

BEFORE THE
BOARD OF EDUCATION OF THE
CLAREMONT UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Certificated Employees of the Claremont
Unified School District,

Respondents.

OAH Case No. 2010030602

PROPOSED DECISION

Administrative Law Judge Susan L. Formaker of the Office of Administrative Hearings heard this matter on April 21, 2010, and April 22, 2010, in Claremont, California.

Michael W. Garrison, Jr., and Tanya A. Guzman of O'Melveny & Myers LLP represented Petitioner Dr. Terry Nichols (Nichols), Superintendent of the Claremont Unified School District (District).

Michael R. Feinberg and Amy Moolin Cu of Schwartz, Steinsapir, Dohrmann & Sommers LLP represented the Respondents listed on Exhibit A received at the hearing, which is incorporated herein as if set forth in full. Respondents Elmira Jannati, Francis DeCastro, Erin Abelar, Homa Khodadoost, Micah Cohen, and Sheri Frost were not represented by counsel at the hearing and did not appear. The District withdrew the Accusation at the outset of the hearing as against Katya Gentry, Christina O'Grady, Jennifer Quincer, Angela Ruiz, Kerrie Richardson, Jennifer Norin, Kara Leeper, Regina Hartman, Rachel Lynch, Victoria Trudel, and Katherine Gilmore.

Oral and documentary evidence was received at the hearing. The record was left open until April 29, 2010, for an additional evidentiary submission by Respondent Kristen VanKouwenberg, which was timely submitted and marked for identification as Exhibit K. Petitioner had no objection to the admission of Exhibit K, and it was received. The record was further left open until May 7, 2010, for the parties to submit written closing arguments. The District's Closing Brief was timely submitted and marked for identification as Exhibit 25; the represented Respondents' Post-Hearing Brief was timely submitted and marked for identification as Exhibit L. The matter was deemed submitted as of May 7.¹

¹ Respondents made an unopposed motion to continue the hearing in this matter from April 22, 2010, to May 7, 2010, a period of fifteen days. The dates prescribed in Education Code sections 44949, subdivision (c), and 44955, subdivision (c), were thereby extended for a period of 15 days.

FACTUAL FINDINGS

1. Nichols made and filed the Accusations in his official capacity. Devon Freitas (Friebas), Assistant Superintendent of Human Resources for the District, acting in her official capacity, caused all pleadings, notices and other papers to be served upon Respondents pursuant to the provisions of Education Code² sections 44949 and 44955.

2. Respondents are certificated employees of the District.

3. On March 4, 2010, on Nichols' recommendation, the Board of Education of the District (Board) adopted Resolution Number 19-2010, reducing or eliminating 70.1188 full-time equivalent (FTE) positions for the 2010-2011 school year, as follows:

1. K-6 Teacher Services (Reduce)	32.0 fte ³
2. 7-8 Teacher Services (Reduce)	12.9 fte
3. 9-12 Teacher Services (Reduce)	18.8 fte
4. Child Development Program Teaching Services (Reduce)	1.4188 fte
5. Counselor Services (Reduce)	2.0 fte
6. Psychologist Services (Reduce)	1.0 fte
7. Transition Specialist Psychological Services (Eliminate)	1.0 fte
8. Child Development Program Specialist Services (Reduce)	1.0 fte

4. On March 15, 2010, the Board adopted an amended Resolution Number 19-2010, which narrowed the scope of the reduction or elimination of positions for the 2010-2011 school year. The amended Resolution provided for the reduction or elimination of 36.4188 FTE positions as follows:

1. K-6 Teacher Services (Reduce)	22.2 fte
2. 7-8 Teacher Services (Reduce)	3.4 fte
3. 9-12 Teacher Services (Reduce)	4.4 fte
4. Child Development Program Teaching Services (Reduce)	1.4188 fte
5. Counselor Services (Reduce)	2.0 fte
6. Psychologist Services (Reduce)	1.0 fte
7. Transition Specialist Psychological Services (Eliminate)	1.0 fte
8. Child Development Program Specialist Services (Reduce)	1.0 fte

² All further references are to the Education Code.

³ The "fte" formatting is in the original resolution.

