished to challenge his or her classification. The respondents classified by the district as temporary are identified on the district’s Exhibit 10.

16. Respondent Marissa Giovacchini teaches second grade at Amelia Earhart Elementary School. She is classified as a temporary employee. She was first hired by the district for the 2008-2009 school year on a one-year contract, which stated that she was being hired as a temporary employee for a term ending June 15, 2009. Giovacchini was released at the end of that year, and she was also given a layoff notice. She was rehired for the 2009-2010 school year on a temporary contract that is identical in all material respects to the first contract, except that the second contract ends on June 14, 2010. Giovacchini has again been given a release from her temporary position at the end of the year, and a layoff notice.

Giovacchini testified that when she was first hired she was told by Joie Garcia, a human resources technician for the district, that she had been hired to replace a teacher who had retired and that “I should be moved up quickly to prob [probationary status].” Giovacchini was not made a probationary employee during the 2008-2009 school year. Giovacchini testified that, when she signed her second temporary contract for the 2009-2010 school year, the district again told her that she would be moved up to probationary status quickly. She was never made a probationary employee. Other teachers who were hired at the same time as Giovacchini have been made probationary; Giovacchini feels that she should have been supported better by the district.

The evidence fails to establish that Giovacchini has been misclassified. It is within the district’s discretion to decide who it will offer a probationary position. Even assuming, for the sake of argument, that the district failed to make good on assurances that it would make her a probationary teacher quickly, that is not sufficient to estop the district from maintaining that she is a temporary employee. The evidence does not establish that the district knew its assurances were false at the time it made them, or that Giovacchini relied on such misrepresentations to her detriment. These are essential elements of an estoppel claim.

17. No other temporary employee challenged his or her classification.

Other matters

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

19. 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.

20. 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 Finding 7, no cause exists to issue a final layoff notice to Steven Allen, Grace Liu-Smith or Stephen Ramos.

2. By reason of the matters set forth in Findings 9 through 14, cause exists to require the district to identify the most senior employee, if there is one, who has been prejudiced by the district's invalid skip of Ponsaran. If there is such an employee, cause does not exist to issue him or her a final layoff notice.

3. By reason of the matters set forth in Findings 15 through 17, the employees identified on the district's Exhibit 10 are temporary employees. Because the provisions of Education Code sections 44949 and 44955 apply only to probationary and permanent employees, they are not entitled to the protections afforded by those sections and it is not necessary to decide whether there is cause for not reemploying them for the 2010-2011 school year. The district may, but is not required to, give them notice that their services will not be required for the 2010-2011 school year.

4. 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 102.70 FTE positions 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 accusation against Steven Allen, Grace Liu-Smith, and Stephen Ramos is dismissed.

2. The district shall identify the most senior employee who was prejudiced by the district's invalid skip of Ponsaran, as set forth in Legal Conclusion 2. If there is such an employee, he or she may not be given a final layoff notice.

3. Notice may be given to all remaining respondents in 102.70 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: \_\_\_\_\_

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DAVID L. BENJAMIN  
Administrative Law Judge  
Office of Administrative Hearings

## Appendix A

1. Alcala, Danielle
2. Alexander, Diane
3. Allen, Steven
4. Armon, Kimiko
5. August, Julian
6. Baddell, Andrea
7. Bailey, Monica
8. Bakal, Debra
9. Braze, Joan
10. Breidinger, Erin
11. Bryant, Lisa
12. Catipovic, Maja
13. Cheshire, Ryan
14. Chung, Jeanee
15. Corbally, Tracy
16. Corpuz, Jo
17. Dalton, John
18. Dhaliwal, Amardeep
19. Dickerson, Ingrid
20. Duderstadt, Hank
21. Esmat, Gatee
22. Friedlander, Laura
23. Galan, Cheri
24. Garnica, Amanda
25. Garza, Marina
26. Giovacchini, Marissa
27. Gonzalves, Janay
28. Gordon, Jeffrey
29. Greden, Mary
30. Haddon, Michael
31. Hamill, Bianka
32. Hartigan, Jennifer
33. Higashi, Todd
34. Hsu, Marie
35. Hyman, Audrey
36. Johnson, Joshua
37. Kayler, Marie
38. Kelley, Erin
39. Kernkamp, Carolyn
40. LaBarre, Andrew
41. Lee, Joanne
42. Lewis, Judi
43. Lewis-Warnock, Janet
44. Liu-Smith, Grace
45. Lorezco, Rizaldy
46. Lyons, Derrick
47. Marsh, Cynthia
48. McClish, Sophie
49. Moats, Ingrid
50. Nakatani, Akemy
51. Nunn-Needham, Lise
52. Nolan, John
53. Parodi, Ron
54. Patil, Sayalee
55. Peiler, Karen
56. Power, Stella
57. Ramos, Stephen
58. Rider, Amanda
59. Spencer, Paizley
60. Struble, Elizabeth
61. Sullivan, Charles
62. Sussman, Brooke
63. Sydow, JoAna
64. Taylor, Deborah
65. Thom, David
66. Thomas, Michelle
67. Varghese, Victoria
68. Vogel, Patricia
69. Wall, Lela
70. Weber, Lara
71. Williams, Jane
72. Williams, Lorna
73. Wocicki, Scot
74. Yudenfreund, Tara
75. Zeldin, Sasha