

BEFORE THE
GOVERNING BOARD OF THE
WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusations
Against:

JOYCE AIDI and Other Certificated
Employees of the West Contra Costa Unified
School District,

Respondents.

OAH Case No. 2009020383

PROPOSED DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge, on April 27, 2009, in Richmond. Complainant Jessica Romeo, Assistant Superintendent, Human Resources, of the West Contra Costa Unified School District was represented by Laurie S. Juengert, Attorney at Law.

Respondents named and designated in Exhibit A were represented by Margo Feinberg, Attorney at Law.

The following respondents, who were identified by complainant's counsel as representing themselves, did not appear and were not represented at the hearing: Michael Aaronian, Jinevra Addiego, Ramtin Aidi, Sonja Bell, Kim Moses, and Gary Watson.¹

Oral, documentary, and stipulated evidence and oral argument having been received, the Administrative Law Judge submitted this matter for decision on April 27, 2009, and finds as follows:

FACTUAL FINDINGS

1. The Administrative Law Judge takes official notice that, on April 8, 2009, the Accusation was made and filed by Jessica Romeo in her official capacity as Assistant

¹ The preliminary notices not to re-employ and/or accusations issued to some of these non-appearing respondents may have been rescinded or withdrawn by the District.

Superintendent for Human Resources (Assistant Superintendent), West Contra Costa Unified School District, State of California (District).

2. Except for those teachers who are temporary certificated employees, respondents, and each of them, are permanent or probationary certificated employees of the District.

3. The District is a comprehensive school district, which is comprised of 38 elementary schools as well as middle and high schools, that serves and educates students in the area of western Contra Costa County.

4. (A) In a letter or Item Requiring Attention dated March 4, 2009, the Assistant Superintendent recommended to the Governing Board of the District that it adopt a resolution under Education Code section 44955 to reduce or eliminate particular kinds of services and to provide notice to appropriate certificated employees before March 15, 2009, "in order to meet the necessary budget reductions for the 2009-2010 school year."

(B) On March 4, 2009, the Governing Board adopted Resolution No. 70-0809 and, pursuant to Education Code sections 44949 and 44955 and based upon the recommendation of the Assistant Superintendent, determined that it is necessary to reduce or discontinue particular kinds of services being rendered by certificated personnel at the close of the current 2008-2009 school year by a total of 166.95 full-time equivalent (FTE) positions, as amended. As result of this reduction or discontinuance of particular kinds of services, the Governing Board found it necessary to terminate the employment of certain certificated employees at the end of the 2008-2009 school year. The Governing Board therefore resolved that the Superintendent or designee send appropriate notices to all employees whose services shall be terminated by virtue of this action.²

(C) On March 4, 2009, in Resolution No. 68-0809, the Governing Board adopted criteria to be used in determining the order of termination or layoff of certificated employees who first rendered paid service to the District on the same date or have the same seniority date.

(D) On March 4, 2009, in Resolution No. 70-0809, the Governing Board also adopted criteria to allow the District to deviate from terminating or reappointing certificated employees in order of least seniority in order to fill a demonstrated specific need for fully credentialed personnel and for personnel to teach a specific course or course of study which other certificated employees with more seniority do not possess. Criteria included, but were not limited to, currently holding a BCLAD authorization or prior equivalent and current assignment to teach in a bilingual classroom and compliance with NCLB requirements.

² The Governing Board also resolved that its resolution was not deemed to "confer any status or rights upon temporary or categorically funded project certificated employees in addition to those specifically granted to them by statute."

5. On March 13, 2009, the Assistant Superintendent recommended to the Governing Board that certain certificated employees not be re-employed for the 2009-2010 school year and that the Governing Board give notice as required by Education Code sections 44949 and 44955 to the certificated employees that their services will be terminated for the 2009-2010 school year. The reasons for the recommendation and for decreasing the number of certificated employees were set forth in the Assistant Superintendent's letter and Resolution No. 70-089, as set forth in Findings 4(A) – (B) above. The Assistant Superintendent also notified the Governing Board that there will be no probationary or permanent certificated employees with less seniority who will be retained to render services which the certificated employees are certificated and competent to render.

6. Before March 15, 2009, pursuant to the resolution of the Governing Board and the provisions of Education Code sections 44949 and 44955, the Assistant Superintendent gave written notices entitled "Notice of Recommendation that Services Be Terminated" to respondents, who are probationary or permanent certificated employees and temporary certificated employees, that she had recommended to the Governing Board that their services will not be required for the ensuing 2009-2010 school year. The written notices included the resolution of the Governing Board to reduce and/or discontinue certain services, acknowledgement of receipt, pertinent sections of the California Education Code, and a request for hearing.

7. Respondents, who are certificated employees of the District, and each of them, timely filed requests for a hearing to determine if there is cause for not re-employing them for the ensuing school year.

8. The District's Notice of Recommendation that Services Be Terminated dated on or about March 11, 2009, was sufficient in providing notice to respondents under Education Code sections 44949 and 44955. Respondents were not prejudiced by errors in the notice, if any, with respect to the description of their employment status, assignments, home addresses, or any other matters. No claims were raised in the hearing that the notice was, in fact, deficient in any respect.

9. On or about April 8, 2009, the District properly served respondents, and each of them, by certified mail with an Accusation, Statement to Respondent, Resolution No. 70-0809, Request for Discovery, copies of Education Code sections 44949 and 44955 and Government Code sections 11506, 11507.5-11507.7, and 11520, blank Notice of Defense form, and Notice of Hearing. All of the respondents filed timely notices of defense, requesting a hearing to determine if there is cause not to employ them for the ensuing school year and objecting to the Accusation. All prehearing jurisdictional requirements have been met by the parties.

10. On March 4, 2009, pursuant to Resolution No. 70-0809, the Governing Board resolved and took action to reduce or discontinue certain services or programs offered by the District for the 2009-2010 school year in the following FTE positions:

<u>Elementary</u>	<u>Full-Time Equivalent Positions</u>
Elementary Music	9.0
Class Size Reduction K-3	43.0
Class Size Reduction 4-6, High Priority School Grant	8.25
Physical Education	5.8
Art	6.0
Computer	1.0
 <u>Secondary</u> 	
Supplemental Counseling Grant--Counselors	5.0
Counseling (Closure of Adams Middle School)	3.0
Librarian (Closure of Adams Middle School)	1.0
Physical Education	12.0
Foreign Language—French	0.6
Foreign Language—German	0.6
 <u>District-Wide</u> 	
Curriculum Specialist	2.0
Instructional Support Reading & ELD Coach	16.0
Literacy Coach	1.0
Project Assistant—Homeless	1.0
Project Assistant—ELD	3.0
Project Assistant—Strategic Focus	1.0
Project Assistant—State & Federal	3.0
Teacher on Special Assignment (at school sites)	7.0
Teacher on Special Assignment—BTSA	3.2
Teacher on Special Assignment—Alternative Certification	1.0
Project Assistant—Staff Development	3.0
Program Assistant—Site Based	6.0
Psychologists	4.5

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Administrative

Executive Director—State & Federal	1.0
Director of Career Academics, Career Tech Original Occupational Programs	1.0
K-12 Instructional Specialists	7.0
Principal, Elementary	2.0
Principal, Middle School	1.0
Vice Principal, Secondary	3.0
Vice Principal, Elementary (Grant Funded)	1.0
Coordinator, Educational Services	3.0
Coordinator, State & Federal	1.0

The reduction or discontinuance of the services set forth hereinabove constitute a total of 166.95 full-time equivalent positions.

11. The services set forth in Finding 10 above are particular kinds of services performed by certificated employees of the District which may be reduced or discontinued within the meaning of Education Code section 44955. The determination of the Governing Board to reduce or discontinue these services is within its sound discretion and is not arbitrary or capricious. The District demonstrated that the reduction or discontinuance of these particular kinds of services is related to the welfare of the District and its pupils.

12. The District prepared a seniority list and published the seniority list in two forms: a Certificated Seniority List—Date Order (Exh. 6), which lists certificated employees in order of first date of paid service with the District, and a Certificated Seniority List—Alphabetical Order (Exh. 7), which lists certificated employees in alphabetical order. The seniority list contains information about seniority dates, work site assignments, and credentials of certificated employees. The District solicited information from the certificated teachers in order to verify and update information for the seniority list and then made changes to the seniority list based on information received from them. The District reviewed the seniority list to identify the least senior certificated employees and examined the credentials of certificated employees to determine whether certain teachers are entitled to bump other employees. The District developed a Bumping Chart (Exh. 8).

13. Further, the District has tried to obviate or mitigate the need to reduce or discontinue the employment of all affected certificated employees by taking into account personnel changes due to leaves of absence (Exh. 10) and retirements and resignations (Exh. 11) of individual employees within the District. In addition, the District has given temporary certificated employees their releases from employment (Exh. 9) and recommended to the Governing Board that probationary certificated employees be non-elected and released for the 2009-2010 school year (Exh. 11). The District has determined what will be positively assured attrition for the 2009-2010 school year.

14. (A) As the parties stipulated during the hearing, respondent Eric Von Buchau, a music teacher with a seniority date of August 26, 1998, was not given proper notice that his services will not be needed for the ensuing school year. The District has agreed to rescind the notice and/or Accusation against Buchau who must be retained as a permanent certificated employee.

(B) As the parties stipulated during the hearing, the District agrees to rescind its notice issued to respondent Mark Nemoyten, a music teacher, that his services will not be needed for the ensuing school year. Nemoyten has a multiple subject credential and an earlier seniority date.