5. Pursuant to Resolution Number 16-2010, adopted by the Board on May 15, 2010, the District exempted from the order of layoff those certificated employees qualified to provide service in Special Education. The District demonstrated a specific need for personnel with special training and experience to teach special education, which others with more seniority do not possess. (Code § 44955, subd. (d).) Respondents did not contest these “skipping” criteria.

6. The proposed reduction or elimination of services is related to the welfare of the District and its pupils. The Board took action to reduce or eliminate the services set forth in Findings 3 and 4 primarily because of a reduction in state funding and resulting budgetary concerns.

7. Prior to adoption of the original Resolution Number 19-2010, and again prior to the Board’s adoption of the amended Resolution Number 19-2010, the District identified vacancies for the 2010-11 school year due to any positively assured attrition (confirmed resignations and retirements), non-reelections of probationary employees, and release of temporary certificated employees. Such attrition, non-reelections of probationary employees, and release of temporary employees was taken into consideration in determining the number of FTE reductions needed and in determining the order of layoff. There has been no further attrition since March 15, 2010.

8. Prior to March 15, 2010, the District provided notice to Respondents pursuant to Code sections 44949 and 44955 that their services will not be required for the 2010-2011 school year due to the reduction of particular kinds of services. On or about March 16, 2010, after adoption of the amended Resolution Number 19-2010, the District notified affected employees of the withdrawal of the notices of intent not to reemploy them.

9. On or about March 31, 2010, the District filed and served the Accusation.

10. All certificated employees listed on Exhibit 23 either requested a hearing or submitted a Notice of Defense, and the District waived any failures of such employees properly to request a hearing or to submit a Notice of Defense. Exhibit 23 thus properly identifies all Respondents in this action, except for those certificated employees as to whom the District withdrew the Accusation at the outset of the hearing. Exhibit 23 is reproduced as Appendix 1 to this Proposed Decision.

11. All prehearing jurisdictional requirements have been met.

12. The District developed a seniority list (Exhibit 8) which contains employees’ names, seniority dates (first date of paid service in a probationary capacity), and credentials and authorizations held. Certificated employees were provided the opportunity to review the information used to create the list and confirm its accuracy, and the District modified the

seniority list to take account of information provided by employees that was verified by the District. The District then used the seniority list, in combination with other information, to identify positions for layoff in inverse order of seniority within each particular kind of service being reduced or eliminated, adding additional positions for layoff until the full number of FTEs for reduction or elimination in a particular kind of service had been reached. In identifying positions, junior employees satisfying the “skipping” criteria were ignored.

13. On March 4, 2010, the Board adopted Resolution 22-2010 (Exhibit 9) setting forth criteria to break ties in seniority among certificated employees with the same first paid date of probationary service. Resolution 22-2010 requires a consideration, first, of the level of credentialing (e.g., “clear” credentials versus lesser credentials), second, of experience, third (if there is still a tie), of education, and fourth (if there is still a tie) substitute relevant experience.

14. In creating the seniority list, the District applied each one of the tie-breaking criteria in order, one step at a time, as needed, with respect to teachers with the same first date of paid service.

15. Respondents did not challenge the tie-breaking criteria. However, in certain instances (discussed as relevant below), some Respondents contended the criteria failed properly to be applied or were improperly not applied.

16. Once teachers were identified for layoff using the seniority list, the District determined whether any of them could “bump” less senior employees currently assigned to positions the more senior teachers were credentialed and competent to teach. The District then determined whether the less senior employees held credentials in another area and were entitled to “bump” other, more junior employees. In determining whether a teacher was “competent” to teach another position, the District utilized a competency criterion requiring that the teacher had taught in the area in the past five years (presumably prior to the notice of layoff). The competency criterion was within the discretion of the District.

Attrition

17. Respondents argue that Freitas improperly accounted for attrition, or failed to do so, in determining the particular kinds of services that would be reduced or eliminated. Respondents point to some of Freitas’s testimony indicating that attrition is only going to be taken into account to determine who will be “brought back” (that is, whose layoff notices will be withdrawn), rather than to reduce the number of layoffs. Although Freitas’s testimony was not entirely consistent, she ultimately clarified that attrition was, in fact, taken into account prior to the adoption of the original Resolution Number 19-2010 on March 4, 2010. She also credibly

testified that no additional attrition occurred between March 4 and March 15, 2010.⁴ In a layoff arising out of a reduction of particular kinds of services, such evidence is sufficient to establish that attrition was accounted for in determining the services to be reduced or eliminated, particularly where Respondents failed to submit competent evidence that attrition was not taken into account. (See Legal Conclusion 2, below.)

