

BEFORE THE GOVERNING BOARD OF THE
BURBANK UNIFIED SCHOOL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

In the Matter of the Layoffs of:

OAH No. 2010031170

Cynthia Almeida, Annie Balian, Joan Becker, Joanna Bencze, Jim Bentley, Robert Berger, Todd Berry, Lucia Bowers, Holly Boyle, Matthew Chambers, Brianne Chandler, Gregory Clark, Kelli Clarke, Nancy Colman, Ellen Craig, Tarquinn Curry, S. Scott Davis, Jerry De Laurie, Michelle Dilgard, Gregory Everhart, Robert Feiner, Tamara Fiola, Joshua Fischbach, Colleen Flores, Kyle Fitzgerald, Jennifer Gallego, Amanda Ghezzi, Kirk Gorbach, Jr., Jamie Griffin, Robert Hammell, Moira Hanson, Kevin Hiatt, Kirsten Jackson, Armineh Kasparian, Deborah Kubeczka, Cathryn Lawhead, Jody Levy, Manuel Lopez, Amy Lucas, Amanda McMahon, Margo Miller, Ana Moen, Doug Nicol, Yvonne Oliver, Melissa Pamperin, Carlos Pelayo, Andrea Permenter, Jill Pomfret, Danielle Reynolds, Martha Rios, Charles Rodriguez, Michelle Romero, Sarah Rounds, Brent Schackmann, Jessica Schackne, Alexander Senar, Jason Shaughnessy, Dylan Simmer-Winfield, Janae Simmons, Kavita Sleight, Crystal Smiecinski, Amanda Spaugh, Lisa Stelmach, Jacklyn Strongin, Marisa Torres, Deanne Torvinen, Benjamin Vargas, Melissa Waters, Alexis Weiner, Selin Zadorian, and Dena Zelig,

Respondents.

PROPOSED DECISION

Mark E. Harman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 28, 2010, in Burbank, California.

Jeff C. Marderosian, Attorney at Law, represented the Burbank Unified School District (District). Lawrence B. Trygstad of Trygstad, Schwab & Trygstad represented all of the above-captioned Respondents.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on April 28, 2010.

FACTUAL FINDINGS

1. Complainant, Kevin Jolly, Ed.D., filed the Accusation while acting in his official capacity as the Superintendent of the District. Gabriel Soumakian, Ed.D., Assistant Superintendent, Human Resources Services, and his staff were responsible for implementation of the technical aspects of the layoff.

2. Respondents are certificated employees of the District.

3. On March 4, 2010, the Governing Board (Board) of the District adopted resolution number 18 (the Resolution) to reduce and discontinue the following particular kinds of services provided by the District no later than the beginning of the 2010-2011 school year:

<u>Position</u>	<u>FTE Reductions</u>
K-5 Elementary Teacher	18.0
6 th Grade CORE	6.0
Elementary PE	4.0
Elementary Music	2.0
TOSA: BTSA	1.0
TOSA: Assessment	1.0
Elementary Interventionist	1.0
Counselors	5.0
High School Math	3.2
Middle School Math	3.0
Spanish	3.0
French	1.0
High School English	8.2
Middle School English	1.0
Journalism	0.2
Speech/Debate	0.2
Web Page	0.2
Video Production	1.0
Art	2.0

Computer Science	0.4
Digital Applications	0.2
Instrumental Music	0.2
High School Physical Education	5.2
Middle School Physical Education	1.0
Business	1.0
Auto Shop	0.4
Health 9	2.0
Middle School Science	1.0
Marine Biology	0.6
Physics	0.4
Geo Science	1.0
High School Social Studies	2.0
AP U.S. History	0.2
Psychology	0.4
Sociology	0.4
Librarian	1.0
Title I Coordinator	0.5
Middle School Special Education SDC	3.0
Middle School Special Education DHH	1.0
Adult ESL (<i>5 positions-36 Adult School hours=2 FTE</i>)	2.0
Total FTE	84.9

4. The Board further determined that the reduction in services necessitated a decrease in the number of certificated employees at the close of the 2009-2010 school year by a corresponding number of full-time equivalent (FTE) positions, and directed the Superintendent to notify the appropriate employees to implement the Board's determination.

