BEFORE THE
GOVERNING BOARD OF THE
PLACENTIA-YORBA LINDA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusations Against: Certificated Employees of the Placentia-Yorba Linda Unified School District, Respondents.	OAH No. 2009030040

PROPOSED DECISION

David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 23, 2009, at the Placentia-Yorba Linda Unified School District, in Placentia, California.

Rutan & Tucker, by David C. Larsen and Denise L. Mester, Attorneys at Law, represented the Placentia-Yorba Linda Unified School District (District).

Trygstad, Schwab & Trygstad, by Richard J. Schwab, Attorney at Law, represented Respondent teachers. A list of Respondents is attached as Attachment A, which indicates which Respondents were present at the hearing. Mr. Schwab did not represent counselors Corinne Bodnar, Kimberly Houg, Paul Juarez and Jason Pike, who were not present at the hearing and whose defaults were taken.

Evidence was received by way of stipulation, testimony and documents. The record was closed and the matter was submitted for decision on April 23, 2009.

SUMMARY OF PROPOSED DECISION

The Governing Board of the District (Board) determined to reduce or discontinue particular kinds of services provided by certificated teachers for budgetary reasons. The decision was not related to the competency and dedication of the individuals whose services are 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. The selection process was in accordance with the requirements of the Education Code, except as indicated herein. The Board may proceed as indicated herein.

FACTUAL FINDINGS

Jurisdiction and Parties

1. The District provides educational services for students in grades kindergarten through 12. The District employs certificated staff in permanent or probationary positions.

2. Dennis M. Smith is the Superintendent of the District and Beth Berndt is the Assistant Superintendent of Personnel Services of the District. Their actions were taken in those official capacities. Ms. Berndt and her staff were responsible for implementation of the technical aspects of the layoff.

3. Before March 15, 2009, the District served 37 teachers and counselors, including Respondents, by personal service and/or certified mail, with a written notice (layoff notice) that it had been recommended that notice be given to them pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year. Each layoff notice set forth the reasons for the recommendation and noted that the Board had passed a resolution reducing the certificated staff by 91.1 full-time equivalent (FTE) positions.[1]

4. Thirty-one certificated employees, referred to as Respondents, submitted timely written requests for a hearing to determine if there is cause for not reemploying them for the ensuing school year.

5. The Superintendent, by his designee, made and filed Accusations against each of the Respondents. On March 26, 2009, the District served Respondents either in person or by certified mail with an Accusation along with required accompanying documents and blank Notices of Defense.

6. Several Respondents completed Notices of Defense that were served on the District.

7. Attachment A is incorporated by reference. Thirty-three names are listed. Thirty-one (not including Ms. Alexander and Ms. Cuellar; see Factual Finding 19) were served with layoff notices. All thirty-three served requests for hearing with the District. On Attachment A, the letter "a" indicates Respondents who submitted a Notice of Defense after being served with the Accusation package. The District stipulated that its notices and Accusations were

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[1] With respect to the discrepancy between the number of FTE positions (91.1) and the number of employees served (37), as noted in Factual Findings 3, 8 and 10, although the Board authorized the reduction of many kinds of services, this proceeding relates only to elementary school teachers and middle and high school counselors. Nevertheless, there was insufficient evidence to explain the difference between FTEs in those categories (64.5) and the number of employees served (37).

rescinded as to all names with the designation "b." The letter "c" indicates Respondents, and Ms. Alexander, who were present at the hearing.

8. Respondents in this proceeding are probationary or permanent certificated employees of the District. This proceeding included issues relating only to reductions in services of elementary school teachers and middle and high school counselors.

The Board and the Layoff Resolution

9. On March 10, 2009, the Board was given notice of the Superintendent's recommendation that certificated employees in 91.1 FTE positions be given notice that their services would not be required for the next school year and stating the reasons therefore.

