

BEFORE
THE GOVERNING BOARD OF
THE BERKELEY UNIFIED SCHOOL DISTRICT

In the Matter of the Non-Reemployment of
Certain Certificated Employees:

OAH No. 2008020506

POOJA GOVIL, CAROLINE KIM,
ROGER A. SMITH-TRUSS, JAIME L. VINES,
JILL WIMMER, KAREN L. CARTER,
LILA G. KEENE, RICHARD A. KLEINE,
ROBERT G. MacCARTHY, DAMION L. McNEIL,
ZOE KALKANIS, JAMES R. PAWLAK,
CORINA ALEMAN TOPPING, RICHARD S. CONN,
JAMIE KNIGHT, SUN HYUNG LEE,
ANGELA PRICE, ERICA RAINS-VARGAS,
CORY W. NAKAMOTO, BRENDA WONG,

Respondents.

PROPOSED DECISION

On April 16, 2008, in Berkeley, California, within the Berkeley Technology Academy of the Berkeley Unified School District at 2701 Martin Luther King, Jr., Way, Berkeley, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

John R. Yeh, Attorney at Law, of Miller, Brown, Dannis, Attorneys at Law, 71 Stevenson Street, 19th Floor, San Francisco, California 94105, represented William Huyett, Superintendent, Berkeley Unified School District (Complainant).

Stewart Weinberg, Attorney at Law, of Weinberg, Roger and Rosenfeld, 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091, represented respondents.

On April 16, 2008, the parties submitted the matter and the record closed.

FACTUAL FINDINGS

1. On April 2, 2008, in his official capacity, Complainant William Huyett, Superintendent, Berkeley Unified School District (the District), made and filed the accusation regarding Respondents Pooja Govil, Caroline Kim, Roger A. Smith-Truss, Jaime L. Vines, Jill Wimmer, Karen L. Carter, Lila G. Keene, Richard A. Kleine, Robert G.

MacCarthy, Damion L. McNeil, Zoe Kalkanis, James R. Pawlak, Corina Aleman Topping, Richard S. Conn, Jamie Knight, Sun Hyung Lee, Angela Price, Erica Rains-Vargas, Cory W. Nakamoto and Brenda Wong (Respondents).

2. The twenty respondents in this matter are fully credentialed and certificated employees of the District, except for Respondent Angela Price who currently works as a counselor with a "waiver." Twelve respondents serve respectively under a multiple subject credential,¹ while each of three respondents holds a respective single subject credential in art.² One respondent³ holds both a multiple subject credential and a single subject credential in art. Five respondents hold a pupil service credential, or have acquired a waiver, to serve as counselors⁴ in District schools.

3. On or before March 12, 2008, the District's Assistant Superintendent for Human Resources, Dr. Lisa Udell, presented the District's Governing Board with a recommendation that the District give notice that particular kinds of services (PKS), then offered through the District, be reduced or eliminated by the District for the ensuing school year (2008-2009).

4. On March 12, 2008, the District's Governing Board unanimously adopted Resolution number 08-36, which adopted the Assistant Superintendent's recommendation.

The resolution recites that, pursuant to Education Code section 44955, it has become necessary for the District to reduce and/or to discontinue, no later than the beginning of the 2008-2009 school year, particular kinds of services in the form of full time equivalent (FTE) certificated positions as follows:

| Particular Kinds of Services | Number of Full Time Equivalent |
|---------------------------------|--------------------------------|
| <u>Administration</u> | <u>5.0</u> |
| Manager, Special Education | 1.0 |
| Principal on Special Assignment | 1.0 |
| Independent Study Coordinator | 1.0 |
| High School Vice Principal | 1.0 |
| Middle School Vice Principal | 1.0 |
| <u>Counselors</u> | <u>11.0</u> |

¹ Pooja Govil, Caroline Kim, Roger A. Smith-Turss, Jaime L. Vines, Jill Wimmer, Karen L. Carter, Lila G. Keene, Richard A. Kleine, Robert G. Maccarthy, Damion L. McNeil, Zoe Kalkanis, and James R. Pawlak.