7-8 and 9-12 Teacher Services

18. Respondents more successfully argue that “7-8 Teacher Services” and “9-12 Teachers Services” are not properly considered particular kinds of services. All regular teaching services in the seventh through twelfth grades within the District occur in a departmentalized setting. A departmentalized setting exists where a single subject is taught by a teacher with an appropriate credential to different groups of students over the course of a school day. Such an assignment requires that a teacher hold a single subject credential authorizing the teaching of that subject area or, if the class is offered in grade nine or below, the teacher may hold a supplemental authorization for instruction in that subject area. (Code §§ 44256, subd. (a), and 44258.) For layoff purposes, the District has grouped all teachers in the intermediate schools together, regardless of the subjects for which such teachers are authorized to teach or the subjects they actually teach, and determined to lay off the most junior of those teachers up to the number of FTE positions being reduced. The same process was followed for high school teachers.

19. School districts have broad discretion in defining positions within the district and establishing requirements for employment. (*Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 299-300.) 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.” (*Gallup v. Board of Trustees* (1996) 41

⁴ The Administrative Law Judge’s credibility findings may take into account factors that would not appear from a written record of the proceedings. “On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted--but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability.” (*Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.) The trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted.” (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at 67-68, quoting from *Nevarov v. Caldwell* (1958) 161 Cal.App.2d 762, 777.)

Cal.App.4th 1571, 1582-1585; *Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.)

20. What amounts to a particular kind of service for layoff purposes varies according to the circumstances and must in each case be determined in light of the specific facts. A particular kind of service may be a certain subject, it may be the teaching of the subject for a particular purpose, or it may be a particular manner of teaching the subject. (*Walsh v. Board of Trustees of Redlands High School Dist.* (1934) 2 Cal.App.2d 180; *Fuller v. Berkeley School Dist. of Alameda County* (1934) 2 Cal.2d 152; *Gallup v. Board of Trustees, supra*, 41 Cal.App.4th at 1571.) *CTA v. Goleta Union School District* (1982) 132 Cal.App.3d 32, holds that elementary teaching is a distinct particular kind of service. In *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 637, the court noted that in elementary teaching it is difficult to identify a reduction in particular subjects because “many subjects are taught to the same students by the same teacher in the same classroom at unspecified times during the day.” However, “[s]ubjects taught in secondary schools and community colleges by designated teachers at particular hours permit easy identification for purposes of PKS reductions.” (*Ibid.*) In the instant case, the District’s identifying particular kinds of services across subject matters suggests that the services being performed are interchangeable. By virtue of the fact that different credentials or authorizations are needed for each subject matter, teaching services in different subject matters at the intermediate and secondary school levels cannot be considered the same, identifiable particular kinds of service. The fact that the District decides upon class sizes by grade levels, rather than by particular kinds of services, as the District contends, is irrelevant to the analysis of the identification of particular kinds of services for layoff purposes.

21. By failing to identify specific subjects for reduction in the intermediate and secondary schools, the District makes any identification of services for layoff based on these categories arbitrary and capricious in violation of the statutory framework. (*Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 807-808 [layoff may not be fraudulent, arbitrary or capricious].) With respect to these positions, the proposed layoffs cannot be said to be related to the needs and welfare of the District and its pupils.

22. Because the District improperly classified “7-8 Teacher Services” and “9-12 Teacher Services” as particular kinds of services, all planned layoffs directly arising from these categories of purported services must be disregarded. Accordingly, the Accusations against Victoria Walker (.2 FTE), Linda Atherton (.4 FTE), Doris Donovan (.8 FTE), John Madunich (1.0 FTE), Sandra Franco-Hinderliter (1.0 FTE)⁵, Janie Van Ryn (1.0 FTE), Ana Espinosa (1.0

⁵ Ms. Franco-Hinderliter bumped Molly Arboleda under the District’s analysis. Under a “second level bump,” the District found that Lindsay Lazenby then bumped Ms. Franco-Hinderliter. However, because Ms. Arboleda must be retained (since her potential layoff originated out of an improper designation of a purported particular kind of service) and

