

BEFORE THE
GOVERNING BOARD OF THE
TORRANCE UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of:
Certain Certificated Teachers Employed by
the Torrance Unified School District,

Respondents.

OAH No. 2011030898

PROPOSED DECISION

Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 20, 2011, in Torrance, California.

Parker & Covert LLP, by Spencer E. Covert, Attorney at Law, represented the Torrance Unified School District (District).

Trygstad, Schwab & Trygstad, by Daniel J. Kolodziej, Attorney at Law, represented all respondents listed on Appendix A attached hereto, except for Derek Hoffman and Denise Leonard. Respondents Hoffman and Leonard were present at the hearing and represented themselves. All other respondents were present at the hearing except Sara Gill, Rachel Kimmel, and Candy Mintz-Moreno.

Evidence was received by stipulation, documents, and testimony. During the course of the hearing, several revisions were made to the District's Certificated Layoff Worksheet (Exhibit 13). At the conclusion of the hearing on April 20, 2011, pursuant to agreement by the parties, the record was held open until April 22, 2011, to allow the parties to submit a final version of the Certificated Layoff Worksheet showing all changes made during the hearing. On April 22, 2011, the Office of Administrative Hearings received a revised Certificated Layoff Worksheet, which was marked and admitted as Exhibit 16. The record was closed and the matter was submitted on April 22, 2011.

FACTUAL FINDINGS

1. George Mannon, Ed.D., is the Superintendent of the District. Mario Liberati, Senior Director of Human Resources for the District, and his staff were responsible for implementation of the technical aspects of the layoff.

2. Respondents in this proceeding are certificated employees of the District.

3. On March 7, 2011, the Governing Board of the District adopted Resolution No. 1-10/11 that proposed a layoff of 48.0 full-time equivalent (FTE) certificated positions. Specifically, Resolution No. 1-10/11 provided for the reduction or elimination of the following particular kinds of services:

<u>Service</u>	<u>FTE Reduction</u>
Multiple Subject Classroom Teachers (K-6)	48.0

4. On or before March 15, 2010, the District served 57 certificated employees, including Respondents, a written notice that it had been recommended that notice be given to them pursuant to Education Code sections 44949 and 44955 that their services would not be required for the 2011-2012 school year. Each written notice set forth the reasons for the recommendation. Each notice also notified the employee of his or her right to request a hearing to determine if there is cause for not reemploying him or her for the ensuing school year, and that a written request for a hearing was due by March 22, 2011.

5. Six certificated employees did not request a hearing and thereby waived their right to a hearing and cannot contest the recommendation of their non-reemployment by the District. (Ed. Code, § 44949, subd. (b).) The six employees are: Katherine Johnson, Lisa Kim, Timothy Magnus, Amber Martin, Michelle Senechal, and Cheryl Thom.

6. Respondents timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year. The Superintendent's designee made and filed Accusations against Respondents. On March 25, 2011, the Accusations with required accompanying documents were timely served on Respondents. A Joint Notice of Defense was filed on behalf of Respondents. All prehearing jurisdictional requirements have been met.¹

¹ Respondent Anissa Shbaro submitted an untimely request for hearing on April 1, 2011. Consequently, she was not served with the Accusation packet on March 25, 2011. At the hearing, the District did not object to Anissa Shbaro's inclusion as a respondent in this proceeding and stipulated that she may contest the recommendation of her non-reemployment by the District for the 2011-2012 school year.

7. The Governing Board took action to reduce or discontinue the particular kinds of services set forth in Factual Finding 3 because of the State's on-going budget crisis and the District's need to reduce or discontinue services in order to maintain a balanced budget and provide essential services.

8. The District determined the number of employees to layoff based on the District's projected budget situation for 2011-2012 and its projected need for teachers in grades K-5 for the 2011-2012 school year. The District currently employs 355 teachers in grades K-5. The District obtained projected enrollment data for grades K-5 from its 17 elementary schools. Based on the projected enrollment data received, the District projected that, as of March 7, 2011, it would need 307 teachers in grades K-5 for the 2011-2012 school year, which results in the 48.0 FTE reduction proposed in Resolution No. 1-10/11. At the hearing, the District clarified that it seeks authorization for a reduction of 47.0 FTE positions, based on further analysis that the District will need 308 teachers, not 307, for grades K-5 for the 2011-2012 school year.

9. Respondents contend the District's analysis resulting in the proposal to reduce 47.0 FTE positions of multiple subject classroom teachers in grades K-6 is faulty, arbitrary, and capricious, because it did not include analysis of projected enrollment data for grade 6. This contention is not persuasive. The District's identification of grade 6 teachers for layoff is not improper merely because grade 6 enrollment data was not analyzed. Resolution No. 1-10/11 authorizes a reduction of multiple subject classroom teachers in grades K-6. The holder of a multiple subject credential is authorized to teach in grades K-6. Dr. Liberati's testimony established that grade 6 teachers were noticed for layoff on the basis of their multiple subject credential and seniority. Respondents who are grade 6 teachers were identified for layoff because they have less seniority than other multiple subject, K-5 classroom teachers.

10. On March 9, 2010, the Governing Board, in Resolution No. 2-10/11, adopted tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date, based solely on the needs of the District and its students. Resolution No. 2-10/11 sets forth Criteria One through Ten. Starting with employees specified in Criterion One (i.e., possession of a BCLAD certificate for the K-12 level by March 15, 2011), if a tie exists with respect to employees with the same first date of paid service, the tie will be broken by applying the criteria, Two through Nine, in numerical order, until the tie is broken. If employees are still tied after Criterion Nine, then the tie will be broken by Criterion Ten (i.e., using the last four digits of the employee's social security number with the high four digit number receiving the higher ranking).

11. The tie-breaker criteria approved in Resolution No. 2-10/11 is similar to the criteria used by the District in the previous year's layoff process except for Criterion Nine, which was added this year. Criterion Nine gives preference to certificated employees who possessed a certificate in any one of the following seven areas by March 15, 2011: California English Language Development Test (CELDT), Cognitively Guided Instruction (CGI), Gesell Test, Mickelson ExxonMobil Teachers Academy, Reading Recovery, Sally

Ride Science Academy, and Sheltered Instruction Observation Protocol (SIOP). Dr. Liberati and his staff worked with elementary principals and the senior director of elementary education to develop Criterion Nine. The District determined that the seven certificates listed in Criterion Nine involved training that is important to meeting the needs of the District and its students. The District further determined that the training for these certificates was available to teachers District-wide. There was no evidence that the District's inclusion of Criterion Nine in the tie-breaker criteria was arbitrary or capricious.

12. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments and locations, and credentials and authorizations. Certificated employees were given the opportunity to verify their seniority date and credential information.

13. The District used the seniority list to develop a proposed layoff and "bumping" list of the least senior employees currently assigned in the particular kinds of services being reduced. The District then determined whether the least senior employees held credentials in another area and were entitled to "bump" other employees. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority. The District then checked the credentials of affected individuals and whether they could "bump" other employees.

14. The District properly considered all known attrition, resignations, and retirements in determining the actual number of necessary layoff notices to be delivered to its employees. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627.) Further, the District agrees it will consider any further positively assured attrition prior to sending final layoff notices. Contrary to Respondents' contention, the District is not required to consider employees on leave of absence as positively assured attrition for the 2011-2012 school year. (*Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796, 810.) An employee whose leave of absence has expired has the right to be reinstated in the position held by him or her at the time the leave of absence was granted. (Ed. Code, § 44973.)

15. The District rescinded the layoff notices and withdrew the Accusation against Respondents Jacqueline Ryan, Jennifer Nakano, Christina Killeen, Wendy Writer, Sara Gill, Claudine Valot, and Kimberly Gauna. Further, the District agreed to change the seniority dates of certain of these respondents. The seniority date of Respondent Jennifer Nakano was changed to May 20, 2002. The seniority date of Respondent Christina Killeen was changed to April 25, 2002. The seniority date of Wendy Writer was changed to April 15, 2002. The seniority date of Sara Gill was changed to March 25, 2002.

16. Two Respondents, Allison Marra and Michelle Martinez, raised claims that they have the seniority and credentials to "bump" into positions held by junior employees. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond*

Unified School District (1975) 13 Cal.3d 469.) Under Education Code section 44955, subdivision (c), a school district is required to "make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render."

17. (A) Respondent Allison Marra has a seniority date of February 3, 2003. She is CLAD certified and holds a multiple subject credential, a pupil personnel services (PPS) credential, and a master's degree in counseling. She received her master's degree in 2003 and her PPS credential in December 2008. Marra has worked in the District as a classroom teacher since 2003. Currently she is assigned as a long-term substitute. Marra contends she has the seniority and qualifications to displace or "bump" a junior employee currently assigned to a counselor position. On the Certificated Seniority List (Exhibit 5), the employees listed as numbers 63 and 64 are counselors with a seniority date of September 4, 2007.

(B) As set forth in the District's official job description for counselor (Exhibit 14), the District's minimum qualifications for the position include, but are not limited to, "[r]ecent training and/or experience in pupil personnel work," a valid PPS credential, and a master's degree. Respondent Marra meets the requirement of a PPS credential and a master's degree. However, she does not have recent training or experience in pupil personnel work. Marra has no experience working in a counselor position. The counseling functions she has performed have been incidental to her classroom teaching assignments, such as being asked by her colleagues to speak to a child because her school does not have full-time counselors, or presentations she has made through her participation in the Student Success Team (SST) at her school. Marra completed 650 hours of counseling, but those hours were part of the "field practice" requirements for obtaining her PPS credential. (See, Cal. Code Regs., tit. 5, § 80632.2, subd. (b).) Marra testified she has received training from her master's degree program, from the SELPA so she could attend IEP meetings as the administrative designee, and from her participation in the special education team at her school. Marra's testimony was insufficient to establish she has recent training in pupil personnel work. Therefore, Respondent Marra does not have the qualifications to "bump" a junior employee currently assigned to a counselor position. Moreover, the District's decision not to reassign Respondent Marra to an existing counselor's position is reasonable. The two employees, numbers 63 and 64, have experience working in counselor positions, which Respondent Marra does not. It is within the District's discretion not to replace an existing, experienced counselor with an employee with no counselor experience.

18. (A) Respondent Michelle Martinez has a seniority date of September 6, 2005. She holds a multiple subject credential with a supplemental authorization in introductory English. Martinez received a layoff notice because she is being bumped from her position by a more senior teacher with credentials to teach the position. Martinez contends that she should be allowed to bump a junior teacher currently assigned to teach English in high school. Employee number 78 on the Certificated Seniority List (Exhibit 5) is a high school English teacher who holds a single subject credential in English and has a seniority date of September 4, 2007.

(B) Respondent Martinez has the seniority and qualifications to "bump" into the high school English position currently assigned to employee number 78. By her credential and supplemental authorization, Martinez is authorized to teach English in departmentalized classes in grades 9 and below. (Ed. Code, § 44256, subd. (b).) The District, however, has decided not to allow Martinez to bump into a high school position because Martinez is limited, by her credential, to teaching only at the ninth grade level. The District's high schools cover grades 9-12. The District has determined it cannot create a master schedule where a teacher is assigned only one grade level of a subject. The District needs high school teachers who can teach at different grade levels, so that it can meet the needs of its high school students, who require various courses to satisfy graduation and college admissions requirements.

(C) The District has correctly identified Respondent Martinez as an employee subject to layoff. A school district generally has wide discretion to make assignments and reassignments. (*Thompson v. Modesto City High School District* (1977) 19 Cal.3d 620, 623-624.) "In determining whether the decision of a school board is reasonable as distinguished from fraudulent, arbitrary, or capricious, its action is measured by the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject." (*Campbell v. Abbott* (1978) 76 Cal.App.3d 796, 808.) Reasonable minds can differ regarding the rationale and need for high school teachers who can teach more than one grade level. The District presented a reasonable rationale for not allowing Respondent Martinez to bump to a high school position. There was no evidence presented that the District acted in an arbitrary and capricious manner with respect to Respondent Martinez, and in the absence of such evidence, its determination should not be disturbed. (*Ibid.*)

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met.

2. The services identified in Resolution No. 1-10/11 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 school 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, pursuant to Education Code sections 44949 and 44955, to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services described in Factual Finding 3.

5. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

6. Respondents contend that any precautionary layoff notices should be dismissed to the extent they are in excess of the 48.0 FTE reduction authorized by Resolution No. 1-10/11. This contention is not persuasive. The purpose of the initial notice of non-reemployment is to notify employees of the probability that their services will not be required for the ensuing school year so that they may consider looking elsewhere for employment. (*Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648, 653.) In order to ensure that all employees who potentially may be affected by a layoff receive proper notice, it is often necessary for a school district to notice more employees than will actually be laid off. Such broad noticing may be necessary when issues of seniority, bumping, etc. have not been finally determined by the statutory deadline for issuing layoff notices. In this case, there is no evidence the District will eliminate more positions than those authorized in Resolution No. 1-10/11.

ORDER

1. Notice may be given to certificated employees occupying 47.0 full-time equivalent positions that their services will not be required for the 2011-2012 school year because of the reduction and discontinuance of particular kinds of services. Such notice may be given to the Respondents listed on Appendix A attached hereto, except for Kimberly Gauna, Sara Gill, Christina Killeen, Jennifer Nakano, Jacquelyn Ryan, Claudine Valot, and Wendy Writer.

2. Notice shall be given in inverse order of seniority.

Dated: May ___, 2011

ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings

APPENDIX A

**OAH No. 2011030898
Hearing Date: April 20, 2011**

List of Respondents

Ahmed, Rubina
Arima, Keri
Chin, Allen
Christian, Christine
Conway, Sharla
Doty, Lucila
Esquibel, Sylvie
Evans, Holly
Flanders, Robert
Gauna, Kimberly**
Gendrano, Jamie
Gill, Sara**
Grossi, Carol
Hayden, Jacqueline
Hegge, Laurene
Hoffman, Derek
Inouye, Stephanie
Jamile, Jeffrey
Jennewein, Steve
Kasper, Karen
Kawazoe, Judy
Kendall, Keri
Killeen, Christina**
Kimmel, Rachel
King, Andrea
King, Sean
Kroesen, Scott
Leach (Drozda), Cynthia
Leader, Shawna
Leonard, Denise
Maeda, Lanae
Marra, Allison
Martinez, Michelle
Mintz-Moreno, Candy
Mosley, Rocio

Nakano, Jennifer**
Owens, Debra
Pages, April
Palmieri, Denise
Perez, Lori
Poling, Amie
Ruth, Maria
Ryan, Jacquelyn**
Schneider, Kelly
Shbaro, Anissa
Shortell, Michelle
Skari, Sherry
Tyrrell, Melissa
Valot, Claudine**
Writer, Wendy**
Yacoob, Tasneem

**Accusation withdrawn,
layoff notice rescinded

