

BEFORE THE
GOVERNING BOARD
TEHACHAPI UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

Certain Probationary and Permanent
Certificated Employees of the Tehachapi
Unified School District,

Respondents.

OAH Case No. 2012040142

PROPOSED DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 1, 2012, in Tehachapi.

The Tehachapi Unified School District was represented by Christopher W. Hine, Attorney at Law, of Schools Legal Services of Bakersfield.

The following 16 respondents were represented by Amy M. Cu, Attorney at Law, of the law firm of Schwartz, Steinsapir, Dohrmann and Sommers, L.L.P., of Los Angeles: Ellen Brockelsby, Jennifer Butler, Cherie Chavez, Amber Dickinson, Heather Gibson, Julie Hammer, Chris Hood, Renee Jacobi, Daena Kirk, Paula Macon, Dan Moon, Pat Snyder, Amy Trillo, Mary Villarruel, Adam Whittier, and Kendra Winchell.

Respondents Guadalupe Cowan, Lauren Dubrow, Rebecca Li, Shelly Marks, and Anne Wood were not present or represented at the hearing.

At the conclusion of the hearing, the Administrative Law Judge requested that the attorneys for the parties file written argument or briefs on certain issues raised during the hearing. On May 3, 2012, the attorney for the Tehachapi Unified School District and the attorney for certain respondents filed post-hearing briefs, which were marked as Exhibits 11 and E, respectively.

Oral and documentary evidence having been received and arguments heard and filed, the Administrative Law Judge submitted this matter for decision on May 3, 2012, and finds as follows:

FACTUAL FINDINGS

1. The Administrative Law Judge takes official notice that, on April 13, 2012, the Accusation was made and filed by Lisa Gilbert in her official capacity as the District Superintendent of the Tehachapi Unified School District, State of California (District).

2. Respondents, and each of them, are probationary or permanent certificated employees of the District and are employed as teachers.

3. The District is a unified school district in Kern County comprised of one comprehensive high school, a continuation high school, one junior high school, and three elementary schools. The District serves and educates approximately 4,500 pupils from kindergarten through twelfth grade.

4. (A) On or before March 9, 2012, the Superintendent of the District recommended to the Governing Board of the District that certain programs or services performed by certificated employees be reduced or eliminated starting with the 2012-2013 school year.

(B) On March 13, 2012, the Governing Board adopted Resolution Number 21MAR12 and resolved to reduce or discontinue particular kinds of services by 30.60 full-time equivalent (FTE) positions. In addition, the Governing Board resolved that the Superintendent be directed to determine which certificated employees may not be required for the 2012-2013 school year as a result of this reduction in services and to give those certificated employees notice no later than March 15, 2012, of the Superintendent's recommendation that they not be reemployed, as required by the Education Code.

5. On March 13 and 14, 2012, pursuant to Resolution Number 21MAR12, and the provisions of Education Code sections 44949 and 44955, the Superintendent gave written preliminary notices by personal service to approximately 25 probationary and permanent certificated employees that their services will not be required for the ensuing 2012-2013 school year commencing on July 1, 2012, because the Governing Board had determined it was necessary to decrease the number of certificated employees of the District. Entitled "Notice of Recommendation Not to Reemploy," and signed by the Superintendent on March 13, 2012, the preliminary notices informed probationary and permanent certificated employees of their right to request a hearing to determine whether there is cause for not reemploying them for the ensuing school year, and included copies of the Governing Board's resolution, relevant sections of the Education Code and Government Code, a Request for Hearing Form, and a Waiver of Hearing form.

6. The District obtained the initials of most of the affected probationary and permanent certificated employees on the preliminary notices and also prepared Proofs of Service to demonstrate that the Notice of Recommendation Not to Reemploy were personally served upon them. On each Proof of Service, the affected certificated employee signed the

Acknowledgement of Service, acknowledging his or her receipt of the preliminary notice before March 15, 2012.

7. The District's preliminary notice of layoff dated March 13, 2012, was sufficient under Education Code sections 44949 and 44955 in providing written notice to probationary and permanent certificated employees that their services will not be required for the ensuing school year. No claims or complaints were raised at the hearing by any certificated employee or respondent that the preliminary notice was deficient in any respect.

8. Subsequently, all individual certificated employees served with the preliminary notices filed Requests for Hearing, except for certificated employee Elizabeth Santi who filed a Waiver of Right to Request a Hearing. On March 21, 2012, a Joint Request for Hearing was filed on behalf of 24 certificated employees who had been given preliminary notices, requesting a hearing to determine whether there is a cause for not reemploying them for the 2012-2013 school year.