5. On or before March 15, 2010, the District gave notice to each of approximately 103 certificated employees of the potential elimination of his or her position for the 2010-2011 school year. On March 30, 2010, the District served the Accusation on the 72 employees, including Respondents, who had requested a hearing to determine whether

there was cause for not reemploying him or her for the ensuing year. On April 15, 2010, the District served the Accusation on Respondents' counsel.

6. All employees who received an Accusation, except Cynthia Almeida, Lucia Bowers, Matthew Chambers, Gregory Clark, Tarquinn Curry, S. Scott Davis, Michelle Dilgard, Gregory Everhart, Robert Hammell, Moira Hanson, Armineh Kasparian, Amanda McMahon, Yvonne Oliver, Carlos Pelayo, Michelle Romero, Brent Schackmann, Jason Shaughnessy, Dylan Simmer-Winfield, and Amanda Spaugh, filed Notices of Defense to determine if there was cause for not reemploying them for the 2010-2011 school year. Normally, those employees who fail to file a Notice of Defense have waived their right to a hearing and cannot contest the recommendation of their nonreemployment by the District under Education Code section 44949, subdivision (b),¹ unless an exception is made. The District objected to these persons being afforded any hearing rights. Jason Shaughnessy requested to be heard. In his testimony, he provided a reasonable excuse for his failure to timely file a Notice of Defense and, thus, he was allowed to present his defense to the charges in the Accusation. None of the other nine employees who failed to timely file their Notices of Defense and who were present during the hearing sought to be heard on this issue, and therefore, they have waived their rights to a hearing on the Accusations.

7. Prior to the hearing, the District withdrew the Accusation against Joanna Bencze, Kelli Clarke, Jerry DeLaurie, Robert Feiner, Amanda Ghezzi, Kirk Gorbach, Jr., Jamie Griffin, Steven Hollis, Jodi Levy, Margo Miller, and Dena Zelig.

8. All prehearing jurisdictional requirements have been met.

9. The services set forth in Factual Finding 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. The Board's decision to reduce or discontinue the identified particular kinds of services was neither arbitrary nor capricious, and constituted a proper exercise of discretion.

10. The reduction or discontinuation of particular kinds of services was related solely to the needs and welfare of the District and its students.

11. The Board considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

12. The District maintains a Seniority List, which contains permanent and probationary employees' seniority dates, current assignments, permanency description, and credential and certificate information. It periodically updates this list from information provided by many sources, including the certificated personnel the District employs.

¹ All further statutory references are to the Education Code.

13. Respondent Kyle Fitzgerald (Fitzgerald) challenged the seniority date assigned to him by the District. Fitzgerald is a permanent teacher who teaches English, journalism, and history to high school students. Fitzgerald first worked for the District on October 6, 2006, as a long-term substitute, and continued to work as such in the spring of 2007. He was rehired as a temporary employee for the 2007-2008 school year. In August 2008, he was hired as a probationary 2 employee. At the commencement of his probationary contract, the District credited him with an additional year of probationary service, based on his prior year of temporary teaching, and assigned him the seniority date of August 20, 2007. Fitzgerald's argument, that his seniority date should be the date he first worked for the District, was not persuasive. The District correctly determined Fitzgerald's seniority date.

14. The District used its Seniority List to develop a proposed layoff list of the least senior employees currently assigned in the services being reduced. The District determined that nobody less senior than Respondents was being retained to render services Respondents are certificated and competent to render. In making its determination, the District followed strict seniority, and did not skip less senior employees who were teaching in the particular services identified for reduction; however, some employees were able to "bump"² into other positions that were not being eliminated and that were held by less senior employees.

