

**BEFORE THE
BOARD OF EDUCATION
CLAREMONT UNIFIED SCHOOL DISTRICT**

In the Matter of the Accusations Against:

**Certificated Employees of the Claremont
Unified School District Listed in
Appendix 1,**

Respondents.

OAH No. 2009030801

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 30, 2009, in Claremont, California.

Michael W. Garrison, Jr., Esq., O'Melveny & Myers LLP, represented the Claremont Unified School District (District).

Michael R. Feinberg, Esq., Schwartz, Steinsapir, Dohrman & Sommers LLP, represented the Respondents listed in Appendix 2. Of those Respondents, the following identified by corresponding numbers on Appendix 2 were present: 1, 4, 6, 10, 13, 14, 17, 19, and 22-25.

No appearance was made by or on behalf of the remaining Respondents listed on Appendix 1, except for Kerrie Austin, who briefly appeared before the Accusation against her was dismissed, as discussed in more detail below.

The record remained open until May 5, 2009, in order for the parties to submit closing argument by way of briefs. The briefs were timely submitted and marked for identification as follows: the District's, exhibit 26; Respondents', exhibit E. The record was closed and the matter was deemed submitted for decision on May 5, 2009.

FACTUAL FINDINGS

Parties and Jurisdiction

1. David Cash, Ed.D., the District's Superintendent, made and filed the Accusations in his official capacity.
2. The Respondents are all certificated, probationary District employees.

3. On March 5, 2009, the Board of Education of the District (Board) adopted Resolution No. 16-2009, which recommended the reduction or discontinuation of particular kinds of services for the 2009-2010 school year.

4. On or before March 15, 2009, the District served Respondents with written notice, pursuant to Education Code sections 44949 and 44955, that Respondents' services will not be required for the following school year. However, Respondents Austin, Cregg, Hartman, Leeper, Norin and O'Grady were provided with "precautionary" notices. The precautionary notices advised the recipients that the District believed their training and experience would allow them to be retained, but that they were still being provided with notices out of an abundance of caution in case the District's decision in that regard was not upheld.

5. Respondents were thereafter timely served with an Accusation and other required materials, and each timely submitted a written request for the hearing that ensued.

6. Respondents' counsel moved to continue the matter pursuant to Education Code section 44949, subdivision (e), in order for the parties to more fully present their closing arguments by way of briefs. The District did not oppose the motion and it was granted. Therefore, the statutory deadlines of Education Code sections 44949 and 44955 were extended as follows: the Proposed Decision shall be submitted by May 11, 2009, and the notice of termination shall be given by May 21, 2009.

The Board's Layoff Decision

7. Resolution No. 16-2009 specifically provides for the reduction or elimination of the following particular kinds of services:

<u>Services</u>	<u>Full-Time Equivalent (FTE) Positions</u>
1. K-6 Teaching Services (Reduce)	21.6 FTE
2. Nurse Services (Reduce)	1.0 FTE
=====	
TOTAL	22.6 FTE

8. The services identified in Resolution No. 16-2009 are particular kinds of services within the meaning of Education Code section 44955.

9. The decision to reduce the above-described particular kinds of services was based on a fiscal solvency problem created by the current state budget crisis, as well as financial problems caused by declining enrollment this past school year as well as an anticipated reduction in projected enrollment next school year. As a result, the District projects a deficit of over \$3 million for the 2009-2010 school year. (See Legal Conclusion 3.)

10. The reduction or elimination of the 22.6 FTE positions will not reduce services below mandated levels.

11. Prior to the adoption of Resolution No. 16-2009, the Board took into account all known positively assured attrition, including retirements and resignations. Devon Freitas, the District's Assistant Superintendent, Human Resources, was responsible for implementing the technical aspects of the layoff. Because of the uncertainty of the state budget crisis, there was less attrition this school year than in past years. Assistant Superintendent Freitas persuasively testified that she took such attrition into account as she became aware of it when implementing the technical aspects of the layoffs that led to the Board's adoption of Resolution No. 16-2009. Therefore, when the Board formally accepted the retirement or resignation of the few certificated employees who separated from the District after March 5, 2009, the Board had already taken that attrition into account for purposes of adopting Resolution No. 16-2009. For example, Condit Elementary School teacher Katherine Nelson tendered her resignation, effective June 20, 2009. The Board accepted her resignation at its meeting of March 19, 2009. Based on the persuasive testimony of Assistant Superintendent Freitas, it was established that she was already aware of Ms. Nelson's pending resignation and had taken it into account when implementing the technical aspects of the layoffs before the Board adopted Resolution No. 16-2009 on March 5, 2009. Therefore, the attrition related to Ms. Nelson's resignation had already been considered by the Board prior to adoption of Resolution No. 16-2009. It was not established that any positively assured attrition that affected the layoffs occurred between March 5, 2009, and March 15, 2009. (See Legal Conclusion 4.)

12. As she implemented the technical aspects of the layoff, Assistant Superintendent Freitas developed a seniority list which contains employees' seniority dates, credentials and authorizations. To assure the accuracy of that information, affected employees were notified in writing of the District's records of their seniority dates and credentials. The affected employees were allowed to either confirm the District's information or provide documentation for suggested corrections which, if confirmed by the District, was used to change their seniority and credential information on file.

13. On March 5, 2009, the Board adopted Resolution 19-2009, which established tie-breaking criteria to determine the relative seniority of certificated employees who had the same seniority date. The resolution provided that the order of termination shall be based on the needs of the District and its students, in order of importance, and to be applied in the following order of most important to less important: credentialing; teaching experience; education; and substitute teaching and tutoring experience. The application of the tie-breaking criteria was not at issue in this case.

14. In determining who would be subject to layoff, the District counted the number of reductions, and determined the impact on incumbent staff in inverse order of seniority. The District then determined whether the least senior employees held other credentials or were otherwise competent to render services being rendered by junior employees. The District determined that none of the certificated employees subject to layoff through the above-described process were able to “bump” junior employees.

15. On March 5, 2009, the Board adopted Resolution No. 13-2009, in which the Board determined to exempt less senior probationary employees from the order of certificated layoff who are qualified to provide educational service in Special Education, due to their “special training, experience, or credential that others with more seniority do not possess,” and on that basis, intended to deviate from the usual order of terminating certificated employees on the basis of seniority (known as “skipping”). In Resolution No. 13-2009, the Board designated Respondents Austin, Cregg, Hartman, Leeper, Norin and O’Grady as those less senior probationary employees it intended to retain on the basis of skipping. These are the employees who received the above-described precautionary notices. None of the other Respondents in this case are credentialed or competent to provide the special education services that are subject to the Board’s skipping resolution. The Board’s skipping decision is not at issue in this case.

Individual Respondents

16. Kerrie Austin. During the hearing, the District withdrew the Accusation against Respondent Austin.

17. Jeffrey Olson. The parties stipulated that Respondent Olson returned from separation of service from the District within 39 months, on or about September of 2008, and that he returned as a tenured certificated employee. For that reason, the District withdrew the Accusation against Respondent Olson during the hearing.

18. Mominani Garcia. The District’s seniority list reflects that Respondent Garcia has a seniority date of September 10, 2007. During the hearing, the parties stipulated that the seniority date for Respondent Garcia is September 1, 2007. It was not established that this change in Respondent Garcia’s seniority date prevents her from being laid off.

19. Skipped Employees. Respondents Austin, Cregg, Hartman, Leeper, Norin and O’Grady are certificated and competent to render the special education services that are the subject of the Board’s skipping resolution.

New Teachers to the District for 2008-2009

20. Teachers new to the District at the beginning of the 2008-2009 school year were given a seniority date of September 1, 2008. That date is in error because it was the Labor Day holiday and school was closed. Veteran teachers of the District were expected to report to school on September 2, 2008, which was the day before classes began.

21. On August 27 and 28, 2008, “New Teacher Staff Development” training sessions were provided to teachers new to the District. Assistant Superintendent Freitas testified that, to her knowledge, all but one of the new teachers attended. The new teachers who attended this training were paid a \$100 stipend. It was not established that this stipend was equivalent to the per diem rate that a teacher would receive under the District’s collective bargaining agreement (CBA) or was part of the compensation provided for by the CBA. It was not established that attendance at the new teacher training affected the teachers’ pay scale. While the District highly encouraged new teachers to attend this new teacher training, there were no consequences for a teacher who did not attend, and no such consequences were taken against the one new teacher who may not have attended. Under these circumstances, it was not established that this new teacher training was mandatory.

22. Respondents Gibb, Lee, Lord, McCabe, Murphy, Parker, Quesada-Diaz, Ramos, Riihimaki and Sampere are first-year probationary elementary school teachers who were given a seniority date of September 1, 2008. Given Assistant Superintendent Freitas’ testimony that, to her knowledge, all but one of the new teachers attended the new teacher training sessions on August 27 and 28, 2008, it was established that these Respondents attended those training sessions and were paid the \$100 stipend.

23. Respondents Gibb, Lee, Lord, McCabe, Murphy, Parker, Quesada-Diaz, Ramos, Riihimaki and Sampere contend that their seniority dates should be corrected to August 27, 2008, to reflect their attendance at the new teacher training. These Respondents concede that such a change in their seniority dates will not prevent them from being laid off, but rather, would affect their recall and rehire rights in the future. However, it was neither established that their attendance at the new teacher training was mandatory or that they were compensated for this attendance as part of their probationary service with the District. Therefore, there is no basis to correct their seniority dates as they suggest.¹ (See Legal Conclusion 5.)

Overall Findings

24. The Board’s decision to reduce or discontinue the above-described particular kinds of services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

25. The cause for reducing and/or eliminating the above-described particular kinds of services relates solely to the welfare of the schools in the District and its pupils.

26. No certificated employee with less seniority will be retained to render a service that Respondents are certificated and competent to render.

¹ The seniority date of September 1, 2008, is obviously in error, as discussed above, but neither the District nor Respondents requested that the seniority dates for the new teachers be adjusted to September 2, 2008, when all teachers reported for duty.

LEGAL CONCLUSIONS

1. All jurisdictional requirements of Education Code sections 44949 and 44955 were met. (Factual Findings 1-6.)

2. The party asserting a claim or making charges in an administrative hearing generally has the burden of proof. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155.) For example, in administrative hearings dealing with personnel matters, the burden of proof is ordinarily on the agency prosecuting the charges (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113); in personnel matters concerning the dismissal of a teacher for cause, the burden of proof is similarly on the discharging school district (*Gardner v. Commission on Prof. Competence* (1985) 164 Cal.App.3d 1035). As no other law or statute requires otherwise, the standard of proof in this case requires proof to a preponderance of the evidence. (Evid. Code, § 115.) In this case, the District has the burden of establishing by a preponderance of the evidence cause to give a final layoff notices to certificated employees given notice of this proceeding.

3. (A) Respondents contend that the District's layoff decision is invalid because part of the decision-making included the anticipated reduced revenue from declining enrollment but that the District did not undertake the process for laying off certificated employees based on a reduction in average daily attendance provided for in Education Code section 44955. As stated in *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 638-639, the reduction of particular kinds of services on the basis of financial considerations is authorized under Education Code section 44955, and, "in fact, when adverse financial circumstances dictate a reduction in certificated staff, section 44955 is the only statutory authority available to school districts to effectuate that reduction." Such a decision may be overruled if proven to be arbitrary or capricious, but a motivation to maintain flexibility in light of financial uncertainty is neither. (*Campbell Elementary Teachers Association, Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 808.)

(B) In this case, the District met its burden of establishing by a preponderance of the evidence that it proposes the reduction of particular kinds of services pursuant to Education Code section 44955. The instant layoff decision was caused by overall budget concerns and not a simple reduction in average daily attendance (ADA). Thus, the reason for the layoff, i.e. the reduction or elimination of particular kinds of services, was correctly stated in the pertinent notices. There is nothing in Education Code section 44955 prohibiting an expected decline in student attendance from being one factor of many in the overall decision to reduce or eliminate particular kinds of services. (Factual Findings 1-9.)

4. (A) Respondents next contend that the number of PKS reductions must be reduced because the District did not properly account for positively assured attrition. Respondents contend that such attrition should have been considered by the Board at the point of adopting Resolution No. 16-2009 or thereafter, but not before. In a PKS layoff such as in this case, a governing board need only consider positively assured attrition that

occurred prior to the March 15th layoff notice deadline, not thereafter. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 635.) There is no requirement that attrition be considered only at the time of the adoption of a resolution approving a PKS layoff.

(B) In this case, it was established that the Board considered all positively assured attrition that occurred prior to adopting Resolution No. 16-2009 on March 5, 2009. It was not established that any further attrition occurred after that date, and before March 15th, that had not been considered by the Board and taken into account for purposes of the layoffs. For example, it was established that Katherine Nelson's resignation had already been taken into account when Resolution No. 16-2009 was adopted. Since Ms. Nelson's resignation was accepted by the Board after the March 15th deadline, that separation was not technically positively assured attrition which the Board was required to consider. In any event, the Board had considered Ms. Nelson's retirement in determining the number of FTE positions subject to layoff. It was not established that any Respondent was prejudiced by the way in which the Board considered attrition in this case.

(C) Respondents correctly assert that, in a sense, the District asks that Assistant Superintendent Freitas be taken at her word that she accounted for positively assured attrition in an appropriate manner in making recommendations to the Board that led to the adoption of Resolution No. 16-2009. Yet, the District established by a preponderance of the evidence that she had done so, and Respondents failed to present persuasive evidence demonstrating the contrary. (Factual Findings 1-11.)

5. (A) Finally, Respondents Gibb, Lee, Lord, McCabe, Murphy, Parker, Quesada-Diaz, Ramos, Riihimaki and Sampere contend that their seniority dates should be corrected to an earlier date to reflect new teacher training they attended before classes started. Education Code section 44845 establishes a teacher's seniority date as "the date upon which he first rendered paid service in a probationary position." Neither that statute nor any case provide any further clarification for how to determine a teacher's first date of paid service. However, the majority of proposed decisions issued by administrative law judges in previous layoff cases have concluded that a first date of paid service cannot be based on attendance at training or orientation sessions held before the beginning of classes, when such attendance was not mandatory, and when those who attended were paid by a stipend rather than a *pier diem* amount reflective of their contract wages.²

² See, e.g., MARYSVILLE JOINT UNIFIED SCHOOL DISTRICT (2003) OAH No. 2003020673, page 4 (Hoover, ALJ); SEQUOIA HIGH SCHOOL DISTRICT (2003) OAH No. 2003010552, page 7 (Johnson, ALJ); SAN FRANCISCO UNIFIED SCHOOL DISTRICT (2003) OAH No. 2003020099, page 3 (Astle, ALJ); MONTEREY PENINSULA UNIFIED SCHOOL DISTRICT (2005) OAH No. 2005030357, page 5 (Owyang, ALJ). An administrative decision may not be relied upon as binding precedent unless it is designated as a precedent decision by the agency. (Gov. Code, § 11425.60.) Therefore, these Proposed Decisions, while persuasive, are not binding. While Respondents cited two other Proposed Decisions that held contrary to these, the ALJ deems the ones cited herein as constituting the majority of Proposed Decisions on this issue and as better reasoned.

(B) In this case, while the Respondents were highly encouraged to attend the new teacher training, their attendance was not mandatory; moreover, they were paid only a stipend that was not reflective of their wages set by their employment contracts. Therefore, these Respondents did not establish that their first date of paid service as a probationary employee was when they attended the new teacher training. (Factual Findings 20-23.)

6. The services identified in Resolution No. 16-2009 are particular kinds of services that can be reduced or discontinued pursuant to 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. Services will not be reduced below mandated levels. Cause for the reduction or discontinuation of those particular services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code sections 44949 and 44955. (Factual Findings 1-24.)

7. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. (Factual Findings 1-25.)

8. Pursuant to agreement of the parties, the Accusations against Respondents Austin and Olson are dismissed. (Factual Findings 16 and 17.)

9. Respondents Cregg, Hartman, Leeper, Norin and O'Grady are certificated and competent to render the special education services that are the subject of the Board's skipping resolution. Pursuant to Education Code section 44955, subdivision (d), those Respondents are not subject to being laid off. (Factual Findings 4, 15, and 19.)

10. No junior certificated employee is scheduled to be retained to perform services that a more senior employee is certificated and competent to render. (Factual Findings 1-26.)

ORDER

1. The Accusations against Respondents Austin and Olson are dismissed.
2. The Accusations against Respondents Cregg, Hartman, Leeper, Norin and O'Grady are dismissed.
3. The Accusations are sustained against the remaining Respondents. Notice shall be given to those Respondents that their services will not be required for the 2009-2010 school year, and such notice shall be given in inverse order of seniority.

Dated: May 8, 2009

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings

APPENDIX 1: List of All Respondents
Claremont Unified School District

1. Kerrie Austin
2. Deborah Barnes
3. Kristi Brandt
4. Kristina Carney
5. Cecilia Cerafice
6. Marlene Cianchetti
7. Jeanne Cregg
8. Kim Evans
9. Mominani Garcia
10. Aimee Gibb
11. Regina Hartman
12. Jodi Hassler
13. Lenora Hester
14. Denise Klinovsky
15. Carol Lee
16. Kara Leeper
17. Sacha Lord
18. Carolyn Magallanes
19. Nicole McCabe
20. Yvonne Murphy
21. Jennifer Norin
22. Ann O'Connor
23. Christina O'Grady
24. Jeffrey Olson
25. Jennifer Parker
26. Kelly Quesada-Diaz
27. Dalet Ramos
28. Dawn Riihimaki
29. Angela Ruiz
30. Paulina Sampere
31. Cyndi Simpson
32. Kristen VanKouwenberg
33. Kimberly Walters
34. Cynthia Wiedefeld

**APPENDIX 2: List of Respondents Represented by Mr. Feinberg
Claremont Unified School District**

1. Deborah Barnes
2. Kristina Carney
3. Cecilia Cerafice
4. Marlene Cianchetti
5. Kim Evans
6. Mominani Garcia
7. Aimee Gibb
8. Jodi Hassler
9. Lenora Hester
10. Denise Klinovsky
11. Carol Lee
12. Sacha Lord
13. Carolyn Magallanes
14. Nicole McCabe
15. Yvonne Murphy
16. Ann O'Connor
17. Jeffrey Olson
18. Jennifer Parker
19. Kelly Quesada-Diaz
20. Dalet Ramos
21. Dawn Riihimaki
22. Angela Ruiz
23. Paulina Sampere
24. Cyndi Simpson
25. Kristen VanKouwenberg
26. Kimberly Walters
27. Cynthia Wiedefeld