² Corina Aleman Topping, Richard S. Conn, and Jamie Knight.

³ Zoe Kalkanis.

⁴ Sun Hyung Lee, Angela Price, Erica Rains-Vargas, Cory W. Nakamoto and Brenda Wong.

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|---|-----|
| Counselors | 9.0 |
| (Including counselors serving under a pupil personnel services credential with specialization in School Social Work (Calif. Code Regs., title 5, § 80049.1) | |
| College Advisors | 2.0 |

| | |
|---|----------------|
| <u>Teachers on Special Assignment</u> | <u>26.26</u> |
| Literacy/Reading Recovery/Writing | 15.21 |
| ULSS (Universal Learning Supports and Services) | 0.65 |
| Math | 5.8 |
| BTSA/PAR | 1.0 |
| Two Way Immersion | 0.2 |
| Teacher Leaders BHS | 2.2 |
| Counseling Liaison | 0.2 |
| School Lunch Initiative Edible School Yard | 2.2 |
| English Language Learner | 0.6 |
| <u>Enrollment Adjustment Elementary</u> | <u>2.0</u> |
| <u>Middle School Math Enhancement</u> | <u>3.8</u> |
| <u>Enrollment Adjustment B-Tech</u> | <u>2.0</u> |
| <u>Art</u> | <u>2.0</u> |
| Total positions eliminated or reduced | 52.06 |

5. By individual letters, dated March 13, 2008, the Assistant Superintendent dispatched preliminary notices⁵ to a number of FTE position holders, including each respondent, that the District's Governing Board had an intention to reduce or to discontinue the particular service provided by each person who received the notice. Hence, due to the prospective elimination or reduction of the particular kind of service now rendered to the District, each of the respondents learned the District would not reemploy the named individuals in the certificated positions each had worked over the past school year.

Also the letter, dated March 13, 2005, conveyed to each respondent that no certificated employee of the District having less seniority than each respective respondent would be retained for the 2008-2009 school year to render a service that each respondent was credentialed and competent to render to students under the District's competency criteria. The letter had attached to it the Board's Resolution No. 08-36, a copy of a form titled "Request for Hearing" as well as copies of pertinent statutory provisions.

⁵ "Notice of Non-Reemployment."

6. The written preliminary notice to respondents from the Assistant Superintendent and the District's resolution set out legally sufficient reasons of the District's Board's intent to eliminate the course as taught by respondents.

7. Respondents each timely requested in writing a hearing to determine whether or not cause exists for not reemploying each respondent for the ensuing school year.

8. The Superintendent timely served upon each respondent the Accusation, dated April 2, 2008, and related documents. Each respondent filed a timely notice of defense.

9. All prehearing jurisdictional requirements were met.

10. Dr. Lisa Udell, in her capacity as the District's Assistant Superintendent (Dr. Udell), appeared at the hearing. She provided credible and persuasive evidence.

Dr. Udell established that the prospective elimination of particular kinds of services for the 2008-2009 school year directly results from a prospective shortfall in money for the District's budget. Also, the prospective elimination of particular kinds of service is due to the declining pupil census for the district for the ensuing school year. In order to partially aid the District in crafting a reasonable budget for the ensuing school year, the District's Superintendent recommended that certain certificated positions be eliminated due to lack of funds.

11. The Superintendent further established that on learning that the District was required to initiate layoff proceedings for teacher employees of the District, the Assistant Superintendent, with her staff, effected reasonable and lawful steps to develop the District's seniority list for the District's teachers.

On March 13, 2008, the Assistant Superintendent caused to be placed in the mail all notices to affected permanent and probationary teachers that their services would not be needed by the District for the next school year. But, at the hearing of this matter, the Assistant Superintendent noted that her office had erred in placing the name of Respondent Angela Price onto the District's seniority list and sending her notice of her right to participate in the instant proceeding as a respondent because Respondent Price actually worked as a counselor under a contract the designated her as being a temporary certificated employee for the current school year.

Respondents' Contentions

12. Certain respondents aver that the District incorrectly applied seniority dates for certain respondents by failing to account for earlier "start dates" for employment with the District. The respondents, who are counselors, assert that each of them reported to work to attend orientation meetings about nine days before other certificated employees began work for the school year. Such respondents contend that the seniority list must be adjusted to reflect for each of them an earlier first day of paid service to the District.

Respondent Angela Price avers that the District erred when it presented her with a contract to work as a temporary employee for the current school year. Respondent Price contends that the decision in *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Distr.* (2006) 145 Cal.App.4th 1260, required the District to classify her as a probationary teacher so that she has standing as a respondent in this matter.

Respondent Sun Hyung Lee contends that she was misclassified when she began work in August 2007. Rather than now being a probationary one teacher, Respondent Lee avers that the District should have recognized her first year as a classified employee during the 2006-2007 school year in her placement on the seniority list.

And Respondent Poola Govil avers that because she attended a team meeting of fellow teachers on a date before the day specified for all teachers, with multiple subject credentials, to report to work that she should have an earlier first day of paid service to the District than the date that is printed on the District's most recent seniority list.

Respondents' contentions are without merit and are rejected.

Individual Respondents

a. Ms. Brenda Wong

13. Respondent Brenda Wong (Respondent Wong) offered evidence at the hearing of this matter.

Respondent Wong holds a pupil personnel services credential. She works as a high school counselor at Berkeley High School. The District's seniority list shows Respondent Wong to have a first date of paid service to the District as August 28, 2006. Respondent Wong holds status as a probationary certificated employee to the District.

14. Respondent Wong was not persuasive that Tuesday, August 15, 2006, was her first day of paid service with the District. She recalled that her supervisor, Vice Principal Rory Bled, directed her to report to the school site to prepare for counseling work on a date that was nine days before teachers arrived at the work site. But, Respondent Wong possessed no written document, which was issued by the District, that demonstrated a requirement for her to have a first day of paid service as a probationary employee.

On cross-examination, Respondent Wong acknowledged that she signed a contract with the District that reflected her handwriting. The contract was titled "Offer of Temporary Employment and Contract." The contract shows that on "8/26/06" Respondent Wong's "employment with the District" will commence for the 2006-2007 school year.

15. Respondent Wong provided no competent evidence that the District has retained any teacher junior to her for which Ms Wong possesses a credential and is currently competent to teach.

b. Mr. Cory W. Nakamoto

16. Respondent Cory W. Nakamoto (Respondent Nakamoto) offered evidence at the hearing of this matter.

Respondent Nakamoto holds a pupil personnel services credential. He works as a high school counselor at Berkeley High School. The District's seniority list shows Respondent Nakamoto to have a first date of paid service to the District as August 28, 2006. Respondent Nakamoto holds status as a probationary certificated employee to the District.

17. Respondent Nakamoto arrived at the work site prescribed by the high school vice principal on a date that was nine days before other District teachers reported to work. But he offered no document that was issued by the District that required him to have a first date of paid service to the District on August 15, 2006.

18. Respondent Nakamoto provides no competent evidence that the District has retained any teacher junior to him for which Mr. Nakamoto possesses a credential and is currently competent to teach.

c. Ms. Erica Rains-Vargas

19. Respondent Erica Rains-Vargas (Respondent Rains-Vargas) presented evidence at the hearing of this matter.

Respondent Rains-Vargas holds a pupil personnel services credential. She works as a high school counselor at Berkeley High School. The District's seniority list shows Respondent Rains-Vargas to have a first date of paid service to the District of August 27, 2007. Respondent Rains-Vargas holds status as a probationary certificated employee to the District.

20. Respondent Rains-Vargas was not persuasive that her first day of paid service to the District was January 7, 2007, as a high school counselor in a probationary employee status. Rather on that date in January 2007, Respondent Rains-Vargas became a temporary employee because she was retained to fill a position that was vacant due to the absence of a permanent employee of the District.