FTE), Korina Gonzales (.2 FTE), Kristin McKown (1.0 FTE), Eric Peterson (1.0 FTE), and Melissa Salter (.2 FTE)⁶ (the employees originally identified for layoff before any bumping was taken into account) must be dismissed. To the extent that the District also provided layoff notices to employees who would be bumped by any of these employees as a result of seniority rights, those employees' Accusations must also be dismissed, as there would no longer be any basis for a bump to occur. Accordingly, the Accusation against Molly Arboleda (1.0 FTE) must be dismissed. To the extent additional teachers providing services to grades 7-8 and 9-12 received layoff notices and were served with Accusations based solely on their status in teaching those grades, they must also be retained. Those employees included Marizka Rivette (1.0 FTE),

holds a position the more senior Ms. Franco-Hinderliter is certificated and competent to render, Ms. Franco-Hinderliter must also be retained.

⁶ Ms. Salter has two seniority dates, each one associated with different portions of her position, and she received two different layoff notices. A number of the teachers subject to layoff have similar situations. The holding of more than one seniority date is caused by the District's policy on part-time work. While the District allows many teachers to work on a part-time basis, when a teacher moves from a full-time position, or a position with more part-time hours, to a part-time position with fewer hours, the District requires the teacher to resign from the portion by which his or her position is reduced. If the teacher then resumes working for a portion of the position from which he or she had previously resigned, a new seniority date is assigned to the portion of the position newly taken on by the teacher. The former position portion would retain the original seniority date. Such splitting of seniority dates allows for the possibility that a teacher can be both tenured and probationary with respect to different portions of the same position. It is not clear this is allowed by law. For example, in *Reis v. Biggs Unified School District* (2005) 126 Cal.App.4th 809, a teacher received notice that a school district was not reelecting him to two part-time positions. Without explicitly considering whether a teacher could hold both a tenured and non-tenured position at the same time, the Court of Appeal ruled that the teacher had improperly been given notice of non-re-election from a .57 FTE tenured position but that he could be non-re-elected from his other .43 position, since the services in that position did not count towards tenure. In contrast, in *Holbrook v. Board of Education of Palo Alto Unified School Dist.* (1951) 37 Cal.2d 316 (1951), the California Supreme Court held that where a certificated employee held varying portions of a certificated position along with varying portions of a non-certificated service over a period of three years, the employee attained full tenure and not just one-fourth tenure, as the district had asserted. Neither of these cases is directly on point, as the issue here concerns one teaching position and not two separate positions. While the District's policy is troubling, Respondents' counsel did not raise any objections to it. Respondents thus waived any objections to having different seniority dates apply to different portions of their positions.

Miguel Trujillo (1.0 FTE), Eric Tucker (1.0 FTE), and Melissa Wonacott (1.0 FTE).⁷ Accordingly, the Accusations against these additional teachers should be dismissed. Linda Carr Handley (with a seniority date of September 1, 2006, and 1.0 FTE), who was to bump Lindsey Lazenby, who, in turn, was to bump Ms. Franco-Hinderliter under the District's analysis (Exhibit 11), must also be retained, since Ms. Carr Handley is the Respondent who is most senior to Ms. Franco-Hinderliter and certificated and competent to fill a position Ms. Franco-Hinderliter is being retained to teach.⁸ Lindsey Lazenby would continue to be subject to layoff, since she was bumped as a result of elementary school layoffs.

23. Respondents contend that because English teacher Victoria Walker, with a seniority date of September 18, 2009, would no longer be laid off based on the improper designation of services, each of the senior Respondent teachers noticed for layoff and credentialed to teach English should be retained. Under the analysis above, junior English teachers Victoria Walker (.2 FTE), Linda Atherton (.2 FTE⁹), and Melissa Salter (.2 FTE) would all be retained, and Respondents presumably would make the same argument they have made concerning Ms. Walker's retention with respect to all three of these teachers, that is, that all teachers subject to layoff who are senior to any of these three teachers and who are certificated and competent to teach English should be retained. Respondents thus assert that the "domino effect" should apply, regardless of whether a particular employee was actually prejudiced by the retention of the junior employee. The domino effect theory argued by Respondents was rejected by the Court of Appeal in *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567, 576, where the Court declined to force a school district to retain all employees that were senior to junior employees who mistakenly were not given notice. Instead, the Court of Appeal indicated only those who were prejudicially affected would need to be retained. Similarly, here only the senior employees subject to layoffs who would be prejudiced by an inability to exercise bumping rights because of the required retention of junior employees should be retained.¹⁰ In

⁷ The District did not identify why these Respondents received layoff notices and Accusations, but because of their current assignments at intermediate or high schools and the fact that they were not bumped by other employees, it can be inferred that they were provided with layoff notices and Accusations in the event the proposed order of layoff was determined to be incorrect.

⁸ Respondents provided a different analysis, starting with the proposition that only the most senior teachers at the intermediate and high schools slated for layoff, up to the designated number of FTE, should be retained. However, if the category of particular kind of defined "service" is invalidated, it stands to reason that all layoff notices associated with that category of "service" are likewise invalidated.

⁹ Ms. Atherton's other .2 FTE is in Music.

¹⁰ This was the same analysis used with respect to Ms. Carr Handley in Finding 22.

determining whether a Respondent is certificated and competent to fill such a position, both credentials and experience must be considered in light of the District's competency standard, set forth at Finding 15.

24. Here the most senior teacher noticed for layoff who is certificated and competent to teach English could claim entitlement to retention of a total of .6 FTE in English. The most senior teacher certificated and competent to fill the positions of Ms. Walker, Ms. Atherton, and Ms. Salter is Talia Bowman (1.0 FTE), with a seniority date of September 1, 2006. The Accusation therefore must be dismissed against Ms. Bowman to the extent of .6 FTE for which she must be retained. Ms. Bowman was already going to bump into two other positions (held by Melissa Salter, .8 FTE, and Suzanne Hensley, .2 FTE) which are senior to those of the junior retained positions of Ms. Walker, Ms. Atherton, and Ms. Salter. Because of Ms. Bowman's retention of .6 FTE of her position, the bump need only be of the remaining .4 FTE of her position, which would still bump the teacher(s) less senior to her whose positions she is certificated and competent to render. Based on the application of tie-breaker criteria, Ms. Salter would be bumped by .4 (instead of .8 as in the District's bumping chart) as the most junior employee performing services Ms. Bowman is certificated and competent to render. Ms. Hensley would no longer be bumped by .2 FTE.¹¹ The Accusations against Ms. Salter and Ms. Hensley must be dismissed to by .4 FTE and .2 FTE, respectively.

25. No other Accusations must be dismissed as a result of the improper designation of services as particular kinds of services, as discussed in Findings 18 through 21.

26. Other than the services invalidated pursuant to Findings 18 through 21, the remaining services set forth in Finding 4 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.

27. The decision to reduce the particular kinds of services identified in Finding 26 is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion. The decision to include competency requirements, as set forth in Finding 16, for "bumping" rights likewise is not arbitrary or capricious and is a proper exercise of the District's discretion.

28. The reduction of services set forth in Finding 26 is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

Because Ms. Carr Handley was the most senior teacher affected by the retention of Ms. Franco-Hinderliter, and Ms. Lazenby would otherwise have been subject to layoff in the absence of Ms. Franco-Hinderliter, only Ms. Carr Handley's Accusation must be dismissed as a result of the unwinding of this double-bump and the retention of Ms. Franco-Hinderliter.

¹¹ This is the second, more senior of Ms. Salter's two part-time positions.

29. A number of Respondents raised issues particular to their situations. Those issues are reviewed below.

Sheri Castro

30. Respondent Sheri Castro, who is tenured, has two seniority dates: September 1, 2001, and September 1, 2007. Each date is associated with a .5 FTE partial position teaching first grade at Sumner Elementary School, with the two partial positions together comprising a 1.0 FTE position. Based on Ms. Castro's September 1, 2007, seniority date, she is to be laid off by .5 FTE as part of the elementary school layoffs. In addition to her clear multiple subject credential, she holds a supplemental authorization in Physical Education that allows her to teach this subject up to ninth grade. Ms. Castro previously taught physical education under this supplementary authorization for 10 years at the Central School District. She also teaches physical education as part of the curriculum in her own elementary classroom at Sumner Elementary School.

31. Ms. Castro shares the same first date of paid service as Phyllis Epling, who teaches 1.0 FTE of physical education. Ms. Epling was originally noticed for layoff in connection with the grade 7-8 service category, but her layoff notice was subsequently withdrawn.

