

BEFORE THE
GOVERNING BOARD OF
THE ROSEMEAD SCHOOL DISTRICT

In the Matter of the Accusation Against:

OAH No. 2011020276

9 Full Time Equivalent Certificated
Employees,

Respondents.

PROPOSED DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 14, 2011, in Rosemead, California.

Guy A. Bryant, Attorney at Law, represented the Rosemead School District (District).

Richard J. Schwab, Attorney at Law, represented Kreg Asplund, Jing Cai, Betty Durazo, Teresa Hess, Respect Ly, Dana Martin, Deborah Pettus, Conner Ryan, and Sonia Valencia (respondents), all of whom except Betty Durazo were present at the hearing.

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 2011-2012 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2011-2012 school year.

Oral and documentary evidence, and evidence by oral stipulation on the record, was received at the hearing. The record was closed and the matter was submitted for decision on April 14, 2010.

FACTUAL FINDINGS

1. Amy Enomoto-Perez, Ed.D., is the Superintendent of the District. Armida Carreon is the Senior Director of Human Resources and Operations for the District. Their actions were taken in their official capacity. Ms. Enomoto-Perez filed the Accusation.

2. Respondents are certificated employees of the District.

3. On March 3, 2011, the Board of Trustees (Board) of the District adopted Personnel Resolution No. 10-11/#1 reducing or discontinuing the following particular kinds of services (PKS) for the 2011-2012 school year:

<u>Services</u>	<u>FTE¹</u>
<u>Elementary Instruction at Grades K-6</u>	<u>5.0</u>
First grade teacher	1.0
Fourth grade teacher	1.0
Sixth grade teacher	1.0
English Language Development teacher	1.0
Preschool Special Day Class teacher	1.0
<u>Middle School Instruction at Grades 7-8</u>	<u>5.0</u>
Science teacher	1.0
Art teacher	1.0
Computer Education/Math Lab teacher	1.0
Industrial Arts/Technology/A.V.I.D./Yearbook Teacher	1.0
CORE-Language Arts/Social Science teacher	1.0
Total Reduction of Middle School Instruction and Support Programs	5.0
<u>Total Reduction of District Programs and Services</u>	<u>10.0</u>

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¹ Full-time equivalent position.

4. The Resolution established tie-breaker criteria for determining the relative seniority of certified employees with the same date of first paid service. The criteria, which are set forth in Exhibit A to the Resolution, provide that the order of layoff shall be determined according to the following criteria:

1. Greatest number of years of teaching with a credential issued with in the United States.
2. Breadth of credential authorization.
3. Advanced degrees in assignment or credential-related subject areas.
4. Greatest number of post-BA accredited college units on file with the District in assignment or credential-related subject areas.
5. Date and time employee signed first employment contract.

5. The Resolution exempted from layoff the services of certificated employees, regardless of seniority, who possess credentials that authorize services as Special Education Teachers, Grades K-8; Speech and Language Specialists; and Math Teachers. Respondents did not challenge this portion of the Resolution.

6. Subsequent to the adoption of Resolution No. 10-11/#1, the District reduced the number of FTEs being eliminated from 10.0 to 9.0.

7. Between March 8 and March 10, 2011, the District provided written notice to respondents, under Education Code sections 44949 and 44955,² that their services would not be required for the 2011-2012 school year. Each written notice set forth the reasons for the District's decision and noted that nine FTE positions would be reduced or discontinued.

8. On March 25, 2011, the District filed and thereafter served the Accusation and related documents on respondents. Respondents thereafter timely filed Notices of Defense, seeking a determination of whether cause exists for not reemploying them for the 2011-2012 school year.

9. All prehearing jurisdictional requirements have been met.

10. The services set forth in factual finding 3 are particular kinds of services that may be reduced or discontinued within the meaning of section 44955.

² All statutory citations are to the Education Code, unless indicated otherwise.

11. The Board took action to reduce the services set forth in factual finding 3 because of uncertainty surrounding future state funding. The decision to reduce services was not related to the capabilities and dedication of the individuals whose services are proposed to be reduced or eliminated. The decision to reduce the particular kinds of services is related solely to the welfare of the District and its pupils, and is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

12. At hearing, the District and respondent Durazo, through counsel, stipulated that Durazo's first date of paid probationary employment was September 1, 2003.

13. At hearing, through counsel, respondent Asplund disputed his seniority date of September 4, 1991. Asplund holds a clear single subject credential in art. He admitted that he contracted for temporary certificated employment as a long-term substitute on November 27, 1989, and that he did not work 75% of the 1989-1990 school year. He contended that he was rehired by the District for the 1990-1991 school year, and has been reemployed every school year since, but not under a temporary employment contract, and that due to his probationary rather than temporary status his seniority date should be September 4, 1990. The District contended that Asplund held only a provisional credential before the 1991-1992 school year, and that Asplund's first date of paid probationary employment for purposes of seniority is September 4, 1991, after his credential status changed from provisional to clear. The parties agree that the issue of respondent's seniority date is not dispositive of the District's right to lay off respondent in these proceedings.

14. At hearing, through counsel, respondent Hess disputed her seniority date of September 5, 2001. Hess holds a clear single subject credential in industrial/tech, with CLAD. She admitted that she contracted for probationary certificated employment with a provisional credential in June 1997, and that her employment in that capacity commenced on September 9, 1997. She contended that her probationary status should have resulted in a seniority date of September 9, 1997, regardless of the fact that she did not obtain a clear credential until after that date. The District contended that Hess had a provisional credential when hired, that time served on a provisional credential does not count toward seniority, and that Hess's first date of paid probationary employment for purposes of seniority is September 5, 2001. The parties agree that the issue of respondent's seniority date is not dispositive of the District's right to lay off respondent in these proceedings.

15. Except as set forth in factual findings 13 and 14, there was no challenge to the order of seniority on the seniority list.

16. The District properly considered all known attrition, resignations, retirements, and requests for transfer in determining the number of layoff notices to be delivered to employees by March 15, 2011.

17. The District did not retain any certificated employee junior to respondents to render a service that respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists under sections 44949 and 44955, by reason of factual findings 1 through 17.

2. The services listed in factual finding 3 are determined to be particular kinds of services within the meaning of section 44955, by reason of factual findings 3 and 9.

3. Cause exists under sections 44949 and 44955 for the reduction of the particular kinds of services set forth in factual finding 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual findings 1 through 17.

4. Cause exists to terminate the services of respondents, by reason of factual findings 1 through 17, and legal conclusions 1 through 3.

5. While time served under a provisional credential does not count toward tenure, i.e., permanent status (§ 44911), a probationary employee, even one with a provisional credential, does accrue seniority based on that employee's first paid date of probationary employment. (*California Teachers Assn. v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135, 152-158.) Therefore, respondent Asplund's seniority date is September 4, 1990, and respondent Hess's seniority date is September 9, 1997, by reason of factual findings 13 and 14, respectively.

ORDER

The District may notify respondents Kreg Asplund, Jing Cai, Betty Durazo, Teresa Hess, Respect Ly, Dana Martin, Deborah Pettus, Conner Ryan, and Sonia Valencia that their services will not be required for the 2011-2012 school year due to the reduction of particular kinds of services.

Dated: April 27, 2011

HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearings