

BEFORE THE  
GOVERNING BOARD OF THE  
MONROVIA UNIFIED SCHOOL DISTRICT  
COUNTY OF LOS ANGELES  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Andrea Sanchez and Other Certificated  
Employees, et al.,

Respondents.

OAH Case No. 2009030192

**PROPOSED DECISION**

Amy C. Lahr, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 9, 2009, in Monrovia, California.

Margaret A. Chidester, Attorney at Law, represented Deborah L. Collins (Collins), Superintendent of the Monrovia Unified School District (District).

Jonathan Klar, of Rothner, Segall & Greenstone, represented Andrea Sanchez, Sharon Socha, Megan Esquer, Rachael Rodriguez, Cristina Barbosa, Susana Lopez, Arabelle Aguirre, Bhakta Bhavini, Chloe M. Yanta, Melissa Moon-Burke, Spring Hills-DuRose and Lynne Dee Newton (Respondents).

Filiberto Lujan, Health Science Teacher, represented himself, Lisa D. Beier, Annette Frietas and Katie A. Woodrick.

The District has decided to reduce or discontinue certain educational services and has given Respondents notice of its intent not to reemploy them for the 2009-2010 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2009-2010 school year.

At the hearing, the District withdrew the Accusation against the following former Respondents, who were not represented by counsel: Marita McCarthy, Ilin Magran, Joy M. Dunn, Jennifer Oldenburg, Theresa S. Petersen, Laura B. Ybarra and Lynn M. Gray.

The District amended Resolution 09-16, to rescind the proposed reductions or discontinuation of services regarding six full-time equivalent elementary teachers and seven pupil personnel counselors.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

FACTUAL FINDINGS

1. Superintendent Collins filed the Accusation in her official capacity.
2. Respondents are employed by the District as permanent, probationary, or temporary certificated employees of the District.
3. On March 2, 2009, the Governing Board of the District (Governing Board) adopted Resolution number 09-16, reducing or discontinuing the following services for the 2009-2010 school year:

<u>Service</u>	<u>Full-Time-Equivalent Positions</u>
K-8 Elementary Classroom Teachers	19.00
Secondary Single Subject, English	1.00
Secondary Single Subject, Spanish	1.00
Secondary Single Subject, Science	1.00
Secondary Single Subject, Art	1.00
Single Subject, Physical Education	<u>4.25</u>
Total	27.25

4. Superintendent Collins thereafter notified the Governing Board that she recommended that notice be provided to Respondents that their services will not be required for the 2009-2010 school year due to the reduction or discontinuance of particular kinds of services.
5. During the period of March 6 to 12, 2009, Superintendent Collins provided notice to Respondents that their services will not be required for the 2009-2010 school year due to the reduction or discontinuance of particular kinds of services. Respondent Newton did not receive notice; she was first aware that her position may be subject to layoff two days prior to the hearing.
6. All Respondents, except Respondent Newton, timely requested hearings and filed notices of defense, to determine if there is cause for not reemploying them for the 2009-2010 school year.
7. All prehearing jurisdictional requirements have been met.
8. The services set forth in factual finding number 3 are particular kinds of services

which may be reduced or discontinued within the meaning of Education Code section 44955.<sup>1</sup>

9. The Governing Board took action to reduce or discontinue the services set forth in factual finding number 3 primarily because of the uncertainty surrounding future funding. The decision to reduce the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

10. The reduction of services set forth in factual finding number 3 is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

11. Resolution number 09-16, adopted at the Governing Board's meeting on March 12, 2009, sets forth the District's desire to exempt certain personnel from the order of layoff by virtue of their credentials, competence, assignment, experience or certification.

12. Respondent Filiberto Lujan is a health science teacher at the District's continuation high school. He testified on behalf of himself and Respondents Lisa D. Beier, Annette Frietas and Katie A. Woodrick, regarding their special training and experience. This includes the Respondents' "highly qualified" status, as defined by 34 C.F.R. § 200.56, under the No Child Left Behind (NCLB) Act of 2001 (Pub.L. No. 107-110 (Jan. 8, 2002) 115 Stat 1425). The continuation school recently received accreditation by the Western Association Schools and Colleges (WASC), which provides college education opportunities, including funding and admission assistance, to minority students. The WASC accreditation was based in part on the District's retention of highly qualified teachers; if the District does not have highly qualified teachers, it risks losing its WASC accreditation. Although Respondents Lujan, Beier, Frietas and Woodrick are junior employees, the District seeks to "skip" them from the layoff order because they possess special training and experience, including their highly qualified designation. No employees with higher seniority dates possess this qualification, or the same special training and experience. The District has demonstrated a specific need to retain Respondents Lujan, Beier, Frietas and Woodrick, and the employees have the special training and experience to provide the needed services.

13. Resolution number 09-16 also established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. In the tie-breaking process, employees earn points in four specified criteria. The District negotiated with the teachers' union to develop criteria in the District's best interest. Resolution number 09-16 provided that employees with a greater number of points shall be considered more senior than employees with fewer numbers of points, for purposes of determining layoff order, as follows:

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<sup>1</sup> All further references are to the Education Code.

<u>Criterion</u>	<u>Points</u>
Masters Degree	1.0
Additional Credential	1.0
Supplemental Authorization	0.5
Each full year of temporary contract service, prior to probationary position	1.0

14. Respondent Susana Lopez is a K-5 elementary teacher with a seniority date of August 28, 2006. Respondent Lopez testified that although she does not currently possess a “highly qualified” distinction under the NCLB Act, she could complete the additional requirements by the beginning of the 2009-2010 school year. The parties stipulated that upon completion and proof of the applicable requirements, the District may re-hire Respondent Lopez in accordance with her seniority date.

15. Respondent Megan Esquer is a K-5 elementary teacher, with a seniority date of August 28, 2006. She testified regarding her ability to obtain future credentials. Respondent Esquer did not dispute her seniority date or her tiebreaker score.

16. Respondent Sharon Socha is a K-5 elementary teacher, with a seniority date of August 28, 2006. She disputes her seniority date, claiming that the District should have used August 23, 2004, her first paid date of service in a temporary contract. Respondent Socha does not dispute that she worked under a temporary contract in 2004, 2005, and 2006; she became a probationary employee in 2007. Section 44845 provides that an employee’s seniority date is deemed as the first date of paid service in a probationary position; to be backdated one year if the employee has worked more than 75 percent of the prior school year. (Educ. Code § 44918, subd. (a).) Thus, the District’s calculation of Respondent Socha’s seniority date as August 28, 2006, is accurate.

17. a. Respondent Lynne Dee Newton is a first-grade teacher. She originally worked full-time with the District from 1971 through 1978, when she resigned. Respondent Newton returned to the District on August 31, 1999, as a temporary employee. In the 1999-2000 school year, she worked full-time. Thereafter, from 2000 through 2008, Respondent Newton worked part-time in a job share assignment, working at 60 percent of the school days.

b. The District provided Respondent Newton with a temporary contract for the 1999-2000 school year. The following year, 2000, Respondent Newton’s contract stated that she was a “certificated employee in a regular position.” It did not indicate that she was a temporary employee. Each year thereafter, including the 2008 school year, Respondent Newton’s contracts noted that she was employed in a “regular position” or that she was tenured; none indicated that she was a temporary employee.

c. Upon review of her personnel file several days before the hearing, Superintendent Collins realized that the District's classification of Respondent Newton as "tenured" had been a mistake. The District concluded that since her re-hire in 1999, Respondent Newton had not worked for two complete consecutive years; i.e., at least 75 percent of the days in a school year; and thus, she was not tenured. The District believed that Respondent Newton was a temporary employee, and as such, she was not entitled to notice of the layoff proceeding. With sincere regret, Superintendent Collins informed Respondent Newton, two days prior to the hearing, that she would be laid off.

18. The District established that Respondents Spring Hills-DuRose and Melissa Moon-Burke were properly classified as temporary employees. As such, they are not entitled to receive notice under this layoff proceeding.

19. Respondents Bhakta Bhavini and Chloe M. Yanta are permanent employees who are certificated and competent to render services of K-5 elementary education. They share the seniority date of August 21, 2006. Respondents Sharon Socha, Megan Esquer, Rachael Rodriguez, Cristina Barbosa, and Susana Lopez are permanent employees who are certificated and competent to render services of K-5 elementary education. They share a seniority dates of August 28, 2006. The District applied the tie-breaker criteria to determine their layoff order. Although none disputed the District's application of the tie-breaker criteria, none were aware of Respondent Newton's appearance and issue at the hearing until that morning.

20. No employees junior to Respondents Andrea Sanchez or Arabelle Aguirre were retained to perform a service that either Respondent is competent and certificated to render.

### LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 7.

2. The services listed in factual finding number 3 are determined to be particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 3 and 8.

3. Cause exists under sections 44949 and 44955 for the District to reduce or discontinue the particular kinds of services set forth in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 20.

4. The Education Code permits certificated employees to be classified in one of four ways: permanent, probationary, substitute, or temporary. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) A certificated employee is

classified as permanent, i.e., acquires tenure, if, after having been employed for two complete successive school years in a position requiring certification qualifications, he or she is reelected for the following year. (§ 44929.21, subd. (b); *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1278-1279.) Probationary employees are “those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees.” (§ 44915.) Substitutes are “those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service. . . .” (§ 44917.) Temporary employees are those requiring certification qualifications, other than substitute employees, who are employed for limited assignments, as defined in the Education Code, such as in sections 44918, 44919, 44920, and 44921. (*California Teachers Assn. v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135, 146.)