32. The District failed to apply tie-breaker criteria to Ms. Castro and Ms. Epling. Ms. Castro contends that had such criteria been applied, Ms. Castro would have been determined to be senior to Ms. Epling by virtue of having a clear credential as compared to Ms. Epling's preliminary credential. As a result, Ms. Castro asserts that she should be able to bump Ms. Epling.

33. The District does not dispute that Ms. Castro's credential is what the District has termed a "superior level of certification." However, the District contends that Ms. Castro cannot bump Ms. Epling under Code section 44955, subdivision (b), because bumping can only occur between employees with different seniority dates, not the same seniority date.

34. The District's argument is persuasive. Code section 44944, subdivision (b), only permits the bumping of employees with "less seniority." The tie-breaker criteria apply to the order of termination as between employees with the same first date of paid service, that is, to those with the same seniority date. Since Ms. Castro was noticed for layoff in connection with the elementary school layoffs and not the grade 7-8 category layoffs, the order of termination does not come into play. Ms. Castro is properly subject to layoff.

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Timothy Northrup and Jessica Gariador

35. Timothy Northrup teaches fourth through sixth grade physical education. He travels among the District's elementary schools teaching a pull-out physical education program. He has a clear multiple subject credential and a seniority date of July 1, 2006.

36. Jessica Gariador, with a seniority date of September 1, 2005, has a clear multiple subject teaching credential with a concentration in Kinesiology. She contends this would "likely" qualify her for a supplemental authorization in physical education.

37. Both Mr. Northrup and Ms. Gariador contend that they should be able bump Francisco Quintana, a junior physical education teacher at San Antonio High School (the District's continuation high school). Mr. Quintana holds a .5 FTE position with a seniority date of September 1, 2006. He also holds a single-subject credential in physical education.

38. Education Code section 44865 allows a teacher to be assigned to teach at a continuation school if the teacher has a valid credential based on a bachelor's degree, student teaching, and "special fitness" to perform. The teacher must also consent to teaching in a continuation school; both Ms. Gariador and Mr. Northrup contend they would be willing to do so.

39. Neither Ms. Gariador nor Mr. Northrup have experience teaching physical education to adults. Nor do they currently hold single subject credentials in physical education or supplemental authorizations to teach physical education. While Ms. Gariador may be able at some point to obtain a supplemental authorization, she does not currently have one. Any qualification for bumping another teacher must be determined as of the date notice of layoff was given.

40. Based on Finding 39, Ms. Gariador and Mr. Northrup have not established a "special fitness" to teach physical education in the continuation school. Teaching physical education to teenagers and young adults is substantially different from teaching it to elementary school-age children. The skills to be taught and levels of coordination vary significantly. Moreover, in light of the District's competency criteria for bumping, Ms. Gariador and Mr. Northrup cannot show experience teaching physical education of the type required in a continuation school within the last five years. Ms. Gariador and Mr. Northrup are properly subject to layoff.

Kristen Van Kouwenberg

41. Kristen Van Kouwenberg is a Kindergarten teacher at Chaparral Elementary School. She has a clear multiple subject credential with CLAD certification. She has two

seniority dates with the District: September 1, 1994, with which .4 FTE is associated, and September 1, 2007, with which .1 FTE is associated.

42. Ms. Van Kouwenberg began working for the District on a full-time basis in 1994. She continued working full-time for six years, through the 1999-2000 school year. When she had her first child, she took a leave of absence from a full-time position to a part-time position, reducing her workload to .5 FTE for the 2000-2001 school year. During the 2001-2002 school year, Ms. Van Kouwenberg resigned half of her position, retaining half of her seniority, and her tenured status, for the remaining .5 portion.

43. Ms. Van Kouwenberg continued working .5 FTE through the 2005-2006 school year. In the 2006-2007 school year, she reduced her workload to .4 FTE to help her friend, teacher Cynthia Simpson. She did so by taking a leave of absence with respect to .1 FTE of her prior .5 FTE position.

