

**BEFORE THE GOVERNING BOARD OF THE
MOUNTAIN VIEW SCHOOL DISTRICT**

**In the Matter of the Reduction In Force
of:**

**CERTIFICATED TEACHERS OF THE
MOUNTAIN VIEW SCHOOL
DISTRICT,**

Respondents.

OAH No. L2009030133

PROPOSED DECISION

H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in El Monte, California on April 7, 2009.

Margaret A. Chidester and Alexandria M. Davidson, Attorneys at Law, represented the Mountain View School District.

Daniel J. Kilodziej, Attorney at Law, represented the respondents.

The record was held open to and including April 14, 2009, for the parties to submit closing briefs. The briefs were timely received. "Petitioner's Post-Hearing Brief" was marked as Exhibit 13 for identification. Respondents' "Closing Brief" was marked as Exhibit "F" for identification. The matter was submitted on April 14, 2009.

SUMMARY OF PROPOSED DECISION

The Governing Board of the Mountain View School District determined to reduce or discontinue particular kinds of services provided by teachers and other certificated employees 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, "bumping," and breaking ties between employees with the same first dates of paid service. The selection process was in accordance with the requirements of the Education Code.

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FACTUAL FINDINGS

1. Gloria Diaz made and filed the Accusation in her official capacity as Interim Superintendent and Assistant Superintendent for Personnel Services of the Mountain View School District (District).

2. Except for Respondent Cecilia Larios, who is challenging her classification as a temporary teacher, all respondents are probationary or permanent certificated District employees.

3. On or before March 15, 2009, the District personally served on each respondent a written notice that it had been recommended that notice be given to respondents pursuant to Education Code¹ sections 44949 and 44955 that their services would not be required for the next school year. Each written notice set forth the reasons for the recommendation and noted that the Board had passed a Resolution reducing the certificated staff.

4. Certificated employees timely submitted written requests for a hearing to determine if there is cause for not reemploying them for the ensuing school year.

5. The Interim Superintendent made and filed Accusations against each of the certificated employees who requested a hearing. The Accusations, with required accompanying documents and blank Notices of Defense, were timely served on those certificated employees.

6. Notices of Defense were timely filed by all respondents herein except Cecilia Larios. (See Factual Finding 2, above.)

7. The Board Resolution, adopted on March 11, 2009, 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 its students.

8. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments and locations, advanced degrees, credentials, and authorizations. Credential and authorization data are obtained from the records of the County Office of Education, at which certificated employees must register such documents.

9. All prehearing jurisdictional requirements were met.

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¹ All statutory references are to the Education Code unless otherwise indicated.

10. The Board took action to reduce or discontinue the following particular kinds of services for the 2009-2010 school year:

<u>Particular Kind of Service</u>	<u>Full-Time Equivalent</u>
K-8 Classroom Teaching Positions	18
Literacy Coaches	7
Teachers on Special Assignment	2
Literacy Content Expert	1
Newcomer Teacher	1
First Five Literacy Coach	1
Out of Class Placement Teacher	1
<u>Special Education Teacher</u>	<u>1</u>
Total Full-Time Equivalent Positions	32

11. At the hearing, the number of literacy coach positions to be eliminated was reduced from seven to two, resulting in a total planned reduction of 27 full-time equivalent positions.

12. At and before the time of the hearing, 26 preliminary notices of layoff were withdrawn.

13. The Board also resolved to retain the services of those employees in the 2009-2010 school year, regardless of seniority, who possess the requisite qualifications for the following programs:

1. Certificated personnel who possess administrative credentials, who are currently assigned to administrative positions, and who will be assigned to administrative positions for the 2009-2010 school year.
2. Certificated personnel who possess a credential authorizing service in special education, who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2009-2010 school year.
3. Certificated personnel who possess a credential authorizing service in language, speech and hearing, who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2009-2010 school year.
4. Certificated personnel who possess a single subject credential authorizing service in mathematics, science, social science, English, or physical education, who are presently assigned within the scope of that credential and who will be assigned within the scope of that credential for the 2009-2010 school year.

5. Certificated personnel who possess a credential authorizing service as a school nurse who are currently assigned under that credential, who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2009-2010 school year.

6. Certificated personnel who possess a credential authorizing service as a school psychologist who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2009-2010 school year.

7. Certificated personnel who possess a credential authorizing service as a school counselor who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2009-2010 school year.

14. The retention of those employees who were certificated and competent to render services which more senior employees are not with respect to the above services necessitated “skipping” pursuant to Code section 44955, subdivision (d). (See also, *Alexander v. Board of Trustees* (1983) 139 Cal.App.3d 567.) Respondents did not object to the District’s determination with respect to any of those positions.

15. The eliminated services were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The Interim Superintendent’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

16. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

17. 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.

18. Except as set forth in Factual Finding 19(a), no certificated employee junior to any Respondent was retained to perform any services which any Respondent was certificated and competent to render.

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19. As referenced in Factual Finding No. 14, above, the respondents did not object to the exemptions made by the District. However, they claimed that other teachers were also entitled to exemptions based on the same criteria:

a. The District exempted Michelle Robinson pursuant to Exemption Criterion 3, “certificated personnel who possess a credential authorizing service in language, speech and hearing, who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2009-2010 school year.” Respondent Eve Mancillas argues that she should also be exempt because her seniority date predates that of Michelle Robinson by approximately two years, and because she holds the same assignment and credential as Ms. Robinson. That position is consistent with the District’s Annotated Seniority List (Exhibit 2), which designates Ms. Mancillas as exempt by virtue of the exemption criterion. Eve Mancillas should be exempt from layoffs pursuant to Exemption Criterion 3.

b. Respondents Cesar Chacon, Daniel Montejano, Ron Beadle and David Morris argue that, because they each hold a single subject credential authorizing service in mathematics, science, social science, English or physical education, they should be retained pursuant to Exemption Criterion No. 4. That position is also consistent with the District’s Annotated Seniority List, which designates all four as exempt by virtue of the exemption criterion. In addition, the District considered Mr. Beadle exempt from layoff, pursuant to Exemption Criterion 1, because of his administrative services credential. Cesar Chacon, Daniel Montejano, Ron Beadle and David Morris should be skipped pursuant to Exemption Criterion 4.

20. The District correctly classified Cecilia Larios as a temporary teacher and did not provide her with a preliminary notice of layoff on or before March 15, 2009. Originally hired as of January 18, 2000, she worked as a day-to-day substitute teacher and rendered substitute services for portions of school years 1999-2000 through 2005-2006. In 2006-2007, under a temporary employee contract, she replaced a teacher who took an authorized leave of absence. Due to familial responsibilities, Ms. Larios was unable to teach during the 2007-2008 school year until January 22, 2008, when she began again as a day-to-day substitute. From March 13, 2008, through June 19, 2008, she served as a long-term substitute for a teacher on maternity leave. That period constituted less than 75 percent of the school year. During the current school year, she has served the District under a temporary contract replacing a teacher who is on leave of absence.

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21. Ms. Larios pointed to a number of factors and circumstances that led her to believe she was and is a probationary employee and had therefore been misclassified and improperly deprived of her due process rights. Although those factors may have been misleading to her, none of them reflect either the District's intent or a legal basis for reclassification as a probationary employee. Errors made by certain District personnel (such as Ms. Larios's principal who marked a box on her evaluation form indicating she was a probationary employee when the form did not contain a box for temporary employees), are not binding on the District because the scope of those employees' agency did not extend to reclassification of other employees. At no time did the District employ a number of temporary teachers that exceeded the number of regular teachers on leave of absence. Ms. Larios was not entitled to a preliminary notice of layoff or the other rights afforded probationary and permanent employees.

22. Respondents argue that certain respondents (not specifically identified in their closing brief) should be assigned earlier seniority dates because they were not timely classified as either temporary or substitute teachers and therefore, became probationary teachers by default pursuant to *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2007) 145 Cal.App.4th 1260. That position was based on those respondents' argument that the District failed to prove they had received timely written notice of their classifications from the District pursuant to Code sections 44915, 44916, 44917, 44919 and 44920.

23. The argument is not persuasive for the following reasons:

a. Despite being given ample opportunity to do so, at no time before or during the hearing did respondents' counsel indicate that any issue regarding proper notice of temporary or substitute status existed or would be raised in this action. That specific issue was not raised until respondents submitted their post-hearing closing brief. Thus, the District properly believed the issue was not contested, and did not offer any evidence in regard to it.

b. After preparing the original seniority list, the District distributed it to its various school sites to give the teachers the opportunity to respond to it. Thereafter, upon receiving input from the teachers who chose to respond, the District made appropriate modifications to the seniority list. The teachers who are potentially affected by the disposition of this issue were permanent teachers at the time the District distributed the original seniority list. No evidence was offered that any of those teachers objected to their seniority number on grounds that the District previously failed to timely notify them of their temporary or substitute status.

c. Respondents' counsel never questioned the District's Interim Superintendent and Assistant Superintendent for Personnel Services, Gloria Diaz, concerning notices being sent to temporary and substitute teachers timely advising them of their employment status.

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d. Each teacher who testified at the hearing that he/she had previously held a temporary and/or substitute position with the District competently testified to his/her status as a day-to-day substitute, long-term substitute and/or temporary teacher. Each such witness showed no confusion as to that status or the dates/school year(s) the status was held. None of those witnesses testified that he/she either failed to receive written notification of temporary or substitute status, or that he/she received such notice but in an untimely manner.

e. Respondents offered no evidence to establish that any temporary or substitute teacher was not provided with proper written notice of his/her employment status.

24. A number of teachers argued that they should be given one year's credit as a probationary employee for the school year prior to becoming a probationary teacher with the District because they served in a substitute or temporary capacity more than 75 percent of the previous school year. (Ed. Code § 44918, subd. (a).)² With the exception of Respondent Carol Notti, no such teacher served as a temporary or long-term substitute teacher for more than 75 percent of the school year before he/she was granted probationary status. They argue instead that their temporary or long-term substitute service, plus their periods of day-to-day substitute service during the same school year, constitutes the required 75 percent of the school year they seek to use to qualify them for the one year's credit.

25. Long-term substitute service and/or temporary service cannot be combined with day-to-day substitute service for purposes of satisfying the requirements of Code section 44918, subdivision (a) because day-to-day substitute service is expressly excluded from that calculation. Code section 44918, subdivision (d) states:

Those employees classified as substitutes, and who are employed to serve in an on-call status to replace absent regular employees on a day-to-day basis shall not be entitled to the benefits of this section.

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² Education Code section 44918, subdivision (a) states: "Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year."

26. Respondent Carol Notti served as a long-term substitute for the District from September 2003, through June 2004, a period exceeding 75 percent of the number of school days in the 2003-2004 school year. She continued in the same position for approximately one week at the commencement of the following school year and was then assigned to day-to-day substitute service. In October 2004, Ms. Notti was given another long-term substitute assignment. In January 2005, the District learned that the teacher for whom Ms. Notti was substituting would not be returning to work. The District then gave Ms. Notti a temporary contract for the remainder of the 2004-2005 school year. She completed the school year as a temporary employee and therefore served for more than 75 percent of the school year in a temporary or long-term substitute position. In September 2006, Ms. Notti accepted a position with the District as a probationary teacher.

27. The District gave Ms. Notti one year's credit as a probationary teacher for the 2004-2005 school year. Ms. Notti seeks an additional year's credit for the 2003-2004 school year. That credit would serve to lower her seniority date.

28. Ms. Notti is not entitled to the relief she seeks. Code section 44918, subdivision (a) permits one year's credit as a probationary teacher to be given to a long-term substitute or temporary teacher who works in that capacity at least 75 percent of the school year, only if he/she is given a probationary position for the following school year. Ms. Notti satisfied those requirements by serving as a long-term substitute and temporary teacher for the required time during the 2004-2005 school year, and then by being hired as a probationary teacher for the 2005-2006 school year. She was properly given credit for the 2004-2005 school year. However, even though she worked as a long-term substitute for more than 75 percent of the 2003-2004 school year, she remained a long-term substitute (and a temporary teacher) during the subsequent school year. She therefore failed to meet the second requirement in Code section 44918, subdivision (a).

29. Respondents Heather Whitaker, Analilia Montes, Karen Knudsen and Emma Bolivar claim they are entitled to earlier seniority dates because they participated in summer training courses/in-services before the beginning of the first school year in which they were employed as probationary teachers. They assert that, because they were paid stipends for their attendance, they incurred earlier first dates of paid service than those appearing on the seniority list. For disparate reasons, each of those four respondents believed the training courses/in-services were mandatory and that the District required their attendance.

30. The above four respondents are incorrect. The District offered the early courses as a convenience for its new teachers but did not require their attendance. The teachers were hired for the specific school year and their salaries were based on the number of days of work in the official school year calendar. The early courses were optional days offered for separate and additional compensation in the form of a stipend. The District properly determined the first dates of paid service for respondents Whitaker, Montes, Knudsen and Bolivar.

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LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. The services identified in the Board's Resolution are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious and was a proper exercise of its discretion. 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 section 44949.

3. 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.)

4. Cause exists to reduce the number of certificated employees of the District due to the reduction or discontinuation of particular kinds of services. The District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued.

5. With the exception noted in Factual Finding 19(a), no junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render. However, as noted in Factual Finding 19, certain employees noticed for layoffs may be skipped in accordance with the District's exemption criteria.

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ORDER

1. With the exception of respondents Eve Mancillas, Cesar Chacon, Daniel Montejano, Ron Beadle and David Morris, the Accusations against the respondents are sustained. Notice shall be given to the remaining respondents that their services will not be required for the 2009-2010 school year because of reduction or discontinuance of particular kinds of services.

2. The Accusations served on respondents Eve Mancillas, Cesar Chacon, Daniel Montejano, Ron Beadle and David Morris, are not sustained, and the Accusations related to those respondents are dismissed.

DATED: April 22, 2009

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings