

BEFORE THE GOVERNING BOARD
OF THE
SAN JOSE UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against:

208.3 Full-Time Equivalent Certificated
Employees,

Respondents.

OAH No. 2009020396

PROPOSED DECISION

Administrative Law Judge Mary-Margaret Anderson, State of California, Office of Administrative Hearings, heard this matter in San Jose, California, on April 6, 7, and 8, 2009.

Namita S. Brown and Dulcinea A. Grantham, Attorneys at Law with the law firm of Lozano Smith, represented the San Jose Unified School District.

Christopher Schumb, Attorney at Law, represented the Respondents listed on Appendix A. Steven Clark, Attorney at Law, represented the Respondents listed on Appendix B.

The record closed on April 8, 2009.

SUMMARY

The Governing Board of the San Jose Unified School District decided to reduce or discontinue particular kinds of services provided by teachers and counselors for the 2009-2010 school year. The decision was not related to the competency and dedication of the teachers and counselors whose services were proposed to be reduced or eliminated.

District staff carried out the Board's decision by using a selection process involving review of credentials and seniority, breaking ties between employees with the same first dates of paid service, and "skipping" teachers with specific qualifications. The selection process complied with Education Code requirements.

FACTUAL FINDINGS

1. Judith Barranti, Ed.D., filed the Accusation in her official capacity as Director of Human Resources of the San Jose Unified School District (District).

2. Respondents, who are listed on Appendix A and Appendix B, are certificated employees of the District.

3. On February 26, 2009,¹ the District's Governing Board (Board) adopted Resolution No. 2009-02-26-02. The Resolution stated the Board's intention to decrease the number of certificated employees due to a planned reduction of particular kinds of services in the 2009-2010 school year. A total of 208.3 certificated full-time equivalent (FTE) positions were targeted for reduction. The reductions were listed as follows:

1. Resource Teachers	122.1 FTE
2. K through 5th Grade	37 FTE
3. 6th through 8th Grade Core	9 FTE
4. Secondary English/Language Arts	8 FTE
5. Secondary Social Science	8 FTE
6. Secondary Foreign Language/Spanish	1 FTE
7. Secondary Foreign Language/Portuguese	.4 FTE
8. Secondary Designated Subjects/ Technical Arts/Media	1 FTE
9. Secondary Music	1 FTE
10. Secondary Art	2 FTE
11. Drop Out Prevention (DOP) Counselors	14.5 FTE
12. Counselor	3.5 FTE
13. Nurse	<u>.8 FTE</u>
Total Full-Time Equivalent Reduction:	208.3 FTE

4. The Board also resolved:

that it will be necessary to retain the services of certificated employees in the 2009-2010 school year, regardless of seniority, who possess credentials needed for the following programs:

¹ All dates are in 2009 unless otherwise stated.

1. Special Education
2. BCLAD² or Bilingual Authorization Equivalent
3. Mathematics and Science

5. Also on February 26, the Board adopted Resolution No. 2009-02-26-03, thereby establishing tie-breaking criteria for the 2009-2010 school year. It states:

For the 2009-2010 school year only, to meet the requirements of Education Code section 44955, the Board of Education determines the needs of the District and the students by establishing the following tie-breaking criteria:

The following rating system shall be applied in determining the order of termination of certificated employees:

- A. Preliminary or Clear Credentials: **Rating: +1 per credential**
- B. Earned degrees beyond the BA/BS level: **Rating: +1 per degree**

TIE BREAKING PROCEDURE

In the event that common day hires have equal qualifications based on application of the above criteria, the District will then break ties by utilizing a lottery.

(Emphasis in original.)

6. District staff compiled a seniority list based upon all of the information in their possession. The tie-breaking criteria were applied, but a number of teachers were still tied. The District therefore conducted a lottery and lists were created based upon the results.

7. On March 18 Dr. Barranti sent written notice to a total of 192 Respondents that their service would be terminated at the close of the current school year. Each notice contained the reasons for it.

8. All Respondents filed timely requests for hearing to determine if there is cause not to reemploy them. Accordingly, an accusation was filed and served. George Adas did not file a timely notice of defense, but the District waived this failure. The remaining Respondents filed timely notices of defense. This hearing followed.

² Bilingual, Cross-Cultural, Language and Academic Development.

Stipulations during hearing

9. During the hearing, the Parties entered into the record numerous stipulations. All of the stipulations are not reiterated in this proposed decision.