10. Board Resolution number 22, adopted on March 10, 2009 (Resolution), proposed a layoff of certificated employees in 91.1 FTE positions. Specifically, the Resolution provided for the reduction or elimination of the following particular kinds of services:

SERVICES OR PROGRAMS TO BE ELIMINATED OR REDUCED	**POSITIONS (FTE)**
Class-size reduction for grades 1 and 2	58.0
Teachers on Special Assignment (TOSAs)	5.0
Counselors (7-12)	6.5
School Psychologists	1.6
Single-subject course offerings (7-12):	
Language Arts	6.0
Art	2.0
Math	3.0
Physical Education	3.0
Social Science	4.0
Science	2.0
TOTAL	**91.1**

11. The Resolution also established tie-breaker 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 shall be based on the needs of the District and the students in accordance with the criteria stated therein. More specifically, the tie-breaker criteria provide for a priority order for, among other things, certain certifications, degrees, credentials, certificates, positions and services, to establish seniority within the shared date of first paid service. In the event of a tie after reference to all listed criteria, a lottery would be held.

12. The Resolution was required by the District's fiscal crisis and need to reduce services to balance its budget for the welfare of students. More specifically, for school year

2009-2010, the Board needed to reduce the budget by approximately $14 million to cover its costs and to maintain the legally required reserve fund.

13. The decision to reduce services was not related to the competency and dedication of the individuals whose services are proposed to be reduced or eliminated.

The Seniority List and the Layoffs

14. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments and credentials.

15. 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.

16. The District used information from the seniority list and personnel files to apply the tie-breaker criteria of the Resolution.

17. The services identified in the Resolution are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Board's decisions to reduce or discontinue the identified services were neither arbitrary nor capricious, and were a proper exercise of its discretion. The decisions were based on the welfare of the District and its pupils.

18. The District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render, except as set forth below.

19. The District withdrew/rescinded layoff notices and Accusations against Respondents Xochitl Dachenhausen, Stephanie Dey, Natali Drake-Riggio, Robin Dudnick, Stacy Keen and Jodi Veraldi. These withdrawals were based on the District's decision to implement a smaller increase in class size for first grade than first anticipated, resulting in the need for six more teachers. These six Respondents had the most seniority of employees with the appropriate teaching credential. The District determined that Leslie Alexander and Jessica Cuellar, who had been hired as temporary employees, should have been classified as probationary employees with the seniority date of August 25, 2008, because their contracts were not signed until after their first date of paid service. Therefore, the District withdrew/rescinded layoff notices and Accusations against them. No layoff notices had been sent to Ms. Alexander and Ms. Cuellar.

Respondents' Contentions and Other Relevant Information

20. Due to the retention of Ms. Alexander and Ms. Cuellar, credentialed as elementary school teachers (multiple subject credential) with seniority dates of August 25, 2008, the Accusations against the two remaining Respondents who are most senior to Ms. Alexander and Ms. Cuellar, and hold a multiple subject credential, should be dismissed. Those Respondents are Debra Occhipinti-DeSpenza and Brenda Dimopoulos, whose seniority date is August 29, 2005, and are more senior to others with the same date due to the tie-breaking criteria (see Exhibit 11).

21. Respondents contend that the seniority list contains errors, that several Respondents are qualified to teach in positions held by someone with less seniority, and that the District's process of hiring temporary teachers, and then converting some temporary teachers to probationary, was unlawful.

22. With respect to these contentions, the following evidence was submitted and findings are made.

(a) Several Respondents served in positions with the District, such as long-term substitute teacher or day-to-day substitute teacher, prior to their first date of paid service as depicted on the seniority list. However, insufficient evidence was submitted to establish that the seniority list should be changed. Such earlier service was not entitled to be treated as service in a probationary position or otherwise entitle any Respondent to an earlier seniority date. Another Respondent who challenged her seniority date (Elaine Hudson, August 28, 2006) did not submit sufficient evidence to conclude that she was entitled to any specific earlier seniority date.

(b) Several Respondents contend that they have additional credentials that would entitle them to displace more junior teachers. However, the evidence did not support these claims. For example, Ms. Vanderhook holds a Board authorization to teach science at the middle school level, which authorization is based upon college credits she has earned but lasts for only one year at a time. She did not establish that she would qualify for a Board authorization to teach the high school chemistry or biology classes that were identified as being taught by more junior employees. Ms. Paniagua holds a supplemental credential in history that permits her to teach students through ninth grade. However, the more junior history teachers that were identified teach higher grades or a combined class including higher grades, which Ms. Paniagua would not be able to teach with her credential. Ms. Flores-Magana has a supplemental credential in Spanish and could teach in the assignment of Mirko Lopez, a more junior employee, except that Ms. Flores-Magana presently teaches a part-time assignment, 0.47 FTE, while Mr. Lopez teaches a full-time assignment, 1.0 FTE.

(c) Ms. Paniagua received her BCLAD certification on April 21, 2009, after layoff notices were served. The District should consider updating its records accordingly. Even if Ms. Paniagua receives benefit due to this certification in the application of tie-breaking criteria, she would still be included in these proceedings.

(d) All 18 Respondents who testified hold multiple subject credentials and stated that, if it were offered to them, they would take the assignment of Kimberly Peck, who teaches Language Arts in the Elementary Independent Studies Program at the Parkview school site. Ms. Peck has less seniority than these 18 Respondents. The District seeks to exempt Ms. Peck from layoff, or "skip" her, due to her special training and experience. There was insufficient evidence to conclude that these 18 Respondents hold the appropriate credential to bump Ms. Peck from her position based on the nature of the position held by Ms. Peck, and the District established grounds to skip her.

(e) Several times in the months of February and March 2009, the Board changed the classification of teachers that had been hired in temporary positions to probationary. Many, and perhaps all, of these conversions occurred after the District determined the number of temporary teachers exceeded the number of certificated employees that were granted leaves of absence (including job shares and teachers on special assignments). The only teachers included within these layoff proceedings that were subject to this conversion were Ms. Alexander and Ms. Cuellar, and the District has withdrawn the Accusations as to them. Some of the "converted" probationary teachers are elementary school teachers with multiple subject credentials, others teach in the special education program, and there was no evidence of the credentials or assignments of others.

LEGAL CONCLUSIONS AND DISCUSSION

1. Education Code[2] section 44949, subdivision (a), states in pertinent part:

"No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor."

2. Section 44955 provides, in pertinent part:

"(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

"(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, . . . and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the

[2] All citations are to the Education Code.

school year. 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.

"As between employees who first rendered paid service to the district 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 board shall furnish . . . 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 the other employees in the group. . . . .

"(c) [S]ervices of such employees shall be shall be terminated in the reverse order in which they were employed, as determined by the board in accordance with Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

"The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. . . .

"(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

"(1) The district demonstrates a specific need for personnel to teach a specific course or course of study . . . and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess."

3. Sections 44949 and 44955 establish jurisdiction for this proceeding, and the notice and jurisdictional requirements set forth therein were met. (Factual Findings 3 through 8.)

4. 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.)

5. Cause exists to reduce the number of certificated employees of 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 section 44949. (Factual Findings 9 through 13.)

6. The services at issue, elementary school teaching reduced due to class size adjustment and school counselors, have been recognized as particular kinds of services subject to layoff proceedings. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627; *Campbell v. Abbott* (1978) Cal.App.3d 796; *Zalac v. Governing Board of the Ferndale Unified School District* (2002) 98 Cal.App.4th 838.)

7. 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 District* (1975) 13 Cal.3d 469.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.)

8. No Respondent can bump Kimberly Peck from her position, and she was properly skipped by the District. (Factual Finding 22(d).)

9. Ms. Vanderhook's authorization from the Board, under section 44263, is an annual authorization that must be renewed and, even if so, would not permit her to teach grades ten through twelve. She cannot bump the more junior teachers teaching those grades. Similarly, Ms. Paniagua's supplemental history credential is limited to teaching up to ninth grade under California Code of Regulations, title 5, section 80057.5, and she cannot bump the more junior history teachers who teach grades ten through twelve. Ms. Flores-Magana, as a part-time employee, cannot bump Mr. Flores, who is a more junior, but full-time, employee that the District has the discretion to retain. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334.) (Factual Finding 22.)

10. Leslie Alexander and Jessica Cuellar were converted to probationary pursuant to section 44916, which, as pertinent here, provides that an employee is probationary unless she receives a written statement at the time of employment indicating her status as a temporary employee. When no such written statement is given, the employee is probationary. (*Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911.) Their status as more junior to other holders of a multiple subject credential means layoff notices must be rescinded as to the two most senior holders of that same credential, by operation of section 44955, subdivision (b). (Factual Findings 19 and 20.)

11. Respondents' contention that the District should be ordered to retain Respondents due to the process whereby it hired more temporary teachers than was allowed by law is rejected. Initially, these proceedings relate to the rights of teachers in the status of probationary and permanent employees under section 44955, and not to temporary employees. There is no jurisdiction here to address the issue raised by Respondents in the manner they suggest. Temporary employees who feel they have been categorized incorrectly may bring writ proceedings in the courts of appropriate jurisdiction. Further, because the substitute and temporary teacher classifications are not guaranteed procedural due process by

statute, they are narrowly defined by the Legislature and should be strictly interpreted. (*Bakersfield Elementary Teachers Ass'n v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260.)

12. The District rescinded its notices to Respondents on Attachment A designated with the letter "b" and, therefore, those Respondents must have the Accusations against them dismissed.

13. Due to the failure of the counselor Respondents to appear at the hearing, their defaults are noted and the District may proceed against them by issuing final layoff notices.

ORDER

1. Notice may be given to employees occupying 91.1 full-time equivalent certificated positions that their services will not be required for the 2009-2010 school year because of the reduction and discontinuance of particular kinds of services, except as set forth below. Such notices may be given to the Respondents listed in Attachment A, except for those designated with the letter "b" for whom the District has rescinded its notice of intent of non-reemployment, and except for Respondents Debra Occhipinti-DeSpenza and Brenda Dimopoulos.

2. Notice shall be given in inverse order of seniority.

3. The Accusations are dismissed as to the Respondents listed in Attachment A designated with the letter "b" for whom the District has rescinded its notice of intent of non-reemployment, and except for Respondents Debra Occhipinti-DeSpenza and Brenda Dimopoulos, and no final layoff notices may be sent to them.

DATED: May 1, 2009.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings

PLACENTIA-YORBA LINDA UNIFIED SCHOOL DIS'TRICT
LAY OFF NOTICE LIST

KEY: a = submitted Notice of Defense
b = District rescinded Accusation
c = present at the hearing

(a, c) Angeles-Dizon, Joan
(a, c) Boydston, Tammy
(a, c) Cerda, Amanda
(b) Dachenhausen, Xochitl
(b) Dey, Stephanie
(a, c) Dimopoulos, Brenda
(b) Drake-Riggio, Natali
(b) Dudnick, Robin
(a, c) Estep, Jennifer
(a, c) Flores-Magana, Guillermina
(a, c) Guzman, Monica
(a, c) Horton, Janet
(a, c) Hudson, Elaine
(b) Keen, Stacy
(a, c) Malner, Erin
(a, c) McElwee, Sarah
(a, c) Miller, Joanne
(a, c) Naval, Jana
(a, c) Occhipinti-DeSpenza, Debra
(a, c) Olson, Leanne
(a, c) Paniagua, Katherine
(a) Saadat, Ramin
(a) Samson, Melissa
(a, c) Thompson, Kristen
(a, c) Vanderhook, April
(b) Veraldi, Jodi
(a, c) Yamamoto, Susan

Claims To Be Probationary Status
(a, b, c) Alexander, Leslie
(a, b) Cuellar, Jessica

Management: School Counselors
(a) Bodnar, Corinne
(a) Houg, Kimberly
(a) Juarez, Paul
(a) Pike, Jason

ATTACHMENT A