9. On April 9, 2012, the District and respondents filed a joint motion to continue the hearing that was scheduled for April 19, 2012, at 1:30 p.m., on the grounds that the District's counsel had a conflict in his schedule and the parties needed more than one-half of a day to complete the hearing. The parties' motion was granted and the hearing was re-scheduled to May 1, 2012.

10. (A) On or about April 19, 2012, the Superintendent timely served those permanent and probationary certificated employees who had requested a hearing, with an Accusation, Statement to Respondent, copies of pertinent sections of the Government Code and Education Code, a blank Notice of Defense form, and Notice of Hearing (Accusation package).

(B) On or about April 19, 2012, the District completed Proofs of Service regarding service of the Accusation package. Those certificated employees who were served with the Accusation package signed the Proofs of Service, acknowledging their receipt of the Accusation package, including the Notice of Hearing. All certificated employees who were served with the Accusation package filed individual Notices of Defense. Respondents are those certificated employees who filed Notices of Defenses, acknowledging their receipt of the Accusation, requesting a hearing to determine if there is cause not to employ them for the ensuing school year, and objecting to the Accusation.

(C) On or about April 20, 2012, counsel for certain respondents filed a Joint Notice of Defense on behalf of 21 respondents, requesting a hearing to determine whether there is cause for not reemploying them for the 2012-2013 school year, objecting to the Accusation, and raising affirmative defenses. All prehearing and jurisdictional requirements have been met.

11. On March 9, 2012, pursuant to Resolution Number 23MAR12, the Governing Board resolved and took action to reduce or discontinue certain particular kinds of services or programs offered by the District for the 2012-2013 school years in the following FTE positions:

<u>Services</u>	<u>FTE</u>
Self-Contained Instruction K-6	10.00
K-6 Title I Funded Teaching Position	1.00
K-6 Categorically Funded Intervention Specialist	1.00
 <u>District</u>	 <u>FTE</u>
SPED—Special Day Class	2.00
Physical Education	2.40
 <u>Departmentalized Instruction Middle School</u>	 <u>FTE</u>
Careers	1.00
Cinematography	0.20
English Language Development	0.40
Opportunity	0.60
Science	0.20
Jacobson Engineering & Math	0.20
Spanish	1.00
Yearbook	0.20
History/Social Studies	0.20
 <u>Departmentalized Instruction High School</u>	 <u>FTE</u>
CTE (Career Technical Education)	1.00
Language Arts	1.40
Drama (VAPA-Visual Arts Performing Arts)	0.60
Math	0.80
Science	1.60
History	2.00
Spanish	1.00
Academic Support	0.60
Driver's Education/Health	0.20
 <u>Continuation High School</u>	 <u>FTE</u>
Elective	1.00

The reduction or discontinuance of the particular kinds of services set forth hereinabove constitute a total of 30.60 FTE.

12. The services set forth in Finding 11 above are particular kinds of services performed by certificated employees of the District which may be reduced or discontinued within the meaning of Education Code section 44955. The determination of the Governing

Board to reduce or discontinue these services is within its sound discretion and not arbitrary or capricious. The reduction or discontinuance of these particular kinds of services is related to the welfare of the District and its pupils and is necessary for the District. Following the reduction or discontinuance of these particular kinds of services, the District will still be able to provide mandated and essential services.

13. (A) Counsel for certain respondents has contended that the Governing Board's resolution to reduce particular kinds of services was legally insufficient under Education Code section 44955 to provide proper notice to respondents and certificated employees of the reason or necessity to terminate them from their certificated employment. Counsel pointed out that there is no recitation in the resolution of any reason, such as a decline in average daily attendance or an economic or budgetary shortfall, for this reduction of particular kinds of services. The contention is not persuasive in the circumstance of this matter.

(B) Education Code section 44955, subdivision (b), provides, in pertinent part, that, whenever a particular kind of service (PKS) is to be reduced or discontinued not later than the beginning of the following school year, and when in the opinion of the governing board of the school district it shall have become necessary by reason of the reduction or discontinuance of a particular kind of service to decrease the number of permanent employees in the school district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the school district at the close of the school year.

(C) A school district may reduce services within the meaning of Education Code 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.) As long as there is a change in the method of teaching or in the particular kind of service in teaching a subject, a particular kind of service provided in excess of any statutorily mandated minimum can be reduced or eliminated pursuant to section 44955. (*Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 811-812.)

(D) In *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, the Court of Appeal, First District, held that a school district may consider its financial circumstances in deciding whether to reduce or discontinue particular kinds of service. However, the court in the *San Jose Teachers* case did not decree that a governing board is required to state or provide in its resolution the specific reasons for a PKS layoff. Education Code section 44955 makes no mention of the specific grounds that a governing board of a school district must use to implement a PKS reduction. Under section 44955, the governing board must only determine that the PKS reduction is necessary. Here, the preliminary notice given to respondents stated the opinion of the Governing Board that it is necessary to decrease the number of certificated employees and thus set forth the statutory ground in section 44955. (*San Jose Teachers Assn. v. Allen, supra*, 144 Cal.App.3d at 632.) Based on the Governing

Board's resolution and the contents of the preliminary notices, the District gave adequate notice to respondents of the necessity for the instant PKS layoff under Education Code sections 44949 and 44955.

14. As established by the testimony of the District's Director of Personnel and the District's exhibits, the chief business officer recommended to and conferred with the Superintendent as to how many certificated employees or teachers in the different services or categories that the District needed to layoff for the reduction or discontinuance of particular kinds of services. The District also prepared and/or updated a seniority list, or First Date of Employment Ranking (Exh. 5), of certificated employees of the District, which identifies in inverse order certificated employees by their first dates of paid service, names, contract status, credentials and authorizations, school sites, and current teaching or class assignments. The Superintendent and the personnel director worked with the Tehachapi Association of Teachers to make the final determinations as to which teachers were needed to be laid off under the Governing Board's resolution. The District did not determine to skip any certificated employees in this layoff proceeding.

Withdrawals of Accusations

15. (A) Prior to the hearing, the District rescinded the preliminary notices served upon respondents Sean Clifton and Jeanene Trauger. Clifton also filed a Waiver of Hearing.

(B) At the outset of the hearing, and pursuant to a stipulation, the District rescinded the preliminary notices and withdrew the Accusation against respondents Cherie Chavez and Julie Hammer.

16. Based on Findings 15(A) – (B) above, respondents Clifton, Trauger, Chavez, and Hammer cannot be given final layoff notices and will continue to be employed with the District in the next school year.

Tie-Breaking Criteria

17. Under Resolution Number 21MAR12 and pursuant to Education Code section 44955, the Governing Board adopted a tie-breaking resolution that stated "the order of termination and as between employees who first rendered paid service to the District on the same date shall be based solely on the needs of the District and the students thereof." The Governing Board further resolved that the specific criteria to be used in determining this need shall be from the July 1, 2011 Collective Bargaining Agreement between the District and the Tehachapi Association of Teachers as follows:

- Area of Credential;
- Flexibility for staffing because of multiple credentials;
- Major and minor fields of study;

- Experience in subject area of the credential;
- Evaluation.

The Governing Board further resolved that these criteria shall be applied in determining the order of termination and reemployment as well.

18. Education Code section 44955, subdivision (b), provides, in pertinent part, that the services of no permanent employee may be terminated while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render. As between employees who first rendered paid service to the school district on the same date, section 44955, subdivision (b), further requires the governing board to determine the order of termination solely on the basis of the needs of the school district and its students. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with section 44959, 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 the other employees in the group.

19. (A) Counsel for certain respondents argued, in part, that the District failed to prepare a document setting forth the relative ranking or order of termination among certificated employees who first rendered paid service on the same dates based on the tie-breaking criteria.

(B) Here, it was not established that the District determined the order of termination of certificated employees who first rendered paid service on the same dates. The Governing Board adopted tie-breaking criteria that were based on and meant to implement the needs of the District and its students, but the evidence did not demonstrate that the District actually applied tie-breaking criteria to determine the order of termination of certificated employees with the same first dates of paid service. The Director of Personnel testified how she applied or would apply the tie-breaking criteria but no evidence was presented to show that the tie-breaking criteria were applied to any specific employees to formulate an order of termination. The District presented the First Date of Employment Ranking without having applied the tie-breaking criteria and listed employees with the same first dates of paid service in an undetermined random order. Because the evidence did not demonstrate that the tie-breaking criteria were applied to any group of certificated employees with the same first dates of paid service, the District cannot be said to have determined the order of termination on the basis of its needs and those of its students under Education Code section 44955, subdivision (b).

20. For example, respondent Heather Gibson (8-17-06) holds a clear multiple subject credential and is a first grade teacher. Gibson is one of approximately 18 permanent certificated employees who share the first date of paid service of August 17, 2006. Prior to being hired by the District six years ago, Gibson worked for one year as a full-time, credentialed elementary teacher in the Muroc School District in eastern Kern County. She

advised the District that she had one extra year of teaching experience and asserts that the District has not given her credit under the tie-breaking criteria for her one year of experience in the subject matter of her credential. Respondent Gibson's claim has merit, for the District did not produce a document or any evidence showing the order of termination for certificated employees having the first date of paid service of August 17, 2006, or any other first date of paid service, after application of the tie-breaking criteria. Thus, the evidence did not show that the District accorded Gibson any credit for having another year of experience in the subject matter of her credential.

Drama/Visual Arts Performing Arts

21. (A) Under Resolution Number 21MAR12, the Governing Board resolved to reduce the particular kind of service of departmentalized high school instruction in drama or visual arts performing arts by 0.6 FTE. The District has determined that permanent certificated employee Lara Crowe (8-20-07) should be reassigned from her position at Tehachapi High School. Crowe holds a clear single subject credential in English and supplementary authorization in English as a Second Language. She teaches two periods of drama, one period of advanced drama and technical theatre, and two periods of English. The District proposes to achieve the 0.6 FTE reduction in drama or visual arts performing arts by eliminating Crowe's three drama classes and then reassigning her. Crowe was not served with a preliminary notice and is not subject to layoff.

(B) Counsel for certain respondents argued that certificated employee Crowe or her position should not be subject to reduction or elimination because the Governing Board resolved to reduce "Drama (VAPA)", or drama/visual arts performing arts, and Crowe teaches drama and not visual arts or performing arts. Counsel's argument is not persuasive, for the testimonial evidence presented at the hearing established that drama is part of the high school's visual arts performing arts department and Crowe is a member of both the visual arts performing arts department and the English department. The District may eliminate Crowe's drama classes and seek to reassign her pursuant to the reduction of particular kinds of services for high school drama.

English/Bumping Issue

22. With the discontinuance of Crowe's drama classes, the District has proposed to reassign her to teach English at the middle school with her single subject credential in English and to have Crowe bump respondent Ellen Brockelsby (8-20-07), a middle school language arts teacher.

23. In general, a teacher with seniority rights whose position is discontinued has the right to transfer to a continuing position which the teacher is certificated and competent to fill. In doing so, the senior teacher may displace or bump a junior employee who is currently in that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.)

Bumping thus refers to the process by which a school district identifies an employee who is more senior and is competent to perform a particular kind of service or to teach a specific subject and determines to move that senior teacher into the position of a junior teacher in that service or subject matter and thereby displacing or bumping the junior teacher.

24. Respondent Ellen Brockelsby (8-20-07) is a language arts teacher at the middle school. She holds a clear multiple subject credential in general subjects but also has supplemental authorizations in English and social science. Her supplemental authorization in English allows Brockelsby to teach language arts at the middle school level or through ninth grade. She teaches four periods of language arts and one period of honors language arts.

25. Here, with her single subject credential in English and experience teaching high school English and drama, Crowe is certificated and competent to teach the middle school language arts classes currently provided by respondent Brockelsby. However, the evidence did not show that Crowe is more senior than Brockelsby. Both of them have the same first date of paid service with the District (8-20-07). Because the District did not conduct a tie-breaking analysis using the tie-breaking criteria, the evidence did not establish an order of termination as between Crowe and Brockelsby who share the same first date of paid service. As such, Crowe is not senior to respondent Brockelsby and cannot bump Brockelsby from her middle school position.

26. (A) Parenthetically, the District also planned to have respondent Brockelsby then bump respondent Daniel Moon (8-20-07), a social studies teacher at the middle school, because Brockelsby has a supplemental authorization in social science. However, Brockelsby and Moon likewise share the same first date of paid service and the District did not determine an order of termination as between them by applying its tie-breaker resolution. The evidence thus did not establish that Brockelsby is a more senior certificated employee than Moon and she cannot bump Moon from his middle school position.