44. In 2007-2008, Ms. Van Kouwenberg reverted to working .5 FTE. In March of 2007, when assignments for the next school year were being considered, Ms. Simpson asked Ms. Van Kouwenberg to job share with her, so that Ms. Simpson would work .6 FTE and Ms. Van Kouwenberg would work .4 FTE. The possibility of Ms. Simpson obtaining a full-time teaching position during the next year was also discussed with their school administrator, who thought it was possible such a position might become available. If Ms. Simpson obtained a full-time position, the job share with Ms. Simpson, and the reduction of FTE for Ms. Van Kouwenberg would be unnecessary, so that Ms. Van Kouwenberg would keep her .5 FTE position. Ms. Van Kouwenberg ultimately agreed to the job share. The District required her to resign her .1 FTE to enter into the job share with Ms. Simpson.

45. Ms. Van Kouwenberg argues she was promised her .1 FTE back in the event Ms. Simpson was offered a full-time position and that she relied on that promise in agreeing to the job share. While she testified she understood her resignation would be null and void if Ms. Simpson obtained a full-time position, there was no documentary evidence upon which she relied that would have justified such an understanding. In fact, Ms. Van Kouwenberg specifically signed a resignation from .1 FTE of her position on March 19, 2007 (Exhibit I), and then signed a reemployment action, acknowledging the probationary nature of her .1 FTE, on July 31, 2007 (Exhibit J.) The District's internal memorandum (Exhibit K), dated February 15, 2007, reflects that while the District was willing to allow Ms. Van Kouwenberg to "have back" her .1 FTE in the event Ms. Simpson had a full-time job made available to her, she was required to "resign officially." These facts are insufficient to support an argument that the District should be estopped from asserting the more junior seniority date associated with Ms. Van Kouwenberg's .1 FTE. She was properly noticed for layoff.

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Linda Atherton

46. In light Findings 18 through 22, it is unnecessary to address the separate arguments raised by Ms. Atherton that her layoff notice failed to provide sufficient notice of which .4 FTE out of her total position would be affected by the layoff. As set forth above, her layoff notice was improper.

Kristin McKown and Janie Van Ryn

47. In light of Findings 18 through 22, it is unnecessary to address the separate arguments raised by Ms. McKown and Ms. Van Ryn. As set forth above, their layoff notices were improper.

Lenora Hester and Cynthia Wiedefeld

48. At hearing, both Lenora Hester and Cynthia Wiedefeld testified regarding their experiences at the District. Their testimony reflected their commitment to teaching and dedication to students. However, they failed to identify a justification for setting aside their layoff notices. They were properly identified for layoff.

Other Matters

49. To the extent Respondents submitted any arguments or evidence other than as discussed above, such arguments and evidence were unpersuasive or surplusage.

50. Except as discussed above, no certificated employee junior to any Respondent was retained to render a service which any Respondent is certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of Findings 1 through 11.

2. Respondents contend that the number of particular kinds of service reductions must be reduced because the District did not properly account for positively assured attrition. While Respondents focus on some of the inconsistencies involved in Freitas's testimony concerning positively assured attrition, she ultimately clarified that attrition was considered both prior to the adoption of the original Resolution Number 19-2010 on March 4, 2010, and no additional attrition occurred between March 4 and March 15, 2010. (Finding 17.) In a layoff involving reductions in particular kinds of service, a governing board need only consider positively assured attrition that occurred prior to the March 15th layoff notice deadline. (*San Jose Teachers Association v. Allen, supra*, 144 Cal.App.3d at 635.) That is what occurred in the

instant case. Freitas's testimony need not be disregarded simply because there was no documentary evidence supplied regarding the specific application of attrition. The District established by a preponderance of the evidence that attrition was taken into account.

3. 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.) The FTE proposed reductions in service associated with what was referred to by the District as "'7-8 Teacher Services" and "9-12 Teacher Services" are determined not to be particular kinds of services within the meaning of section 44955, by reason of Findings 18 through 21. Cause therefore does not exist to reduce or discontinue such services.

4. By reason of Finding 26, the remaining proposed reductions in service are particular kinds of services within the meaning of section 44955. Cause exists under sections 44949 and 44955 for the District to reduce or discontinue such particular kinds of services, which cause relates solely to the welfare of the District's schools and pupils.

5. 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. (§ 44955, subds. (b) and (c); *Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469, 473-474; *Krausen v. Solano County Junior College District* (1974) 42 Cal.App.3d 394, 402.) For purposes of analyzing "bumping" rights, a district may, in its discretion, define the term "competent," as used in section 44955, so long as the competency standard is reasonable. To be reasonable, a competency standard must relate to the skills and qualifications to teach. (See *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 564-567 [definition of competency under parallel statute applicable to community college districts held reasonable because it required one year's full-time teaching in the subject area in the prior ten years].) Junior teachers may be given retention priority over senior teachers if the junior teachers possess special credentials or needed skills, capabilities, or experience which their more senior counterparts lack. (§ 44955, subd. (d) (1); *Santa Clara Federation of Teachers, Local 2393 v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.)

6. In determining the order of seniority among employees who first rendered paid service to the District on the same date, the order of termination shall be "solely on the basis of needs of the district and the students thereof." (Code § 44955, subd. (b).) The District's tie-breaking criteria met this standard.

7. Cause exists to terminate the services of all Respondents other than those

specifically identified in Findings 22 through 24, by reason of Findings 1 through 50, and Legal Conclusions 1 through 5.

ORDER

The Accusation is sustained and the District may notify all Respondents (other than those identified in Findings 22 through 24, in inverse order of seniority, that their services will not be needed during the 2010-2011 school year due to the reduction of particular kinds of services. The Accusation is dismissed as against the Respondents identified in Findings 22 through 24.

Dated: May 21, 2010

SUSAN L. FORMAKER
Administrative Law Judge
Office of Administrative Hearings

APPENDIX 1: List of All Respondents

Claremont Unified School District

Last Name	First Name	FTE
Abelar	Erin	.475
Arboleda	Molly	1.0
Arevalo de Madunich	Josefina	.475
Atherton	Linda	.4
Barnes	Deborah	.2
Barnes	Deborah	.2
Bowman	Talia	1.0
Carney	Kristina	1.0
Carr-Handley	Linda	1.0
Carter	Lena	1.0
Castro	Sheri	.5
Cerafice	Cecilia	1.0
Cohen	Micah	.6
Cohen	Micah	.4
Cooke	Nicole	.6
DeCastro	Francis	.4
Donovan	Doris	.8
Dyar	Timothy	.4
Espinosa	Ana	1.0
Evans	Kim	.4
Franco-Hinderliter	Sandra	1.0
Frost	Sheri	.2
Frost	Sheri	.4
Garcia	Mominani	.5
Garcia	Mominani	.5
Gariador	Jessica	1.0
Gentry	Jennifer	1.0
Gentry	Katya	1.0
Gilmore	Katherine	1.0
Gonzales	Korina	.2
Hartman	Regina	1.0

Last Name	First Name	FTE
Mittino	Juliana	1.0
Moore	Richard	1.0
Mowbray	Sheila	1.0
Norin	Jennifer	.2
Norin	Jennifer	.2
Northrop	Timothy	1.0
O'Connor	Ann	.3
O'Connor	Ann	.6
O'Grady	Christina	.5
O'Grady	Christina	.5
Ortega-Gingrich	Elizabeth	1.0
Peterson	Eric	1.0
Quincer	Jennifer	1.0
Rhoads	Tamara	1.0
Richardson	Kerrie	1.0
Riihimaki	Dawn	1.0
Rivette	Marizka	1.0
Ruiz	Angela	.5
Ruiz	Angela	.5
Salter	Melissa	.2
Salter	Melissa	.8
Schreiber	Chelsea	.2
Simpson	Cynthia	.4
Simpson	Cynthia	.1
Texeira	Michelle	.5
Texeira	Michelle	.5
Troesh	Jeremy	1.0
Trudel	Victoria	1.0
Trujillo	Miguel	1.0
Tucker	Maria	.5
Tucker	Eric	1.0

Hassler	Jodi	1.0
Hensley	Suzanne	.2
Hester	Lenora	.4
Jackson	Melissa	1.0
Jannati	Elmira	.4688
Khodadoost	Homa	1.0
Klinovsky	Denise	.5
Lazenby	Lindsay	1.0
Leeper	Kara	1.0
Lynch	Rachel	1.0
Madunich	John	1.0
Magallanes	Carolyn	.5
Marin-Hines	Yvonne	.5
McKown	Kristina	1.0

Van Ryn	Janie	1.0
VanKouwenberg	Kristen	.1
Walker	Victoria	.2
Walters	Kimberly	.5
Wiedefeld	Cynthia	.1
Wonacott	Melissa	1.0
Zimmerman	Cathy	.2