21. Respondent Rains-Vargas arrived at a work site prescribed by her supervisor, Amy Fry, on a date that was nine days before District teachers reported to work. But she

offered no document that was issued by the District that required her to have a first date of paid service to the District on August 14, 2007.

22. Respondent Rains-Vargas provides no competent evidence that the District has retained any teacher junior to her for which Ms Rains-Vargas possesses a credential and is currently competent to teach.

d. Ms. Angela Price

23. Respondent Angela Price (Respondent Price) offered evidence at the hearing of this matter.

Respondent Price holds a position as a college advisor at Berkeley High School. She serves in a classification as a counselor under a "waiver," as she does not possess a pupil personnel credential. Her first day of paid service to the District was August 27, 2007.

24. Respondent Price recalled that her supervisor, Vice Principal Rory Bled, directed her to report to the school site to prepare for counseling work on a date that was nine days before teachers arrived at the work site. But, Respondent Price possessed no written document, which was issued by the District, that demonstrated a requirement for her to have a first day of paid service as a probationary employee earlier than August 27, 2007.

On cross-examination, Respondent Price acknowledged that she signed a contract with the District that was titled "Offer of Temporary Employment and Contract." The contract shows that on "8/27/2007" Respondent Price began employment with the District for the 2007-2008 school year. The contract classified Respondent Price as a temporary employee of the District. Respondent Price holds her current position due to the leave of absence taken by Ms. Jennifer Antonuccio, who is a counselor.

25. Respondent Price provides no competent evidence that the District has retained any teacher junior to her for which Ms. Price possesses a credential and is currently competent to teach.

e. Ms. Sung Hyung Lee

26. Respondent Sung Hyung Lee (Respondent Lee) offered evidence at the hearing of this matter.

Respondent Lee holds a pupil personnel services credential as well as a social work authorization. She works as a counselor at the middle school level (grades 6 through 8). The District's seniority list shows Respondent Lee to have a first date of paid service to the District as August 27, 2007. Respondent Lee holds status as a certificated employee to the District and notes her seniority status as being in the range of probationary one.

27. On August 22, 2007, which was nine days before the date teachers reported for the school year, Respondent Lee reported for staff orientation meetings in accordance with direction from her supervisor. (Respondent worked only four days during the orientation phase and she notes that she "owes" five days, which she will perform at the end of the year to earn the stipend that specifies money beyond the contract salary payable to her.) But, Respondent Lee possessed no written document, which was issued by the District, that demonstrated a requirement for her to have a first day of paid service as a probationary employee earlier than August 27, 2007.

28. In August 2006, the District hired Respondent Lee to work as a classified employee whereby she performed services as an instructional specialist, and after the passage of four months her classified employee position changed to health educator. She began that school year on August 27, 2006, which was the first day that students arrived for school. Respondent Lee observed that a credential is not required to work as an instructional specialist. She did not know whether a pupil service credential is required to work as a health educator.

When the District's seniority list for the current school year was distributed among certified employees to review for accuracy, Respondent Lee did not complain to the District that she believed that her first date of paid service to the District was one year earlier than the date of August 27, 2007.

29. Assistant Superintendent Udell established that the positions of health educator and instructional specialist, which were positions held by Respondent Lee in the 2006-2007 school year, were classified employee positions for which a credential was not required to hold the jobs.

30. Respondent Lee provides no competent evidence that the District has retained any teacher junior to her for which Ms. Lee possesses a credential and is currently competent to teach.

f. Ms. Pooja Govil

31. Respondent Pooja Govil (Respondent Govil) offered evidence at the hearing of this matter.

Respondent Govil holds a multiple subject credential with a CLAD certificate. She works as a fourth grade teacher at Berkeley Arts Magnet school. The District's seniority list shows Respondent Govil to have a first date of paid service to the District as August 27, 2007. Respondent Govil holds status as a certificated employee to the District and notes her seniority status as being in the range of probationary one.

32. On August 17, 2007, Respondent Govil attended a staff meeting for fourth grade and fifth grade teachers. The meeting was prompted by the direction of the school principal that a team of four teachers, which included Respondent Govil, to attend the

meeting. She was paid for that single day of team meetings, which flowed from her signing of a time sheet for the work, but she noted that the stipend was in excess of the salary specified in the contract that she entered into with the District for the 2007-2008 school year.

33. Respondent Govil was not persuasive that before the date of the hearing in this matter the District had failed to provide her with a seniority list that reflected the correct date for her first day of paid service to the District. She did not show by corroborating evidence that the District's seniority list, which was sent to her by mail, had no date for her first day of paid service.

District's Reasonable Basis to Proceed

34. During the current school year, the Board has found that the District faces a prospective budget shortfall in that the amount of funding from the State of California may be markedly reduced for the upcoming school year. Hence, the Board has determined that sufficient money is not available to operate the same number of teacher and administrator positions and programs during the ensuing school year so that the District must prospectively reduce or eliminate a number of FTE of particular kinds of services, including the positions held by respondents.

35. No competent and credible evidence establishes that as a result of the proposed elimination of the full time equivalent positions respectively held by respondents, the District will retain any teacher who is junior to respondents to perform services for which respondents have been certificated or found to be competent to teach in such FTE positions for the next school year.

36. The recommendation of the Superintendent and the Board's decision to eliminate or discontinue a total of 52.06 FTE positions, including the positions held by each respondent, were neither arbitrary nor capricious. Rather, the Superintendent's recommendation and the Board's decision were within the proper exercise of the District's discretion.

37. The District's proposed elimination or discontinuation of a number of FTE positions, including the positions respectively held by respondents, for the ensuing school year is related to the welfare of the District and its overall student population.

38. The Board determined that it will be necessary, due to the elimination of particular kinds of services, to decrease the number of teachers before the beginning of the next academic year. The Board lawfully directed the notification to respondents of the elimination of the certificated positions held by each respondent.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955.

2. The District provided all notices and other requirements of Education Code sections 44949 and 44955. This conclusion of law is made by reason of the matters set forth in Factual Findings 1 through 9, inclusive.

3. Evidence Code section 664 establishes a presumption that the action or official duties of a public entity, such as the District and its governing board, have been regularly performed. Respondents offer no evidence to rebut the presumption that the District has properly performed actions related to the procedures that seek the non-reemployment of respondents.

4. Education Code section 44955 establishes, in part, that the order of teacher layoff must occur "in inverse of the order in which [the employee teachers] were employed, as determined by the board in accordance with the provisions of [Education Code section] . . . 44845. . . ." And, Education Code section 44845, in part, states: "Every probationary or permanent employee employed . . . shall be deemed to have been employed on the date upon which [s]he first rendered paid service *in a probationary position.*" [Emphasis added.]

5. Respondents, who are employed as counselors for the District, proclaimed that they had earlier first dates of paid service than shown on the seniority. They asserted that each was called into work nine days before other teachers reported for the subject school year. But Assistant Superintendent Udell offered a copy of the contract between the District and the Berkeley Federation of Teachers for the years July 1, 2005 through June 30, 2008. The District's form of contract for counselors established that counselors are paid to perform services over 184 school days. But teachers are paid for the provision of service for nine days that may be rendered either before the beginning of the school year or after the final day of the school year or even during the mid-year winter break. (The stipend paid to each teacher for the nine days worked beyond the length of the contract is a monetary amount calculated by dividing the prescribed gross salary by 184, which represents the length of the term of the contract for counselors.) Respondents unpersuasively argued that by attending the meetings of counselors on dates in August 2006 and August 2007, which occurred about nine days before the contract-prescribed first day of the school year that each affected respondent-counselor acquired a first date of paid service to the District, which were dates earlier than as reflected on the existing District seniority list. But, the District's Assistant Superintendent was persuasive that the stipend paid to counselors for nine "per diem" days was not a part of the contract salary paid to counselors for services performed during the regular school year. Dr. Udell noted that counselors were not required by the District as a term of the contract of employment to attend training or team meetings specified by individual principals or supervisors. Those counselors were paid a special stipend, rather than being compensated the regular wage because the time of the orientation training was not part of certificated employees' salaries under the District's employment contract.

Respondent Govil was not persuasive that her attendance at a staff meeting on a date before other teachers, who held multiple subject credentials, reported for work for that school

year bestowed on Respondent Govil first performed services for the District earlier than the seniority list indicated for her as probationary employee of the District.

No respondent, who is referred to in this Legal Conclusion, offered sufficient evidence to alter that District's seniority list so as to grant such respondent a first day of paid service to the District in a probationary employee status that is contrary to the date set out for such person on the District's seniority list. The dates on which the subject respondents reported on training dates or team meeting dates were not part of the contract with the District. Rather the subject certificated employees arrived at work sites at the direction of individual supervisors, who exercised discretion to enhance employee development.

6. Respondent Price, who holds the position of college advisor, is viewed as being a teacher on special assignment. Assistant Udell notes that Respondent Price is currently classified as a temporary certificated employee. Respondent Price holds her current position due to the leave of absence taken by Ms. Jennifer Antonuccio, who is a counselor. Assistant Udell credibly asserted that Respondent Price, as a temporary employee, had her name mistakenly placed on the seniority list as a respondent who had a statutory right to participate in the hearing of this matter. The contract, signed by Respondent Price on August 28, 2007, in four places on the contract described Respondent as "a temporary employee" or "temporary certificated employee."

Respondent Angela Price cites *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Distr.* (2006) 145 Cal.App.4th 1260, 1287. Respondent Price argued that the District's position at the hearing of this matter that she was a temporary employee and therefore she was ineligible to participate in the layoff action was erroneous. Respondent Price proclaimed that despite language in the contract that she signed, which designated her as a temporary employee, she had a date in early August 2007 as a probationary teacher. But, Respondent Price did not offer adequate evidence that the District erred in designating her as being a temporary employee who provided service as a counselor, and more specifically as a college advisor, in place of an employee who was on a leave of absence. Complainant, through Assistant Superintendent Udell, demonstrated that the District's determination as to classification of individual teachers as temporary, although Ms. Price was incorrectly provided with a notice of hearing and inadvertently placed on the District's seniority list, was lawful and correct.

Respondent Price has no proper standing to challenge the District's seniority list because during the current school year she holds a position as a temporary certificated employee who serves in the position of a District employee who is away on a leave of absence.

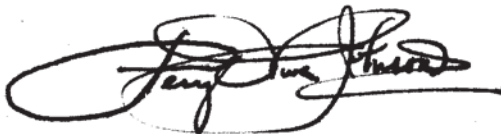
7. Pursuant to Education Code sections 44949 and 44955 cause exists to give respondents notice of the discontinuation of full-time equivalent positions in the particular kinds of services rendered by respondents, by reason of the matters set out in Factual Findings 10 and 11, 34 to 36 inclusive and 38.

8. The discontinuation of the subject particular kinds of service provided by each respondent relates solely to the welfare of the District and its students within the meaning of Education Code sections 44949 and 44955, by reason of the matters in Factual Finding 37.

ORDER

1. The Accusation served on each respondent is sustained.
2. Final notice may be given to Respondents Pooja Govil, Caroline Kim, Roger A. Smith-Truss, Jaime L. Vines, Jill Wimmer, Karen L. Carter, Lila G. Keene, Richard A. Kleine, Robert G. MacCarthy, Damion L. McNeil, Zoe Kalkanis, James R. Pawlak, Corina Aleman Topping, Richard S. Conn, Jamie Knight, Sun Hyung Lee, Angela Price, Erica Rains-Vargas, Cory W. Nakamoto and Brenda Wong that their services will not be required for the 2008-2009 school year because of the reduction or discontinuance of the particular kinds of services by the District.

DATED: May 2, 2008



PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings