

to decrease the number of certificated employees at the close of the present school year by a corresponding number of full-time equivalent (FTE) positions as follows:

K-3 Class-Size Reduction (classrooms)	36.0 FTE
K-6 Science	6.7 FTE
K-6 Physical Education	8.0 FTE
K-6 Music	1.5 FTE
K-8 Independent Study	1.0 FTE
7-8 Computer (4 sections)	0.8 FTE
7-8 Band (5 sections)	1.0 FTE
7-8 Choir (5 sections)	1.0 FTE
7-8 Life Skills (8 sections)	1.6 FTE
7-8 Movement and Flexibility (3 sections)	0.6 FTE
NJHS Activities Director (Release Period)	0.2 FTE
7-12 Counselors	3.46 FTE
NJHS Special Education Lead Teacher (Release Period)	0.2 FTE
7-12 English	7.0 FTE
7-12 Math	4.0 FTE
7-12 Science	2.0 FTE
7-12 Modern Language-Spanish	3.0 FTE
9-12 Music	1.0 FTE
9-12 Art	1.0 FTE
College Connection Teacher	1.0 FTE
9-12 Librarian	1.0 FTE
NMHS Special Education Lead Teacher (Release Period)	0.2 FTE
NMHS Athletic Director (Release Period)	0.4 FTE
NMHS Activities Director (Release Period)	0.4 FTE
Director of East Bay BTSA	1.0 FTE
Coordinator of Professional Development, BTSA	1.0 FTE
7-12 Assistant Principals	3.0 FTE
<hr/>	
Total	88.06 FTE

4. Resolution No. 1775 also provided for deviation of seniority, based on specific needs of the District, for personnel special training, experience, or special competency necessary to teach specific courses as follows:

1. Special Education: Possession of Special Education Credential as well as currently teaching special education;
2. Speech: Possession of Speech Credential as well as currently teaching speech; and
3. Psychologist: Possession of Psychology Credential as well as currently assigned as a psychologist at the District.

5. On March 3, 2009, the Board adopted Resolution No. 1779, to decrease the following programs or services of the District. The Board further determined that based on the decrease or elimination of such services, it would be necessary to terminate certain certificated management employees at the close of the present school year by as follows:

Coordinator of pupil Services	1.0 FTE
Coordinator of Educational Services	1.0 FTE
Coordinator of Assessment	1.0 FTE
Cluster Two Region Director - BTSA	1.0 FTE
<hr/>	
Total	4.0 FTE

6. The Board directed the Superintendent to notify the employees affected by the Board's resolutions. On or about March 12, 2009, the Superintendent notified certificated employees, including Respondents, in writing that it had been recommended their services would not be required for the next school year. The notice included the reasons for the notification. Respondents made timely requests for hearing.

7. On March 27, 2009, the Superintendent made and filed Accusations against each Respondent.

8. Notices of Defense were timely filed by Respondents. All prehearing jurisdictional requirements were met.

9. The reduction or discontinuation of the particular kinds of services set forth in Factual Findings 4 and 6, related to the welfare of the District and its pupils.

10. The District maintains a Seniority List which contains employees' seniority dates (the first date of paid service in a probationary position), current assignments and locations, advanced degrees, credentials, and authorizations.

11. The District used the Seniority List to develop a proposed layoff list of the least senior employees currently assigned in the various services being reduced. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority.

12. At the hearing, the parties stipulated the following respondents have been assigned a new seniority date:

Lindsey Affleck's seniority date changed from August 21, 2006 to August 24, 2005;

Jessica Francisco's seniority date changed from August 18, 2006 to August 11, 2006;

Julie Mirshad's seniority date changed from October 1, 2008 to October 17, 2007;

Anne Musial's seniority date changed from August 21, 2006 to August 24, 2005;

Jacueline Rastrullo's seniority date changed from August 24, 2005 to Aug. 12, 2005;

Rafael Rodriguez's seniority date changed from August 24, 2005 to August 15, 2005;

Teresa Garcia's seniority date changed from August 24, 2005 to August 15, 2005;

Michael Stollman's seniority date changed from August 17, 2007 to August 16, 2005;

Ellie Wasser's seniority date changed from August 20, 2007 to August 17, 2005.

13. On February 3, 2009, the Board adopted Resolution No. 1771, which established tie-breaking criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. It provided that the order of termination and reemployment would be based on the needs of the District and its students in accordance with the specific criteria set forth in the resolution.

14. The Senior Director of Human Resources for District obtained employee information for the tie-breaking criteria by reviewing the files of each Respondent. In addition, the Human Resources Director sent an email to all principals in the District asking them to obtain information from Respondents concerning Spanish Language Skills, extra curricular activities, additional training and subject matter experience. After obtaining all of the above information for each Respondent, the Human Resources Director met with officials of the local teachers' union to apply the tie-breaking criteria.

15. The District applied the tie-breaking criteria to obtain an order of termination for Respondents who teach 7-12 math, and who have the same seniority date of August 18, 2006. Based on documentation in each Respondent's file and on the evidence at hearing, the District's order of seniority for these employees is Emery Tung, Nisha Bhatia, Sangeeta Sharma, Jo Lynn Hanke, and Vidual Kirtikar. The District plans to rescind the layoff notices previously sent to Respondents Tung, Bhatia, Sangeeta and .6 FTE for Respondent Hanke. This was a proper application of the tie-breaking criteria as to these Respondents.

16. The district also applied the tie-breaking criteria for Respondents with a seniority date of August 30, 2004, however, the notices given to these employees were later rescinded.

17. The District plans to rescind a notice for the 7-12 English classes of .8 FTE. The District has not yet applied the tiebreaking criteria for these employees.

18. No junior certificated employee is being retained to perform services which a more senior employee subject to layoff is certificated and competent to render.

LEGAL CONCLUSIONS

1. All notices and other requirements of Education Code sections 44949 and 44955 were met. Therefore, jurisdiction was established for this proceeding as to all Respondents.
2. 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.)
3. Cause was established as required by Education Code section 44955 to reduce the number of certificated employees due to the reduction or discontinuation of particular kinds of services. The Board’s decisions to reduce or eliminate the identified services were neither arbitrary nor capricious. The decisions relate solely to the welfare of the District’s schools and the pupils within the meaning of Education Code section 44949.
4. Respondents contend that the District acted arbitrarily and capriciously when applying the tie-breaking criteria because the process was applied unevenly in that the District could not be sure that individual school principals obtained the employee information accurately. While the process was unwieldy and did result in some errors, especially in the area of extra curricular activities, the District application of the tie-breaking criteria was neither arbitrary nor capricious.
5. Respondents assert that the undersigned should make findings regarding the rehiring of respondents. Respondent assertion is not persuasive. It is not necessary to address the District’s rehire list. The instant proceeding, to determine whether cause exists to reemploy certificated employees for the ensuing school year, is authorized by sections 44949 and 44955. Section 44955 provides: “As between employees who first rendered paid service on the same date, the governing board shall determine *the order of termination* solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose *order of termination* is so determined, the governing body shall furnish in writing . . . a statement of the specific criteria used in determining the *order of termination* and the application of the criteria in ranking each employee relative to other employees in the group. . . .” (Emphasis added.) Thus, the plain meaning of the statute directs review of the order of termination, not the order of reemployment. Preferential rehiring is the subject of other statutory provisions, such as, for instance, sections 44956 and 44957. Inasmuch as the application of the tie-breaking criteria did not impact the order of termination of any Respondent, it is not necessary to modify, create, or direct the creation or modification of the derived rehire list.
6. No junior certificated employee is being retained to perform services which a more senior employee subject to layoff is certificated and competent to render.

ORDER

Notice may be given to Respondents that their services will not be required for the 2009-2010 school year.

Dated: May 4, 2009

HUMBERTO FLORES
Administrative Law Judge
Office of Administrative Hearings