(C) Respondent Pierre DeOliveira is named as a German teacher on the District's seniority list. In fact, DeOliveira is a counselor with the second least seniority among the counselors listed on the Bumping Chart. The District agrees to make this change to the seniority list.

(D) Counsel for the District and counsel for respondents conferred extensively prior to the hearing and reached agreements on many issues that obviated the need to litigate those issues during the hearing. There are other issues remaining that respondents will be discussing with the District in the context of a collective bargaining agreement.

15. (A) Respondents' counsel does raise two criticisms of the District's handling of this reduction in force proceeding. First, counsel correctly observes that the exact positions of many respondents in this layoff process have not been determined and the District may still rescind notices issued to respondents or re-employ them for the next school year. The District has not completed its bumping and layoff analysis because it allows certificated employees to apply for positions for which they are credentialed and competent to fill and the second stage of this "transfer round" will not be completed until the next month.

(B) Second, respondents' counsel contends that the District's resolution to reduce or discontinue particular kinds of services is defective on the grounds that the Governing Board did not make any finding or state a reason why the District had to make such financial decision. Respondents' counsel argues that there must be a nexus between the Resolution and the need of the District to curtail its finances or cut its budget. Here, the District did present such evidence. As established by the testimony of the Assistant Superintendent and Associate Superintendent of Business Services, the Governing Board has been apprised of and discussed the impending District budget deficit of \$25.7 million for some time before it adopted the reduction in force resolution. The District is already under the review of a state trustee and, if it fails to balance its budget or cannot meet its financial obligations for the next school year, the District will be subjected to control and supervision by a state administrator. The District's budget and funding is affected by decreasing enrollment as well as the loss or expiration of certain grants and funding sources, including the grant for class size reduction for grades four through six and categorical funds. With the current reduction or discontinuance of particular kinds of services, the Governing Board

hopes to realize a budget savings of \$2.9 million from the class size reduction of kindergarten through grades three and a total budget savings of \$5 million from the current reduction in force proceeding. Despite the current reduction or discontinuance of particular kinds of services, the Governing Board and District expects to continue providing state-mandated services although in different manner. Accordingly, the resolution of the Governing Board to reduce or discontinue particular kinds of services was reasonable and not arbitrary or capricious within the meaning of Education Code sections 44949 and 44955.

16. (A) The District may take action against any certificated employees, who were duly served with preliminary notices of layoff but then did not request a hearing, pursuant to Education Code sections 44949 and 44955.

(B) The District may likewise take action against any respondent, who was duly served with a preliminary notice of layoff and an accusation but then did not file a notice of defense or make an appearance at the hearing after filing a notice of defense, pursuant to Government Code section 11520, subdivision (a), and Education Code sections 44949 and 44955.

17. It was not established there is or will be any certificated employee with less seniority than those respondents or certificated employees, who is being retained by the District to provide services, that respondents or other certificated employees are certificated and competent to render.

* * * * *

Pursuant to the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

1. Jurisdiction exists for the subject proceedings pursuant to Education Code sections 44949 and 44955, based on Findings 1 – 13 above. All notices, accusations, and other related papers and reports required by these Education Code sections have been provided in timely manner and, as such, the parties have complied with the statutory requirements.

2. Cause exists pursuant to Education Code sections 44949 and 44955 to reduce by 166.95 full-time equivalent positions the concomitant number of certificated employees of the District due to the reduction or discontinuance of particular kinds of services, as set forth in Findings 1 – 13 above. With respect to those respondents whose employment has been found to be terminable by the District and any other certificated employees who received notices but did not request a hearing, the causes set forth in the Accusation relate solely to

the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

3. Based on Findings 1 – 17 above, there is no certificated probationary or permanent employee with less seniority than any one of respondents or the certificated employees who is being retained by the District for the 2009- 2010 school year to render services which any one of respondents or certificated employees is certificated and competent to render.

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WHEREFORE, the Administrative Law Judge makes the following Order:

ORDER

1. The Accusation issued to respondents is sustained, based on Conclusions of Law 1 – 3 above. The West Contra Costa Unified School District may give notice in inverse order of seniority to respondents, and each of them, whose layoff notices have not been rescinded, that their services will not be required for the ensuing 2009-2010 school year because of the reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955.

2. The West Contra Costa Unified School District may give notice to those certificated employees, who were served with notices and/or accusations that their services will not be needed next year but did not file requests for hearing or appear at the hearing, that their services will not be required for the ensuing 2009-2010 school year because of the reduction or discontinuance of particular kinds of services pursuant to Education Code sections 44949 and 44955.

3. Before giving notice to respondents and the other certificated employees who did not request a hearing, the West Contra Costa Unified School District shall determine and take into account any additional positively assured attrition and updated transfers or reassignments among certificated employees in deciding how many and when certificated employees should be terminated before the ensuing 2009-2010 school year.

Dated:

Vincent Nafarrete
Administrative Law Judge
Office of Administrative Hearings