(B) In his Post-Hearing Brief, the District's counsel now concedes that Brockelsby cannot bump Moon if the District accepts Moon's newly acquired credential. The evidence showed that, as of March 15, 2012, Moon, like Brockelsby, held a clear multiple subject credential with a supplemental authorization in social science. On or about March 13, 2012, when he was given a preliminary notice, Moon advised the District that he had completed the requirements for issuance of a clear single subject credential in social science. However, the evidence did not show that respondent Moon filed documentary proof of having attained a clear single subject credential with the District by March 15, 2012. Since he did not file his newly acquired single subject credential with the District or county office of education by March 15, 2012, Moon is not entitled to receive seniority, tie-breaking, or authorization credit for the newly acquired credential. (See Ed. Code, § 44949; *Campbell v. Abbott* (1978) 76 Cal App.3d 796, 814-815.) Subsequently, and after March 15, 2012, Moon did obtain documentary proof from the Commission on Teacher Credentialing that he was issued his single subject credential on March 14, 2012.

(C) Further, if Brockelsby were allowed to bump Moon, the District planned to have Moon with his newly acquired single subject credential in social science bump respondent Paula DiGerolami-Macon (8-20-08). DiGerolami-Macon is a social science teacher at the high school. She teaches four periods of government and one period of world history. She holds a clear single subject credential in social science. DiGerolami-Macon is junior to Moon, having a later first date of paid service with the District. However, even assuming that Brockelsby could even bump Moon, Moon cannot bump DiGerolami since he did not file or register his newly acquired credential with the District or county office of education by March 15, 2012, as stated above.

27. Based on Findings 17 – 26 above, the District’s bumping plan involving Crowe and respondents Brockelsby, Moon, and DiGerolami-Macon must fail under Education Code section 44955. Respondents Brockelsby, Moon, and DiGerolami-Macon cannot be given final layoff notices and the Accusation against them should be dismissed.

High School and Middle School Social Science

28. Under Resolution Number 21MAR12, the Governing Board resolved to reduce the particular kinds of services of departmentalized high school instruction in history by 2.0 FTE and departmentalized middle school instruction in social science by 0.2 FTE.

29. (A) Certificated employee William Smith (1-21-88) is a social science teacher at Tehachapi High School. He holds clear single subject credentials in social science and English. He teaches three periods of economics, one period of U.S. history, and one period of geography. Smith has given notice that he is retiring from the District at the end of this school year.

(B) Respondent Amber Dickinson (8-20-08) is a social science teacher at the high school. She holds a clear single subject credential in social science. She teaches two periods of world history and three periods of geography and careers. Dickinson is the most junior of high school social science teachers in the District.

(C) For the 2.0 FTE reduction in high school history, the District has determined to achieve this reduction by not filling the position to be left vacant by the retirement of Smith and by laying off respondent Dickinson. The District’s determination is reasonable and not arbitrary or capricious.

30. (A) Certificated employee Rosalie Kuskey (8-20-07) is a middle school social science teacher. She holds a clear single subject credential in social science. Kuskey has given notice that she is retiring from the District at the end of the current school year.

(B) For the 0.2 FTE reduction in middle school history and social science, the District has determined to achieve this reduction by reassigning an undetermined teacher who teaches one period (0.2 FTE) of social science into another department. Another

unnamed permanent certificated employee will be reassigned to fill Kuskey's position which will be vacant due to her retirement. The District does not plan to layoff another respondent or another permanent or probationary certificated employee due to the reduction of the particular kind of service of middle school history or social science.

31. Counsel for certain respondents contended that the District will not be able to provide mandated services in social science or history at the high school and/or middle school levels due to the retirements of Smith and Kuskey. However, this contention was not supported by any evidence that the District is reducing services in social science or history in high school or middle school below mandated levels. In any case, the District is expected to proceed with this year's layoff in good faith. It was not established that the District's decision to reduce the particular kind of service of social science or history in the secondary schools is fraudulent or arbitrary and capricious. (See *Campbell Elementary Teachers Assn., Inc. v. Abbott*, *supra*, 76 Cal.App.3d at 807-808.)

Attrition and Self-Contained Instruction: K-6th

32. Under Resolution Number 21MAR12, the Governing Board decreed that self-contained instruction from kindergarten through grade 6 should be reduced by 10.00 FTE by the next school year. The District provided preliminary notices to 11 elementary teachers and failed to give a preliminary notice to Linda Quiroga (8-29-06). To correct the over-noticing of one elementary teacher and the failure to give a preliminary notice to Quiroga, the District agreed to withdraw the preliminary notices issued to respondents Julie Hammer (8-17-06) and Cheri Chavez (8-17-06). In addition, elementary teacher Elizabeth Santi (10-1-10), who is the most junior elementary teacher, was given a preliminary notice but did not request a hearing. The District plans to layoff the following elementary teachers who hold multiple subjects credentials: Rene Jacobi (8-17-06), Heather Gibson (8-17-06), Kendra Winchell (8-17-06), Daena Kirk (8-17-06), Jennifer Butler (8-20-07), Amy Trillo (8-20-07), and Rebecca Li (9-8-08).

33. (A) On or about March 5, 2012, the District received notices of retirement from the following six, full-time elementary teachers, each of whom holds a multiple subject credential: (1) Cherise Powell, a first grade teacher; (2) Claudia Thompson, a kindergarten teacher; (3) Carol Rapp, a second grade teacher; (4) Lora Minton, a sixth grade teacher; (5) Linda Bereman, a kindergarten teacher; and (6) Sharon Rhodes, a fourth grade teacher. With the retirement of these six elementary teachers, the District will have six self-contained K-6 classrooms without teachers for next year. In other words, the retirement of these six elementary teachers means that the number of certificated teachers in the District's self-contained, K-6 classrooms will be reduced by 6.0 FTE due to positively assured attrition before the next school year.

(B) The District, however, has elected not to take into account this positively assured attrition due to the retirements of these six elementary teachers, and thus has not mitigated the need to reduce or discontinue all of the 10.0 FTE of self-contained classroom

teachers by reassigning any of the certificated and competent respondents to their positions or classrooms.

34. In this proceeding, counsel for certain respondents has contended the District was required to take into account the retirements of the elementary teachers in determining how many certificated employees must be noticed for termination pursuant to the reduction of particular kind of services in self-contained classrooms under Education Code section 44955. Counsel's contention has merit.

35. (A) Education Code section 44955 provides that the governing board of a school district may terminate the services of certificated employees when, in the opinion of the governing board, it is necessary by reason of a PKS reduction to decrease the number of certificated employees. As a general rule, a school district need not consider attrition occurring between the date of the preliminary notice (March 15) and the final notice (May 15) in determining the number of certificated employees to be terminated by reason of a PKS reduction or discontinuance. (*San Jose Teachers Assn. v. Allen, supra*, 144 Cal.App.3d at 634-636.) It is within a school district's discretion to determine the extent to which it deems a reduction of services necessary and proper and such decision is made at the time of the final notice. (*San Jose Teachers Assn. v. Allen, supra*, 144 Cal.App.3d at 636.)

(B) On the other hand, a governing board must account for positively assured attrition such as voluntary resignations and retirements which occur during the so-called computation period. (*Santa Clara Federation of Teachers v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 847.) A school district must consider in a PKS reduction such evidence of positively assured attrition for the ensuing school year which was known to the governing board when it made its preliminary determinations on March 15. (*Lewin v. Bd. of Trustees of Pasadena Unified School Dist.* (1976) 62 Cal.App.3d 977, 982-983.)

36. Here, the evidence demonstrated that the District received notice on or about March 5, 2012, that certificated employees and self-contained classroom teachers Powell, Thompson, Rapp, Minton, Bereman, and Rhodes were retiring from their employment with the District at the end of the current school year. As such, the District knew of the positively assured attrition represented by these six retirements when it issued the preliminary notices to respondents and other certificated employees on or before March 15, 2012. By not taking into account this positively assured attrition that was known by March 15, 2012, the District seeks to layoff more than the number of self-contained classroom teachers that the Governing Board has resolved is necessary under this reduction of particular kind of services.

37. Based on Findings 32 – 36 above, the following six respondents, who hold multiple subject credentials and are self-contained classroom teachers in kindergarten through sixth grade, must not be given a final layoff notice due to positively assured attrition: Rene Jacobi (8-17-06), Heather Gibson (8-17-06), Kendra Winchell (8-17-06), Daena Kirk (8-17-06), Jennifer Butler (8-20-07), and Amy Trillo (8-20-07).

High School Career Technical Education

38. Under Resolution Number 21MAR12, the Governing Board resolved to reduce departmentalized instruction in high school in career technical education (CTE) by 1.0 FTE. According to the Director of Personnel, the District determined that CTE teacher Julie Heaslet is entitled to bump respondent Chris Hood because he is a less senior certificated employee in the CTE department and that Hood should be laid off to accomplish the 1.0 FTE reduction of CTE services.

39. (A) Respondent Chris Hood (10-3-05) holds a clear single subject credential in business and teaches virtual enterprises, computer applications and keyboarding, web design, and accounting in the CTE department at Tehachapi High School. He has attained a master of arts degree in human resources management. Hood is the chairperson of the CTE department, which has teachers and offers courses in home economics, vocational education, foods, business, and Regional Occupational Program (ROP) services.

(B) Certificated employee Julie Heaslet (8-20-98) is a CTE teacher at Tehachapi High School. She holds a clear multiple subject credential in general subjects with supplemental authorizations in business and English. Heaslet teaches international foods, home economics, business math, and clothing.

(C) Certificated employee Carol Bartels (1-22-08) is a 0.4 FTE teacher in CTE at the high school. She holds a preliminary part-time designated subject career credential in public service and teaches two periods of criminal justice.

(D) Certificated employee Cynthia Hynes (8-20-08) is a full-time CTE teacher at the high school. She holds a preliminary full-time designated subjects career credential in health science and medical technology and teaches health careers, medical front office, and medical terminology as part of the ROP course offerings.

(E) Certificated employee Edward Weaver (8-28-86) is a woodworking and drafting teacher in the CTE department at the high school. He holds a clear single subject credential in industrial and technology education.

(F) Certificated employee Linda Munoz (8-22-96) is a child development and food and nutrition teacher at the high school. She holds a clear single subject credential in home economics and health science as well as a multiple subject credential with a supplemental authorization in English.

40. (A) In this layoff proceeding, the Governing Board decreed that services in CTE be reduced by 1.0 FTE but did not designate a particular course or courses for reduction or elimination. The personnel director testified that the District has decided to eliminate the CTE position occupied by Heaslet, but did not testify that the District has decided to eliminate the classes (international foods, home economics, and business math) taught by

Heaslet. Thereupon, the District determined that Heaslet is entitled to bump respondent Hood and to be reassigned to teach Hood's classes.

(B) While a school district has discretion in making reductions and reassignments, there is a problem with the proposed bumping and layoff of respondent Hood. Heaslet has a business credential or authorization which might allow her to teach Hood's accounting class, but she does not have the proper credential to teach computer applications, virtual enterprises, or web master or design. As such, Heaslet is not certificated and competent to be reassigned to teach Hood's CTE course load. Parenthetically, there are two teachers in the CTE department who are less senior than Hood and they are certificated employees Bartels and Hynes. The District did not give preliminary notices to either Bartels or Hynes but did not determine to skip them either under Education Code section 44955, subdivision (d), to continue to teach criminal justice or health careers, respectively.

41. Based on Findings 38 – 40 above, certificated employee Heaslet may not bump respondent Hood and be reassigned into Hood's CTE teaching position due to the reduction of the particular kind of service of CTE course or courses. Respondent Hood should not receive a final layoff notice.

High School Academic Support

42. Under Resolution Number 21MAR12, the Governing Board resolved to reduce the particular kind of service of departmentalized high school instruction or service in academic support by 0.6 FTE. To achieve this reduction in a particular kind of service, the District plans to eliminate the one period of study skills class taught by each of the following first year probationary certificated employees at the high school: Wayne Thompson (8-17-11), Gregory Hargleroad (8-17-11), and Mary Villarruel (8-30-11).

43. (A) In addition to teaching one period of study skills, Thompson teaches high school biology under a clear single subject credential in life science. The District has elected not to rehire Thompson on completion of his first year of probationary status. The District's non-election of Thompson fulfills the partial reduction of academic support by 0.2 FTE and the 0.8 FTE reduction in high school science.

(B) In addition to teaching one period of study skills, Hargleroad teaches earth science at the high school pursuant to a preliminary single subject credential in geosciences. The District gave a preliminary notice to Hargleroad. The District's determination to layoff Hargleroad fulfills the partial reduction of academic support by 0.2 FTE and science by 0.8 FTE.

(C) In addition to teaching one period of study skills, Villarruel teaches algebra support, basic math, and applied algebra pursuant to her clear single subject credential in foundational level math. The District gave a preliminary notice to Villarruel.

The District's determination to layoff Villarruel fulfills the partial reduction of academic support by 0.2 FTE and math by 0.8 FTE.

44. Counsel for certain respondents has contended that the District's determination to eliminate the study skills classes taught by Thompson, Hargleroad, and Villarruel is arbitrary and capricious because the Governing Board resolved to reduce academic support and the District did not present any documentary evidence to show that the study skills classes are the same service as academic support. Counsel's argument is not persuasive, for the personnel director's testimony that academic support and study skills classes are the same service in this District was sufficient to prove that the District's determination to eliminate the three study skills classes to fulfill the reduction or discontinuance of academic support by 0.6 FTE is reasonable and not arbitrary or capricious.