Districts are required to provide employees with written notice of their classification when first hired. (§ 44916; *Kavanaugh, supra*, 29 Cal.4th at 911.) Section 44916 provides: “The classification [of a certificated employee] shall be made at the time of employment and thereafter in the month of July of each school year. At the time of initial employment during each academic year, each new certificated employee of the school district shall receive a written statement indicating his employment status and the salary that he is to be paid. If a school district hires a certificated person as a temporary employee, the written statement shall clearly indicate the temporary nature of the employment and the length of time for which the person is being employed. If a written statement does not indicate the temporary nature of the employment, the certificated employee shall be deemed to be a probationary employee of the school district, unless employed with permanent status.” Failure to provide notice of temporary employment as required by section 44916 results in probationary service as a matter of law. (*Kavanaugh, supra*, 29 Cal.4th at p. 926.)

The District contended that Respondent Newton is not a permanent tenured employee because she had not worked more than 75 percent of the school days for two complete consecutive years, arguing that it could not confer tenure by mistake. The District is correct that it could not inadvertently grant tenure to Respondent Newton because she did not meet the Education Code requirements. (§§ 44929.21, 44914, 44908; *Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 886, 890-893.) Section 44929.21 requires that the employee work two “complete” years as a probationary employee in order to attain tenure, and Respondent Newton has only worked 60 percent of the second pertinent year, and each year thereafter. Thus, she is not entitled to tenure as a matter of law. Respondent Newton’s argument of equitable estoppel also does not apply to give her tenured status, because the Code requires two complete years as a probationary employee, and the District may not waive the statutory requirements. (*Fleice, supra*, 206 Cal.App.3d at 894.)

The District did not, however, establish that Respondent Newton was a temporary employee. Subsequent to the 1999-2000 school year, the District did not inform Respondent

Newton that she held a temporary position. To the contrary, the District provided Respondent Newton with a written statement that she was tenured each year from 2000 through 2008. Since this classification was a mistake, the proper default classification for Respondent Newton is probationary. (See *Vasquez v. Happy Valley Union School Dist.* (2008) 159 Cal.App.4<sup>th</sup> 969, 983, citing *California Teachers Assn., supra*, 149 Cal.App.4<sup>th</sup> at 146, 150; and *Bakersfield, supra*, 145 Cal.App.4<sup>th</sup> at pp. 1279-1281, 1299.)

Under Education Code section 44955 subdivision (c), if “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.” As a probationary employee, Respondent Newton was entitled to notice of the layoff proceeding. The District did not provide her with notice; thus, she must be retained.

5. Cause does not exist to terminate the services of Respondent Lynne Dee Newton, by reason of factual finding numbers 5, 6 and 17, and legal conclusion number 4.

6. The District’s misclassification, failure to serve notice, and subsequent retention of probationary employee Respondent Newton invalidates the layoff with respect to all permanent employees. Section 44955, subdivision (b) provides that “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.” The layoff is not saved by Section 44949, subdivision (c)(3), which permits nonsubstantive procedural errors; here, the District’s errors are both substantive and prejudicial. The errors do not simply pertain to the procedures for issuing layoff notices, but they affect the rights of permanent employees, and they do so in a significant, prejudicial manner: layoff.

7. Cause does not exist to terminate the services of Sharon Socha, Megan Esquer, Rachael Rodriguez, Cristina Barbosa, Susana Lopez, Bhakta Bhavini and Chloe M. Yanta, by reason of factual finding numbers 1 through 20, and legal conclusion numbers 1 through 6.

8. The District may retain certificated junior employees if it establishes a specific need for personnel to teach a specific course or course of study, and if the certificated employees it proposes to retain have special training and experience necessary to provide those services. (§ 44955(d); *Bledsoe v. Biggs Unified School Dist.* (2009) 170 Cal.App.4<sup>th</sup> 127, 135-140, *review den.* Apr. 15, 2009.)

9. Cause exists to retain Respondents Filiberto Lujan, Lisa D. Beier, Annette Frietas and Katie A. Woodrick, by reason of factual finding numbers 11 and 12, and legal conclusion number 8.

10. Cause exists to terminate the services of Respondents Andrea Sanchez and

Arabelle Aguirre, by reason of factual finding numbers 1 through 20, and legal conclusion numbers 1 through 3.

ORDER

1. The Accusation is sustained in part, and the District may notify Respondents Andrea Sanchez and Arabelle Aguirre that their services will not be needed during the 2009-2010 school year due to the reduction of particular kinds of services.

2. The Accusation is dismissed with respect to Respondents Sharon Socha, Megan Esquer, Rachael Rodriguez, Cristina Barbosa, Susana Lopez, Bhakta Bhavini and Chloe M. Yanta.

3. The District may not terminate the employment of Respondent Lynne Dee Newton.

4. The District's decision to classify Respondents Spring Hills-DuRose and Melissa Moon-Burke as temporary employees is upheld.

DATED: May 6, 2009

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AMY C. LAHR  
Administrative Law Judge  
Office of Administrative Hearings