15a. Resolution No. 18 includes criteria for determining the order of seniority of those employees with the same first date of paid service (tie-breaking criteria). These tie-breaking criteria are based on the needs of the District and its students. The District awarded points based on the employees' prior employment within the District, credentials/certificates to teach English learners or special education; reading specialist certificate; national board certification; other teaching experience; degrees earned; and number of semester units subsequent to a Baccalaureate degree. The District applied these criteria to determine the relative order of seniority among employees who had the same seniority date.

15b. After application of the tie-breaking criteria, Melissa Pamperin, Moira Hanson, and Joshua Fischbach, each having a seniority date of August 26, 2006, were still tied. The District consulted the teachers' union that represents Respondents, which recommended that the District use a coin flip. All three employees were present at the District's offices on April 13, 2010, when the coin flip was done, and the tie was broken. Respondents object that a coin flip was not authorized by Resolution 18, and is arbitrary and capricious. Respondents offered no legal authority for this argument, and it is rejected.

16. Respondent Deanne Torvinen (Torvinen) has been employed by the District in a part-time (.5) position as a middle school counselor since August 22, 2007. Torvinen's credentials also authorize her to be a school psychologist. In fact, she has been performing

² 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 Dist.* (1975) 13 Cal.3d 469.)

the duties of a school psychologist for 23 years, both in public and private schools, and currently works part time as a school psychologist for a charter school. She also teaches students at a local university who are seeking to obtain their credentials as school psychologists. In March 2009, Torvinen informed the District of her interest in working for the District in that capacity, particularly if the part-time counseling position was unable to be funded. Torvinen received some positive feedback from the District, but no offer was made. Instead, the District hired another person, Diane Richmond (Richmond), to be a school psychologist in August 2009. Torvinen's position is being eliminated in this proceeding, but she argues that she should be allowed to bump Richmond. The case law appears to settle the issue. In *Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343-344, the court held that a part-time permanent employee with greater seniority was not entitled to bump full-time employees with lesser seniority, in part, because the District had determined that a part-time position was not the same "service" as a full-time position. The District has the discretion to make the same determination in this proceeding.

17. Respondents Jason Shaughnessy, Doug Nicol, Amy Lucas are permanent teachers who teach physical education and share the same seniority date of August 20, 2007. Kenneth Knoop is also a physical education teacher with a seniority date of August 20, 2007. The three Respondents received preliminary layoff notices, but Knoop did not. The District applied the tie-breaking criteria between Shaughnessy and Knoop, and Knoop purportedly had more points; however, Knoop is a probationary 2 employee. Section 44955, subdivision (b), states that: "Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render." The District has not disputed that any of these three Respondents is certificated and competent to render the service that Knoop is providing. Since Knoop did not receive notice and he is being retained, it is necessary under section 44955 that the District retains the Respondent who is the next most senior employee on the seniority list and who is credentialed and competent to serve in Knoop's position. Respondents have presented no authority for the proposition that all three Respondents should be retained. Although Amy Lucas appears next on the Seniority List, before Shaughnessy and Nicol, the Governing Board should reapply the tie-breaker criteria to these three and identify one who is competent to render the services provided by Knoop.

18. Respondent Manuel Lopez (Lopez) holds a clear designated subjects vocational education teaching credential that authorizes him to teach automotive mechanics. He teaches this subject for the District and has a seniority date of August 25, 2003. The District is reducing .4 of the position currently taught by Lopez. David Vezina (Vezina) holds a clear designated subjects vocational education teaching credential that authorizes him to teach airframe and powerplant mechanics. His seniority date is August 30, 2004. Lopez argues that he should be able to bump into .4 of Vezina's assignment. The District argues that these individuals' authorizations are specific, and Lopez's credential does not authorize him to teach Vezina's subject. Further, Lopez did not establish that he has ever taught airframe and powerplant mechanics, and thus, whether he could meet the District's competency requirements in order to bump Vezina. Thus, Lopez is subject to a .4 reduction.

19a. The District has classified as temporary approximately 31 persons who have been employed in assignments requiring a credential during the 2009-2010 school year. The District has sent notices to these individuals that they will not be retained for next year. These so-called releases are different from the notices that are required under section 44949. Respondents argue that these employees were misclassified by the District, and that the District failed to provide them with the notice rights afforded by the layoff procedure. The law requires that probationary and permanent employees must receive proper notice in these layoff proceedings, and if these employees are probationary or permanent, rather than temporary, they must be retained for the ensuing year by virtue of not having received the required notices. An extension of this argument is that any Respondents senior to these employees must be retained, as well.

19b. Respondents' counsel offered nine contracts designated as "Notice of Offer of Employment - Certificated Employees," for Caroline Sasorski, Cynthia Sagastume, Cheryl Rotunno, Jill Johnson, Susan Glenn, Barbara Fariss, Timothy Crawford, Lisa Carr and Jenna Stewart. The contracts clearly state the employees were hired as temporaries. The length of time for employment generally was for between four and six months. Some of these contracts were signed after the period of employment had begun, e.g., Caroline Sasorski signed her contract on September 30, 2009, for service that, according to the contract, began on August 11, 2009. Counsel argued that when these individuals began employment, they were not notified of their status, and thus, were probationary employees under the rule of *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911. None of the employees who signed these contracts testified at the hearing.

19c. The District explained that it routinely hired substitutes at the beginning of the school year, before student enrollment numbers had stabilized. Once it was certain how many teachers were needed for a longer term, the District offered temporary contracts to these employees that it needed to retain. In those situations, the employees' contracts gave them credit for their service as substitutes, which boosted these employees' salaries and benefits. The District maintained that there was never any confusion among these employees concerning their status before they signed their contracts. The District's evidence and analysis of these circumstances are persuasive. It was not established that any of the nine individuals referred to in these contracts was a probationary or permanent employee of the District in 2009-2010, or entitled to notice of these layoff proceedings.

20. No certified employee junior to any Respondent was retained to perform any services which any Respondent was certificated and competent to render.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met. (Factual Findings 1 through 8.)

2. The services listed in Factual Finding 3 are determined to be particular kinds of services within the meaning of Education Code section 44955. (Factual Findings 3 and 9.)

3. Cause exists to reduce the number of certificated employees in the District due to the reduction and discontinuation of particular kinds of services. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code sections 44955. (Factual Finding 10.)

4. No employee with less seniority is being retained to render a service which any more senior employee is certificated and competent to render.

5. With the exception of Respondents Jason Shaughnessy, Doug Nicol, or Amy Lucas, cause exists within the meaning of Education Code section 44955 for terminating or reducing Respondents' employment for the 2010-2011 school year, as set forth in Factual Findings 1 through 20.

6. With respect to Respondents Jason Shaughnessy, Doug Nicol, and Amy Lucas, the Board should reexamine its seniority list, reapply their tie-breaking criteria, and determine which one of these Respondents is the next most senior employee credentialed and competent to serve in Knoop's position. This person may be retained, and the remaining two may be terminated

ORDER

1. The Accusations served on all Respondents, with the exception of Jason Shaughnessy, Doug Nicol, and Amy Lucas, are sustained. Notice may be given to those Respondents before May 15, 2010, that their services will be reduced or terminated for the 2010-2011 school year because of the reduction or discontinuation of particular kinds of services as indicated.

2. With respect to Respondents Jason Shaughnessy, Doug Nicol, and Amy Lucas, the Governing Board should reexamine its seniority list and determine which one of these Respondents is the next most senior employee certificated and competent to serve in Knoop's position. This person shall be retained, and the remaining two may be terminated.

Dated: May 6, 2010

MARK E. HARMAN
Administrative Law Judge
Office of Administrative Hearings