High School Math

45. Under Resolution Number 21MAR12, the Governing Board resolved to reduce the particular kind of service of departmentalized high school instruction in math by 0.8 FTE. To achieve this reduction, the District plans to lay off respondent Villarruel who teaches four periods, which is equivalent to 0.8 FTE, of high school math in addition to one period of study skills. Villarruel is the least senior certificated employee in the high school math department.

46. In her Post-Hearing Brief, counsel for certain respondents contended that respondent Villarruel should be reassigned to the position that will be vacated by a temporary teacher. Albert Mainord is a retired teacher who teaches algebra and geometry at the middle school. He is a part-time (0.4 FTE), temporary certificated employee who is to be released from his temporary contract before the next school year. It is within the District's reasonable discretion, however, to determine how to achieve this reduction of services in high school math, which the Governing Board has deemed necessary and proper under Education Code section 44955. (See *San Jose Teachers Assn. v. Allen, supra*, 144 Cal.App.3d 627.) Here, the District is not required to reassign respondent Villarruel into the part-time position of a temporary teacher who is to be released and its determination not to do so is reasonable and not arbitrary or capricious.

47. Any claims and contentions made by the parties at the hearing or in written argument for which there are no specific findings in this Proposed Decision were deemed unproven or were considered irrelevant or surplussage.

* * * * *

Pursuant to the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

1. Jurisdiction exists for the subject proceedings pursuant to Education Code sections 44949 and 44955, based on Findings 1 – 47 above. All notices, accusations, and other related papers and reports required by these Education Code sections have been provided in timely manner and, as such, the parties have complied with the statutory requirements, except with respect to the tie-breaking criteria.

2. Cause exists pursuant to Education Code sections 44949 and 44955 to reduce or discontinue by 30.60 full-time equivalent positions the concomitant number of certificated employees of the District due to the reduction or discontinuance of particular kinds of services, based on Findings 1 – 47 above. With respect to those respondents whose employment have been found to be terminable by the District and any other certificated employees who received notices but did not request a hearing, if any, the causes set forth in the Accusations relate solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

3. Cause does not exist pursuant to Education Code sections 44949 and 44955 to terminate the employment of the following respondents and/or certificated employees: Sean Clifton, Jeanene Trauger, Cherie Chavez, Julie Hammer, Ellen Brockelsby, Daniel Moon, Paula DiGerolami-Macon, Rene Jacobi, Heather Gibson, Kendra Winchell, Daena Kirk, Jennifer Butler, Amy Trillo, and Chris Hood, based on Findings 15 – 16, 17 – 27, 32 – 37, and 38 – 41 above.

4. Cause exists under Education Code sections 44949 and 44955 for the District to serve upon the remaining respondents, notices that their services will not be required for the ensuing 2012-2013 school year because of the reduction or discontinuance of particular kinds of services, as long as those respondents were previously identified in evidence presented during the hearing as being the subjects of a final layoff notice.

5. Based on Findings 1 – 47 above, except as provided in this Proposed Decision and/or due to determinations by the District in reasonable exercise of its discretion, there is no certificated probationary or permanent employee with less seniority than any one of respondents who is being retained by the District for the 2012-2013 school year to render services which any one of respondents is certificated and competent to render.

* * * * *

WHEREFORE, the Administrative Law Judge makes the following Order:

ORDER

1. The Accusation issued against respondents named or identified in Findings 15 – 16, 17 – 27, 32 – 37, and 38 – 41 above, must be dismissed, based on Conclusion of Law 3 above. These respondents may not be given final layoff notices that their services will not be required for the 2012-2013 school year.

2. The Accusation issued against all of the remaining respondents is sustained, based on Conclusions of Law 1, 2, 4, and 5 above. The District may give notice to these respondents, and each of them, in inverse order of seniority that their services will not be required for the ensuing 2012-2013 school year because of the present reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955.

3. Before giving notice to respondents, the District shall reasonably determine and take into account any additional positively assured attrition among certificated employees in deciding how many respondents should be terminated before the ensuing 2012-2013 school year.

4. The District may give notice to any respondents that their services will not be required for the ensuing 2012-2013 school year because of the reduction or discontinuance of particular kinds of services as long as those respondents were previously identified as being subject to service of a final layoff notice, based on Conclusion of Law 4 above.

Dated: May 9, 2012

Vincent Nafarrete
Administrative Law Judge
Office of Administrative Hearings