10. At different times during the hearing, the District announced that it was rescinding notices to certain Respondents. Appendix A and Appendix B contain the names of the Respondents who remained noticed at the conclusion of the hearing.

11. Based upon new information concerning credentials and degrees held by various Respondents received during the hearing, and upon adjustments to the first dates of paid service for the 2007-2008 and 2008-2009 school years for some Respondents, the District created new lists of Respondents with the same first date of paid service. A second lottery was conducted to break the still-existing ties.

12. The District employs counselors who hold Pupil Personnel Services (PPS) credentials in three categories: dropout prevention (DOP) counselor, academic counselor and ED (emotionally disturbed) counselor. (It noticed the reduction of 14.5 FTE DOP counselors and 3.5 FTE counselors.) During the hearing, the District stipulated that it would not be eliminating or reducing any ED counseling positions as part of this proceeding.

Reduction in counselors

13. Respondents contend that the District will not be able to provide state-mandated counseling levels if it eliminates 18 FTE positions. Emma Ruiz, a DOP counselor at Gardner Academy, gave compelling testimony about the services DOP counselors provide to students and the community. Ruiz surveyed six counselors and prepared a document that shows the services provided and an estimate of the amount of time each week the counselors work.

The District explained, however, that DOP counselors are categorically funded and that full funding for the program will not be available next year. Further, after a reduction of 18 FTE counselors, 39 remain and this number will be sufficient to meet the needs of the District. Mandated counseling services are to be reduced by just 3.5 FTE and the remaining staff will be sufficient to meet District needs and any state-mandated services. For example, exit examination counseling will be provided next year by the allocated academic counselors at each school site.

Sufficiency of tie-breaking criteria

14. Respondents challenge the sufficiency of the tie-breaking criteria. They contend that not enough criteria were designated, resulting in the employment of a lottery for a large number of teachers with the same first date of paid service. Employment of the criteria resulted in four sub-groups of teachers who were still tied.

The District, however, has broad latitude in establishing and applying tie-breaking criteria. In this case, the Board sought criteria that were objective, clear, useful to the District, and that could be documented easily by District staff. Thus, points were given for credentials and advanced degrees.

15. The Board's selection and the District's application of the tie-breaking criteria were not arbitrary or capricious. Respondents may disagree with the number and content of the criteria, but they are rationally related to the needs of the District and its students. In addition, it is noted that no authority was presented in support of Respondents' argument that use of a lottery in this instance violated legislative intent or was otherwise not permitted. All things considered, it was demonstrated that the selection and application of the tie-breaking criteria was an appropriate exercise of the District's discretion.

The preference accorded teachers holding a BCLAD or equivalent

16. A school district may deviate from terminating a certificated employee in order of seniority if it demonstrates a specific need for personnel to teach a specific course or course of study and the employee has special training and experience necessary to teach that course or course of study. (Ed. Code § 44955, subd. (d).) Current District enrollment is approximately 32,000 students. Approximately 8,495 of these students are English language learners and 2,592 are enrolled in a bilingual program. At the elementary level, the program is chosen based in part upon input from the student's parents. Fifteen elementary schools offer the Academic Language Acquisition Program (ALA). Four elementary schools (increased from two last year) offer the Two-Way Bilingual Immersion Program. The elementary programs are expanding, in part due to great parent interest. In addition, in sixth through twelfth grade, the District offers Structured English Immersion, Specially Designed Academic Instruction in English (SDAIE) courses and courses taught in Spanish for newly-arrived students who speak only Spanish.

The District requires teachers in bilingual programs to possess a BCLAD or equivalent certification. Employing and retaining sufficient teachers with such certification has been a continuing challenge for the District, which actively recruits such teachers each year. Further, the District is monitored every four years by the State to ensure that teachers working with English learners are properly certificated.

17. Respondents do not dispute the District's need to skip employees in the areas identified in the resolution. Some Respondents contend, however, that the category of "BCLAD or Bilingual Authorization Equivalent" is too restrictive and that the application was not rational, in that teachers with the training and experience to teach in the bilingual programs, including those holding emergency BCLADs, were not skipped. In addition, two teachers who hold BCLADs but are not currently teaching in a bilingual program were skipped, and this is contended to have been an overly broad application of the skipping criteria.

18. The District has determined that its need is for present holders of a BCLAD and the decision to skip bilingual teachers only if they possessed BCLADs or the equivalent was well within the District's discretion. It is true that more personnel would have been skipped if the category included those holding emergency BCLADs, but there is no guarantee that those with the emergency certificates will complete the necessary requirements to obtain a BCLAD by next year. And there was ample evidence that the two BCLAD holders who did not teach in a bilingual program in the 2008-2009 school year will be utilized in that manner in 2009-2010, because the programs are growing. In summary, the District did not abuse its discretion when it limited the bilingual education teachers subject to skipping to those teachers who have completed BCLAD training and received their certificates.

19. No certificated employee junior in seniority to any Respondent is being retained by the Board to perform services that any respondent is certificated and competent to render.

20. All contentions made by Respondents not specifically addressed herein are found to be without merit and are rejected.

LEGAL CONCLUSIONS

1. All notices and other requirements of Education Code sections 44949 and 44955 have been provided as required. The District has therefore established jurisdiction for this proceeding as to all Respondents.

2. Education Code section 44955 allows a school district to deviate from seniority order in terminating a certificated employee when:

the district demonstrated a specific need for personnel to teach a specific course or course of study . . . and that the certificated employee has special training or experience necessary to teach that course or course of study . . . which others with more seniority do not possess.

Cause was established that the preference given to teachers with credentials to teach special education, mathematics and science, and who hold BCLAD certificates or the equivalent, was reasonable and appropriate. The District may exempt from layoff those teachers who have demonstrated that they possess such credentials, certificates, or equivalent, including the Respondents listed in Appendix B, who were issued precautionary notices.

3. Cause was established as required by Education Code section 44955 to reduce the number of certificated employees in 208.3 full-time equivalent positions due to the

reduction and discontinuation of particular kinds of services. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious. The decisions made relate solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

ORDER

1. Notice may be given to Respondents listed in Appendix A, representing up to 208.3 FTE, that their services will not be required for the 2009-2010 school year.
2. The Accusation is dismissed as to those Respondents listed in Appendix B.

DATED: _____

MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings

APPENDIX A-- LIST OF RESPONDENTS REPRESENTED BY CHRISTOPHER SCHUMB, ATTORNEY AT LAW

1.	Adas	George
2.	Allion	Danielle
3.	Antonini	Alice
4.	Ashkinaz	David
5.	Assadi	Janice
6.	Barros	Christopher
7.	Bates	Jennifer
8.	Battiato	Jennifer
9.	Benton	Stephanie
10.	Bevilacqua	Gina
11.	Billings	Hilary
12.	Bindreiff	Dustin
13.	Bird	Denise
14.	Bjornkjeld	Jesse
15.	Bonner-Lyon	Adelyn
16.	Boyd	April
17.	Brennan	Penelope
18.	Broderick	Amy
19.	Bullen	Kristen
20.	Cakir	Evrin
21.	Calkins	Franklin
22.	Canote	Victoria
23.	Canser	Jelani
24.	Carse	Sally
25.	Castillo	Jacquelyn
26.	Chambers	Steven
27.	Choi	Marilu
28.	Ciardelli	Zoe
29.	Cilker	Noel
30.	Clevenger	Lisa
31.	Cook	Kimberly
32.	Crawford	Colleen
33.	Croley	Stephanie
34.	Crow	Carol
35.	Cruz	Pamela
36.	Danialy	Linda
37.	Denos	Christine
38.	Derheimer	Amanda
39.	Diallo	Alpha
40.	Dyckson	Ashley
41.	Edwards	Benjamin
42.	Escamilla	Amy

43.	Escobar	Jesse
44.	Fitch	Kelly
45.	Frederick	Janet
46.	Gangwish	Ryan
47.	Garcia	Amber
48.	Gianola	Michelle
49.	Gilmore	Kristine
50.	Gonzalez	Marta
51.	Goodwin	Carrie
52.	Goulart	Julie
53.	Guilian	Teresa
54.	Hallgren	Michelle
55.	Haugen	Brian
56.	Herlth	Michelle
57.	Hernandez	Crystal
58.	Hillesland	Sandra
59.	Hobbs	Joanne
60.	Hoffman	Stacey
61.	Horton	Patrick
62.	Hudson	Bridget
63.	Ikemoto	Amber
64.	Isla	Jessica
65.	Kahn	Marie
66.	Khuu	Diane
67.	Kimerer	Chad
68.	King	Yvonne
69.	Koman	Alison
70.	Krogh	Julie
71.	Kryzak	Jody
72.	Le	Binh
73.	Lobach	Renee
74.	Lopez	Robert
75.	Lucente	Raquel
76.	Lytle	Stephanie
77.	Maravilla	Veronica
78.	Marsh	Cindi
79.	Martinico	Salvatore
80.	Mateos	Juan
81.	McClure	Jessica
82.	McCoy	Katie
83.	McKenzie	Lyndsey
84.	Meade	Charlotte
85.	Medlin	Allison
86.	Meraz Salapatek	Grace
87.	Michels	Wiebke

88.	Millhollen	Candice
89.	Minjares	Desiree
90.	Mitchell	Catherine
91.	Mlakar	Elizabeth
92.	Mongiello	Lori
93.	Morales-Anaya	Olga
94.	Murtha	Lynn
95.	Nangle	Paul
96.	Nelson	Bonnie
97.	Noonan	Jocelyn
98.	Nunes	Suzanne
99.	O'Brien	Kimberly
100.	Oldfield	Jane
101.	Olson	Sarah
102.	O'Neill	Michelle
103.	Orozco	Christian
104.	Otto	Diana
105.	Pakel	Celestina
106.	Passalacqua	Leanne
107.	Patel	Palak
108.	Pearson	Jessica
109.	Pereira	Lisa
110.	Petraglia	Nicole
111.	Powell	Rachel
112.	Reichmuth	Cristin
113.	Rejbrand	Barbara
114.	Resz	Daniel
115.	Reyes-Sanchez	Brenda
116.	Rimmer	Katie
117.	Rimmer	Ryan
118.	Robertson	Bryan
119.	Roderick	Jennifer
120.	Rodrigues	Monique
121.	Rodriguez	Erika
122.	Rodriguez	Jessica
123.	Rodriguez	Rosemary
124.	Rokhlin	Alexander
125.	Rovai	Lindsey
126.	Ruiz	Emma
127.	Sakamoto	Shannon
128.	Sanders	Grace Morgan
129.	Sanders	Scott
130.	Sanfilippo	Bradley
131.	Sardegna	Jill
132.	Saviage	Leslie

133.	Schilens	Samara
134.	Seandel	Stephen
135.	Sieler	Patrick
136.	Smith	Vickie
137.	Soza	Jesse
138.	Stefanic	John
139.	Stone	Brenda
140.	Stone	Jessica
141.	Symonds	Margo
142.	Tabatabai	Maryam
143.	Tan	Felicia
144.	Tatge	Amber
145.	Thomas	Jennifer
146.	Tran	Gloria
147.	Trivedi	Prithi
148.	Vargas	Sonia
149.	Wark	Kathleen
150.	White	Steffanie
151.	Woodburn	Sharon
152.	Woodworth	Christine
153.	Wymore	Paul
154.	Zumbiel	Rebecca

**APPENDIX B-- LIST OF RESPONDENTS REPRESENTED BY STEVEN CLARK,
ATTORNEY AT LAW**

1. Agrawal, Pooja
2. Antonini, Alice
3. Benkonvic H, Claudia
4. Bravo, Moses
5. Bush, Carmenza
6. Cadena, Holly
7. Campusano, Silvia
8. Canela, Rosalia
9. Carlin, Jayme
10. Cervantes, Sonia
11. Chavez, Nancy
12. Christon, Nicole
13. Cisneros, Lidia
14. DaFonseca, Deanna
15. Garcia Ganán, Ryan
16. Gaytan, Cesar
17. Gomez, Liliana
18. Gonzalez Fernandez, Luz
19. Guerrero, Jose
20. Harms, Nicole
21. Hernandez Bardach, Irma
22. Jackson, Pamala
23. Krietzman, Robert
24. Lara, Veronica
25. Lopez, Yvette
26. Magallon, Ana
27. Marquez, Francisco
28. Martinez, Monica
29. Martinez, Teresa
30. Medina, Melissa
31. Munoz, Anna
32. Nevarez, Elizabeth
33. Ortiz-Agib, Alma
34. Petkiewicz, Margaret
35. Pineda, Tatiana
36. Porter, Giles
37. Ramirez, Maritza
38. Recio, Leticia
39. Salgado, Marivel
40. Smith-Kirknis, Nivia

41. Thurmond, Vanessa
42. Tomlinson, Marieanna
43. Usilton, Kristin
44. Velasquez, Hector
45. White, Jennifer