

BEFORE THE
GOVERNING BOARD OF THE
WALNUT VALLEY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In The Matter Of The Layoffs Of:

OAH No. 2009030601

Kristina Biederman, and Other
Certificated Employees of the
Walnut Valley Unified School District,

Respondents.

PROPOSED DECISION

This matter was heard by Mark E. Harman, Administrative Law Judge of the Office of Administrative Hearings, State of California, on April 17, 2009, in Walnut, California.

Mark W. Thompson, Attorney at Law, represented the Walnut Valley Unified School District (District). Henry Willis, Attorney at Law, represented Kristina Biederman, Kate Borihane, Irene Carter, Susan Chang, Enoch Choi, Elizabeth Davis, Frank De Anda, Crystal Dira, Laurie Eyestone, Jennifer Fetchik (Fetchik), Kathryn M. Frick, Adam T. Fujimoto (Fujimoto), Mary Thibodeaux Gaxiola (Gaxiola), Wendy L. Hopkins, Thomas Hwang, Jill Igarashi, Linda Kim (Kim), Rebecca King (King), Kathryn R. Lagerborg, Lina Lahham, Mary Lee, Janet Liao, Iris Magboo, Bonnie P. Manuel (Manuel), Jill Courtney Marquez (Marquez), Kimberly McNeil, Darcy Faye Milam, Kellie Muragishi, Jennifer Najera, Kari L. Pierce, Whitney N. Prenger, Simone Sevilla (Sevilla), Sarah Sherman, Victoria Silcock (Silcock), Amy Smith, Valeria Suarez-Moya, Kirsten Melissa Thibeault, Scott S. Usher, Jennifer Galang Veneracion, Ramil Veneracion, Anne E. Wiencek, Susan Marie Willmering, Jorge Arauz (Arauz), Darlene Boliver, Carolyn Campbell (Campbell), Christina Chiang (Chiang), Melissa S. Daniels, Janine De Vera, Charmaine Fujioka, Kimberly Kalem, Vivian Mares, Mindy M. Martin (Martin), Brenda Moscoso, Linda Taing (Taing), Lisa Wade, Jennifer Welch (Welch), Kaymi Wong (Wong), and Sara Yu, (collectively, Respondents).

The District decided to reduce or discontinue certain educational services and gave Respondents and other certificated District employees 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.

Oral and documentary evidence was received. The record was left open until April 27, 2009, to allow the parties to file closing briefs. Both briefs were timely received and considered. The District's brief was marked for identification as Exhibit 17, and

Respondents' brief was marked as Exhibit F. While not announced prior to concluding the hearing, the administrative law judge considered the time the matter was left open for briefing to be a continuance of the hearing for good cause on the administrative law judge's own motion pursuant to Education Code section 44949, subdivision (e), and Government Code section 11524. The conclusion of the hearing was April 17, 2009, and the due date of the briefs was April 27, 2009. As a result, the length of the continuance is ten days. Therefore, the May 7th and May 15th dates prescribed in Education Code sections 44949, subdivision (c) and 44955, subdivision (c), are extended to May 18, 2009, and May 26, 2009.

FACTUAL FINDINGS

1. The District operates nine elementary schools, three intermediate schools, two high schools, and one continuation high school, for approximately 15,000 students.

2. Respondents in this proceeding are permanent, probationary, and temporary certificated employees of the District.

3. Dr. Cynthia Simms is the Superintendent of the District. Brian Cole (Cole) is the Assistant Superintendent for Human Resources. He and his staff were responsible for implementation of the technical aspects of the layoff. Cole filed the Accusation in his official capacity.

4. The Governing Board of the District (Governing Board) adopted Resolution No. 09-12 on March 4, 2009, reducing or eliminating the following services for the 2009-2010 school year:

PARTICULAR KINDS OF SERVICES	NO. OF FULL TIME EQUIVALENT (FTE) POSITIONS
<u>Elementary School Services</u>	
Kindergarten through 3d classroom teaching services	32.0
ELS (Elementary Learning Specialist) teaching services	4.5
Elementary Reading Recovery Teacher	1.0
Elementary Chinese Magnet Teacher	1.0
<u>Middle and High School Services (Grades 6 through 12)</u>	
Social Studies Teaching Services	3.2
Language Arts/English Teaching Services	2.8
Science Teaching Services	

Middle School Science	1.6
High School Chemistry	0.4
High School Biology	0.4
Math Teaching Services	4.0
Spanish Teaching Services	0.4
French Teaching Services	1.2
German Teaching Services	0.2
Mandarin Teaching Services	1.0
Korean Teaching Services	0.4
Alternate to Suspension	1.0
Special Education Teaching Services	1.0
Physical Education Teaching Services	1.0
Band Teaching Services	1.0
Yearbook Teaching Services	0.6
Computer/Technology Teaching Services	1.2
Photography Teaching Services	1.2
PALS (Peer Assistance Leadership) Teaching Services	0.2
Life Skills Teaching Services	0.8
Instructional Dean Services	1.6
Walnut High School (.08)	
Diamond Bar High School (.08)	
<u>Educational Services</u>	
Reading Clinic Teaching Services	1.0
Reading Specialist Teaching Services	0.2
<u>Total</u>	64.9

4. On March 4, 2009, the Superintendent notified the Governing Board that she recommended that notice be provided to 65 certificated employees of the District, including Respondents, that their services would not be required for the next school year because of the elimination or reduction of particular kinds of services.

5. On March 9, 2009, the District served a written “reduction in force” notice (RIF notice) on 65 certificated employees, including Respondents, that the Superintendent had recommended to the Governing Board that their services would not be required for the 2009-2010 school year due to the elimination or reduction of particular kinds of services.

6. Assuming that all certificated employees would file a request for hearing/notice of defense, the District issued and served the Accusation on March 9, 2009, with the written notice (collectively, the notice and Accusation packet). The notice and

Accusation packet was sent to 46 certificated employees, whom the District had classified as permanent or probationary. Forty-two of these requested a hearing to determine if there was cause for not reemploying them for the 2009-2010 school year.

7. The District served a so-called “precautionary” notice and Accusation packet on three tenured teachers, Jamie Highstreet, Christopher Ko, and Jana Young, who were the least senior employees saved through the District’s application of the tie-breaking criteria, and whom the District intends to retain for the 2009-2010 school year. The District’s purpose for precautionary notices is to safeguard the District’s ability to terminate a corresponding number of employees, in the event that it was determined after hearing that the services of Highstreet, Ko, and Young, should be terminated instead of the services of other employees selected by the District.

8. The District also sent a “precautionary” notice and Accusation packet to 16 employees whom the District has classified as temporary employees, because the District anticipated these employees might claim to be probationary employees. Approximately five of these employees, Respondents Campbell, Chiang, Taing, Welch, and Wong, requested a hearing. Some other who had not requested a hearing appeared at the hearing to assert they had been misled by District employees into forgoing their hearing rights. From this latter group, Arauz and Martin, who had not requested a hearing, were allowed to testify at the hearing. They testified that some District personnel in various meetings had opined that they were uncertain whether the so-called temporary employees had any rights to participate, but the employees should check on it. The parties then stipulated that the remainder of the “temporary” employees who were served with a notice and Accusation packet, but failed to request a hearing, would testify similarly to Arauz and Martin. It was not established that any District personnel mislead any “temporary” employee concerning his or her right to participate in the lay off proceeding. In fact, a large group of “temporary” employees were present at the hearing.

9. All prehearing jurisdictional requirements have been met.

10. At the hearing, the District dismissed the Accusation against Respondent Kurt Davies

11. The services set forth in factual finding number 4 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code (the Code) section 44955.¹

12. The Governing Board took action to reduce the services set forth in factual finding number 4 primarily because of the uncertainty surrounding State funding. The decision to reduce or discontinue the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District’s discretion.

¹ All statutory references are to the Education Code.

13. The reduction or discontinuance of services set forth in factual finding number 4 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.

14. On March 4, 2009, the Governing Board adopted criteria for determining order of seniority of those employees with the same date of first paid service (tie-breaking criteria). The tie-breaking criteria are reasonable as they relate to the skills and qualifications of certificated employees. The criteria, themselves, were not challenged by Respondents.

15. The District did not issue a layoff notice to Jenny Kwan (Kwan), a probationary teacher with a seniority date of August 18, 2008, who holds a Teacher on Special Assignment position as an English Language Development Program Specialist. Kwan was specifically hired for this position based on her special training and experience. No other certificated person who is senior to Kwan has demonstrated sufficient credentials, qualifications or competency to render the services provided by Kwan. Retaining Kwan is appropriate, as the District has demonstrated it has a specific need for these services, and Kwan has the requisite special training and experience for the position.

16. The District reduced middle and senior high school social studies teaching services by 3.2 FTE. Two of the affected teachers have resigned. Notices were sent to Respondents Gaxiola, Marquez, and Fujimoto, who is the least senior of these three. Gaxiola, who teaches social sciences at Diamond Bar High School, was hired on August 21, 2007. She was noticed for a 1.0 FTE reduction of her services. (She is being displaced by two senior employees who are affected by the reduction in instructional dean services.) Marquez has a seniority date of August 19, 2008, and teaches social science at Walnut High School. She was noticed for a .4 FTE reduction; however, the District failed to account for Gaxiola's right to bump into Marquez's remaining .6 FTE position. Therefore, the District has proposed to reduce Gaxiola's position by .4 FTE. In other words, both Gaxiola and Marquez will retain a .6 FTE position, which is correct. Gaxiola's argument, that she is entitled to retain her entire 1.0 FTE, is not persuasive.

17. The parties have stipulated Respondent Choi will be retained for .4 FTE, and Respondent Kim will be retained for .55 FTE.

18. Respondents King, Fujimoto, Sevilla, Manuel, Silcock, and Fetchik dispute the seniority dates assigned to them by the District. However, even if the District agreed to change their seniority dates, as requested, none of these employees would be placed ahead of any certificated employee who is being retained. Such new seniority dates, if granted, would not affect the order of termination, but they might affect Respondents' rehire rights.²

² It is not necessary address the correctness of the seniority list for the purpose of establishing rehire rights. 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

19. The final issue is whether the District properly determined that 16 certificated teachers who were served with the notice and Accusation packet are temporary employees of the District. If these employees are not temporary employees, the District has failed to credit them with their seniority, to give them proper notice of non-reemployment, and a reasonable opportunity to participate in this proceeding. Such a failure would cause these employees to be rehired for the next school year. If these individuals are, in fact, temporary employees, then they have no right to participate in this proceeding, and the issue of their layoff hearing rights becomes moot. “Moreover, temporary employees, unlike permanent and probationary employees, may be dismissed at the pleasure of the board and need be given only a more limited form of notice before the end of the school year, and no hearing. [Citation omitted.]” (*Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1273 (*Bakersfield*).

20. The code authorizes the Governing Board to hire and classify its employees, but also imposes limitations on its decisionmaking power. The code establishes four possible classifications for certificated employees: permanent; probationary; temporary; and substitute. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916-917.) “The classification of ‘probationary’ is the default classification. School districts classify all teachers as probationary who are not otherwise required by the code to be classified as permanent, temporary, or substitute.” (§ 44915; *Bakersfield, supra*, 145 Cal.App.4th at p. 1280.) [(*Vasquez v. Happy Valley Union School Dist.* (2008) 159 Cal.App.4th 969, 975 (*Vasquez*)).] In *Bakersfield*, the court of appeal ruled that a district could classify teachers based only on the grounds provided in the code. (*Id.* at p. 983.) “If a certificated employee occupies a position the Code defines as temporary, he or she is a temporary employee; if it is not a position that requires temporary classification (or permanent or substitute), he or she is a probationary employee. (§ 44915.) The Code grants school districts no discretion to deviate from this statutory classification scheme. [Citation.]” (*Id.* at p. 983, citing *Bakersfield*, 145 Cal.App.4th at p. 1299.)

21. The District maintains at least a majority of these employees are elementary teachers occupying class-size reduction positions, and that these positions are categorically funded (See Code § 44909). “Person employed in categorically funded programs or in programs operated by a district under contract are treated *like* temporary employees in certain respects . . .”. (*Bakersfield, supra*, 145 Cal.App.4th at p. 1281.) Other kinds of

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.

temporary employees include those referred to as “short-term temporary teachers” and “long term replacement teachers” are recognized as kinds of temporary employees. (*Id.*) The District further maintains that some of its temporary employees are filling positions for teachers who are on leave of absence, or are teachers in job share, or are teachers temporarily assigned as Elementary Learning Specialists.

21. Respondents offered only a rhetorical question in their closing brief: Where is the District’s evidence that these employees are categorically funded? Respondents failed to offer any evidence to shift the burden to the District, such as an employment contract, a District memorandum, or even some of the Respondents’ testimony about their perceived classifications, in order to establish Respondents’ own assertions of a misclassification. Despite the fact that the probationary classification is the “catch-all” status for teachers not properly classified as something else, Respondents have not met their burden to establish that the District misclassified them as temporary employees. Therefore, these employees’ re-employment rights are not a proper issue for determination in this proceeding

22. No certificated employee junior to any Respondent was retained to render a service which any of these Respondents are certificated and competent 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 9.

2. The services listed in factual finding number 4 are particular kinds of services that could be reduced or discontinued under section 44955.

3. Cause exists for the District to reduce or discontinue the particular kinds of services listed in factual finding number 4, which cause relates solely to the welfare of the District's schools and pupils within the meaning of section 44949, as set forth in factual finding numbers 1 through 11.

4. Cause exists to terminate the services of Respondents Kristina Biederman, Kate Borihane, Irene Carter, Susan Chang, Enoch Choi (.6 FTE), Elizabeth Davis (.5 FTE), Frank De Anda, Crystal Dira, Laurie Eyestone, Jennifer Fetchik, Kathryn M. Frick, Adam T. Fujimoto, Mary Thibodeaux Gaxiola (.4 FTE), Remy M. Hitomi, Wendy L. Hopkins, Thomas Hwang, Jill Igarashi, Linda Kim (.45 FTE), Rebecca King, Kathryn R. Lagerborg (.5 FTE), Lina Lahham, Mary Lee, Janet Liao (.8 FTE), Iris Magboo, Ryan Maine (.2 FTE), Bonnie P. Manuel, Jill Courtney Marquez (.4 FTE), Kimberly McNeil, Darcy Faye Milam (.4 FTE), Kellie Muragishi, Jennifer Najera, Kari L. Pierce, Whitney N. Prenger, Simone Sevilla, Sarah Sherman, Victoria Silcock, Amy Smith, Valeria Suarez-Moya, Kirsten Melissa Thibeault, Scott S. Usher (.6 FTE), Jennifer Galang Veneracion, Ramil Veneracion, Anne E. Wiencek, Susan Marie Willmering, and Julie Wong (.25 FTE), for the 2009-2010 school year due to the reduction of particular kinds of services, by reason of factual finding numbers 1 through 22, and legal conclusion numbers 1 through 3.

ORDER

The Accusation is sustained and the District may notify Respondents Kristina Biederman, Kate Borihane, Irene Carter, Susan Chang, Enoch Choi, Elizabeth Davis, Frank De Anda, Crystal Dira, Laurie Eystone, Jennifer Fetchik, Kathryn M. Frick, Adam T. Fujimoto, Mary Thibodeaux Gaxiola, Remy M. Hitomi, Wendy L. Hopkins, Thomas Hwang, Jill Igarashi, Linda Kim, Rebecca King, Kathryn R. Lagerborg, Lina Lahham, Mary Lee, Janet Liao, Iris Magboo, Ryan Maine, Bonnie P. Manuel, Jill Courtney Marquez, Kimberly McNeil, Darcy Faye Milam, Kellie Muragishi, Jennifer Najera, Kari L. Pierce, Whitney N. Prenger, Simone Sevilla, Sarah Sherman, Victoria Silcock, Amy Smith, Valeria Suarez-Moya, Kirsten Melissa Thibeault, Scott S. Usher, Jennifer Galang Veneracion, Ramil Veneracion, Anne E. Wiencek, Susan Marie Willmering, and Julie Wong, that their services will not be needed during the 2009-2010 school year due to the reduction of particular kinds of services.

Dated: May 7, 2009

MARK E. HARMAN
Administrative Law Judge
Office of Administrative Hearings