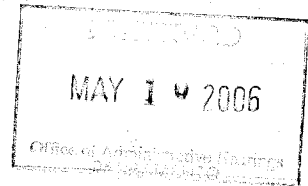


**BEFORE THE
GOVERNING BOARD
SOUTH WHITTIER SCHOOL DISTRICT**



In the Matter of the Accusations Against:

JEAN FOSTER, MARK FUENTES,
KIMBERLY ISRAELSON, REBECCA
MILLER, LAURA RIEGER, KATHERYN
RUSK, SALVADOR SARMIENTO,
MARINA SIMENTAL-GUTIERREZ,
MARTHA TOVAR, LINDA TRUONG,
and LINDSEY WHITE,

OAH No. L2006030441

Respondents.

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 21, 2006, in Whittier.

Aaron V. O'Donnell, Esq., Atkinson, Andelson, Loya, Rudd & Romo, represented Complainant, who was also present.

Carlos R. Perez, Esq., Reich, Adell, Crost & Cvitan, represented Respondents, except for Salvador Sarmiento. Each Respondent was present, except for Mr. Sarmiento and Laura Rieger.

Oral and documentary evidence was received during the hearing. The record was left open for the parties to make their closing arguments by way of briefs, which were timely received and marked as follows: Complainant's, exhibit 28; Respondents' exhibit C. The record was closed and the matter submitted for decision upon receipt of the closing briefs.

FACTUAL FINDINGS

Parties & Jurisdiction

1. Complainant Lilia B. Dickson is the Associate Superintendent, Administrative Services, of the South Whittier School District (District), and she signed the Accusations in that official capacity and as the designee of the District's Superintendent, Richard L. Graves (Superintendent).

2. Respondents were at all times mentioned certificated District employees.

3. On March 7, 2006, the Governing Board of the District (Board) adopted Resolution No. 05-06-09, which proposed to reduce or discontinue the particular kinds of services encompassing 10.00 Full-Time Equivalent (FTE) positions by no later than the beginning of the 2006-2007 school year.

4. By no later than March 15, 2006, the District's Superintendent recommended to the Board that notice be given to Respondents that their services will be terminated at the end of the current school year, pursuant to Education Code sections 44949 and 44955.

5. By no later than March 15, 2006, and after notification to the Board, Respondents were given written notice that it had been recommended, pursuant to Education Code sections 44949 and 44955, that their services will not be required next school year.

6. Respondents timely requested a hearing to determine if there is cause for terminating their services next school year, except for Salvador Sarmiento. Each Respondent was thereafter served with an Accusation. Respondents timely filed Notices of Defense, which requested the instant hearing, except for Katheryn Rusk and Mr. Sarmiento.¹

7. After adoption of Resolution No. 05-06-09, the Board considered all known assured attrition.

The District's Layoff Decision

8. Board Resolution No. 05-06-09 specifically provides for the reduction or elimination of the following particular kinds of services:

<u>Particular Kinds of Service</u>	<u>Full-Time Equivalent (FTE) Positions</u>
K-6 Classroom Teaching Services	8.0 FTE
7/8 Grade Social Science Teaching Services	0.5 FTE
7/8 Grade English/Language Arts Teaching Services	1.5 FTE
	=====
Total FTE Reduction	10.0 FTE

9. Pursuant to Board Resolution No. 05-06-09, the District identified the specific need to hire and retain only those elementary and middle school teachers assigned to teach core academic subjects who are rated as "highly qualified" within the meaning of the No Child Left Behind Act of 2001, and on that basis, the District would deviate from the usual order of terminating certificated employees on the basis of seniority.

¹ Although Ms. Rusk filed her Notice of Defense three days late, Complainant did not object to her participating as a Respondent at the hearing. However, by failing to request a hearing and/or submit a notice of defense, Mr. Sarmiento waived his right to a hearing, pursuant to Education Code section 44949, subdivision (b).

10. Board Resolution No. 05-06-10 established tie-breaking criteria to determine the relative seniority of certificated employees who first rendered paid service on the same date. The tie-breaking criteria were used in this matter to resolve ties in seniority amongst certificated personnel. The validity or application of the tie-breaking process is not subject to dispute in this matter, and otherwise was proven to be valid and fairly applied.

11. The reduction or elimination of the 10.0 FTE positions will not reduce services below mandated levels.

12. The District maintains a Seniority List containing employees' seniority dates, current assignments and locations, credentials and authorizations. The information on the Seniority List is accurate.

13. The District used that Seniority List to develop a proposed layoff and "bumping" list of the least senior employees currently assigned in the various services being reduced. The District then determined whether the least senior employees held other credentials entitling them to "bump" other employees or be "skipped." In determining who would be subject to layoff for each kind of particular 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.

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

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

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

Respondent Rusk

17. Katheryn Rusk is a middle school teacher for the District. Her seniority date is September 1, 2004, and she is a probationary employee. She performs the .50 FTE position in 7/8 Grade Social Studies that is subject to elimination/reduction by Board Resolution No. 05-06-09. As a probationary employee, Ms. Rusk is subject to layoff before any similarly competent and credentialed permanent employee, and she is the least senior certificated employee performing this assignment.² She is therefore properly subject to layoff.

² Pursuant to Education Code section 44955, subdivision (b), "the services of no permanent employee may be terminated . . . while any probationary employee . . . is retained to render a service which said permanent employee is certificated and competent to render."

18. In order for the District to receive Title I funds from the federal government during the 2006-2007 school year, all teachers of core academic subjects must rate as "highly qualified" within the meaning of the No Child Left Behind Act of 2001 (NCLB). To be rated as "highly qualified," a teacher must possess a bachelor's degree, a teaching credential, and demonstrate subject matter competence by passing an examination.

19. An elementary school teacher who does not rate as "highly qualified" within the meaning of the NCLB cannot teach an elementary school class at the District next school year. Thus, the District will not have available any assignments next school year for elementary school teachers who do not rate as "highly qualified" under the NCLB.

20. Beginning at least in September 2002, and continuing thereafter, the District notified its certificated personnel of the requirement for them to become rated as "highly qualified" for purposes of the NCLB. The District also provided information on how to become so rated, including preparation for the examinations that were part of the process.

21. *Respondent Sarmiento.* Salvador Sarmiento is an elementary school teacher with the District. He has a seniority date of September 12, 1994, which makes him more senior than others who are being retained to perform K-6 Classroom duties. He was designated for layoff because he does not meet the District's specific need of being rated as "highly qualified" under the NCLB. The less senior certificated employees being retained are so rated. He is properly subject to layoff for that reason.³

22. *Respondent Fuentes.* Mark Fuentes is an elementary school teacher with the District. He has a seniority date of September 9, 1996, which makes him more senior than others who are being retained to perform K-6 Classroom duties. Mr. Fuentes was also designated for layoff, because he does not meet the District's specific need of being rated as "highly qualified" under the NCLB. The less senior certificated employees being retained are so rated. He is properly subject to layoff for that reason.⁴

23. Mr. Fuentes is not rated as "highly qualified" because he has not yet demonstrated subject matter competence, in that he has only passed two of the three subdivisions of the California Subject Examinations for Teachers (CSET). He has failed the third subdivision of the CSET three times. Mr. Fuentes intends to take the third subdivision of the CSET examination on May 20, 2006. The scores of that examination will be reported June 19, 2006. If he fails the third subdivision at that time, he intends to take that examination again on July 22, 2006. The scores of that examination will be reported on August 21, 2006. If Mr. Fuentes passes the third subdivision of the CSET examination, he would be able to demonstrate subject matter competence and thus would be rated as "highly

³ See Legal Conclusion 5.

⁴ See Legal Conclusion 5.

qualified" within the meaning of the NCLB. However, his scores from the two upcoming examinations will be reported well after the May 15th deadline for the District to render a final decision in this matter.⁵

24. *Respondents Israelson and White.* Kimberly Israelson and Lindsey White are elementary school teachers with the District, who are both rated as "highly qualified" within the meaning of the NCLB. They were given notice of layoff as a matter of precaution, in that they would be subject to layoff only if Respondents Fuentes and Sarmiento were retained for the next school year. The parties agree that if Respondents Fuentes and Sarmiento are terminated from employment as a result of this proceeding, Respondents Israelson and White would not be subject to layoff. Therefore, Respondents Israelson and White are not subject to layoff.⁶

Respondent Tovar

25. Martha Tovar is an elementary school teacher for the District and is rated as "highly qualified" within the meaning of the NCLB. She began working for the District on September 8, 1997, under an emergency credential. She continued working for the District under emergency permits and a pre-intern certificate through the 2002-2003 school year. She entered a university internship program during the 2003-2004 school year, and she worked for the District under a university internship credential through the 2004-2005 school year. Ms. Tovar presented her professional clear credential to the District on March 6, 2006. Ms. Tovar is currently designated by the District as a probationary employee, a status of which she does not dispute.

26. Ms. Tovar performs one of the K-6 Classroom positions that is subject to elimination and/or reduction by Board Resolution No. 05-06-09. After deciding to layoff Respondents Fuentes and Sarmiento, the District next designated Ms. Tovar for layoff because she is a probationary employee.⁷ Ms. Tovar was not entitled to permanent classification while she served the District under the university internship credential. Ms. Tovar could not be classified as a permanent employee until next school year, at the earliest, because she is required to serve one additional complete school year with the District after completing the internship program.⁸ Her current classification as a probationary employee is correct and she is therefore properly subject to layoff.

⁵ See Education Code section 44955, subdivision (c).

⁶ Respondent Israelson also presented evidence and legal authority supporting her argument that the District's assigned seniority date for her of September 4, 2002, should be modified to September 4, 2001, or in the alternative, to October 16, 2001. In light of the fact that Ms. Israelson is not subject to layoff in this matter due to the terminations of Respondents Fuentes and Sarmiento, a resolution of her seniority date argument is unnecessary. (See Legal Conclusion 5C.)

⁷ See footnote 2 above.

⁸ Education Code section 44466.

Respondents Truong and Rieger

27. *Respondent Truong.* Linda Truong is an elementary school teacher for the District. Her seniority date is September 30, 2002. After deciding to terminate Respondents Fuentes, Sarmiento and Tovar, for the reasons explained above, Ms. Truong was determined by the District to be the least senior certificated permanent employee performing the K-6 Classroom duties subject to elimination/reduction by Board Resolution No. 05-06-09. Thus she is properly subject to layoff.

28. *Respondent Rieger.* Laura Rieger is an elementary school teacher for the District. Her seniority date is September 4, 2002, which places her in a tie for seniority with various other Respondents. After applying the tie-breaking criteria, the District determined that Ms. Rieger was the next least senior certificated permanent employee performing the K-6 Classroom duties subject to elimination/reduction by Board Resolution No. 05-06-09. The application of the tie-breaking criteria to Ms. Rieger was correct and she is properly subject to layoff.

Respondents Simental-Gutierrez, Miller and Foster

29. *Respondent Foster.* The District designated Jean Foster as having a seniority date of September 4, 2002, which was the date she was first assigned by the District to be a probationary employee. However, Ms. Foster began working for the District on September 12, 2001, as an itinerate substitute teacher. She did so for approximately one month. On October 3, 2001, and through the remainder of the 2001-2002 school year, Ms. Foster worked as a full-time temporary employee teaching a fourth grade class. She worked as a probationary employee during the 2002-2003 and 2003-2004 school years. Although Ms. Foster was issued a preliminary multiple subject credential on September 12, 2001, it was not established when she presented that credential to the District.⁹ Ms. Foster was later issued a multiple subject professional clear credential on October 7, 2002.

30. *Respondent Miller.* The District designated Rebecca Miller as having a seniority date of September 4, 2002, which was the date she was first assigned by the District to be a probationary employee. However, Ms. Miller began working for the District during the 2000-2001 school year as a full-time itinerate substitute teacher, in which she was given many different short-term assignments. During the 2001-2002 school year, she was still designated as a full-time itinerate substitute teacher, although she was assigned to teach the same sixth grade class the entire school year. She did not replace a teacher that year; she was given the assignment to teach a new class developed for the sixth grade due to the student enrollment that school year. Ms. Foster thereafter worked as a probationary employee during

⁹ None of these three Respondents testified to the specific date that they presented their credentials to the District. The District's various seniority lists and charts are not helpful because it is clear that the dates listed on those reflect the issuance dates of the credentials (relevant to the tie-breaking criteria) and not the date the credentials were first presented to the District. For example, it is clear that Ms. Tovar worked many years on an emergency permit and internship certificate. Yet the District's seniority lists and charts only show the date that her clear credential was later issued (May 10, 2005), and not the date it was presented to the District (March 6, 2006).

the 2002-2003 and 2003-2004 school years. Ms. Miller worked during the 2000-2001 and 2001-2002 school years under an emergency credential. She was issued a multiple subject professional clear credential on October 5, 2002.

31. *Respondent Simental-Gutierrez.* The District designated Marina Simental-Gutierrez as having a seniority date of September 4, 2002, which was the date she was first assigned by the District to be a probationary employee. However, Ms. Simental-Gutierrez began working for the District on September 4, 2001, as an itinerate substitute teacher. She replaced an elementary school teacher who was out on a leave of absence. Ms. Simental-Gutierrez remained in that classroom until February of 2002, when the other teacher came back from leave. Ms. Simental-Gutierrez was given various assignments for two weeks, but returned to the elementary classroom where she started the school year when the other teacher went back on leave. Ms. Simental-Gutierrez remained in that classroom for the rest of the school year. She worked as a probationary employee during the 2002-2003 and 2003-2004 school years. Although Ms. Simental-Gutierrez was issued a preliminary multiple subject credential on August 16, 2001, it was not established when she presented that credential to the District.

32. By a letter dated December 16, 2005, the District advised Ms. Miller, Ms. Foster and Ms. Simental-Gutierrez that it had taken the position that their seniority date was September 4, 2002. The letter requested those Respondents to respond in writing whether they agreed or disagreed. These three Respondents responded to the District in writing that they agreed with the stated seniority date. Their responses to the letter do not legally determine or control those Respondents' seniority dates.¹⁰

33. The District did not establish a factual basis for the Respondents to be estopped from asserting a different seniority date.¹¹ Respondents were not told in the letter that this information would be used in an upcoming layoff proceeding; thus they were not apprised of the factual context under which they were agreeing with the stated seniority date. It was not established that Respondents intended their responses to be relied upon by the District. In fact, the letter strictly defined the meaning of the stated seniority date, such that the Respondents were essentially directed to arrive at a particular conclusion regarding their seniority date. The District was not ignorant of the true facts, in that it always had at its disposal the same information as testified to by the Respondents at the hearing. There is nothing in the record to suggest that the District relied on Respondents' responses to the letter, as opposed to it simply making a legal conclusion of their seniority date regardless of

¹⁰ Statutory provisions regarding employment classifications for certificated personnel may not be waived, and any agreement, express or implied, made by an employee to waive them is null and void. (Ed. Code, § 44924; *Fine v. Los Angeles Unified School District* (2004) 116 Cal.App.4th 1070.)

¹¹ Equitable estoppel applies where (1) the party to be estopped is apprised of the facts; (2) he or she must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has the right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the party invoking estoppel must rely on the conduct to its injury. (*Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 581.)

what these Respondents would have otherwise asserted. Based on the District's precautionary notices sent to other Respondents, it is assumed that the District was not relying on any contrary position taken by any Respondent in this matter. Moreover, Respondents cannot be expected to know all the nuances of the complex legal and factual issues intertwined with the issues of seniority, status as temporary employees, and the legal significance of the dates in which their credentials were issued, registered and presented.¹²

34. Respondents Foster, Simental-Gutierrez and Miller are not entitled to an earlier seniority date than that assigned by the District, and they are properly subject to layoff.¹³

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945 were met. (Factual Findings 1-7.)

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

3. Education Code section 44955, subdivision (d)(1), permits a school district to deviate from the order of seniority in teacher layoffs when "the district demonstrates a specific need for personnel to teach a specific course or course of study . . . and that the employee [who is retained] has special training and experience necessary to teach that course or course of study . . . which others with more seniority do not possess." (See also, *Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831.)

¹² In addition, the District's contention is not persuasive that Respondents' ability to challenge their seniority date is precluded by an unstated statute of limitations. The District's other contention is also unpersuasive that Respondents' responses to the December 2005 letter are subject to laches a mere five months later, and no prejudice was shown.

¹³ See Legal Conclusion 6.

4. A school district is not required to account for circumstances that occur after March 15th when implementing layoff decisions. (*Lewin v. Board of Trustees* (1976) 62 Cal.App.3d 977, 982.) For example, a school district need not consider credentials obtained after that deadline for purposes of its layoff decisions. (*Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796, 815.)

5A. Respondents Fuentes and Sarmiento are properly subject to layoff because the District established by a preponderance of the evidence a specific need for personnel teaching elementary classes to be rated as "highly qualified" within the meaning of the NCLB and these two Respondents do not possess the training and experience necessary to teach the subject courses. Failure to abide by the rules and requirements of the NCLB would result in the District losing that funding. The District has no position available for an elementary school teacher who is not "highly qualified." The less senior certificated employees being retained are rated as "highly qualified." Thus, the District properly skipped over less senior certificated employees and designated Respondents Fuentes and Sarmiento for layoff. (Factual Findings 1-23.)

5B. The fact that Mr. Fuentes may pass the required examination to become "highly qualified" under the NCLB after the May 15th deadline for the finality of this process is of no consequence. His situation is similar to that of an employee who has been issued a credential but has failed to file it with his employing school district before the March 15th deadline. The case of *Campbell Elementary Teachers Assn.* clearly holds that no change in circumstances after-the-fact need be considered. Otherwise, if Mr. Fuentes fails to pass the requisite examination and become rated as "highly qualified" before next school year, the District would be in the untenable position of having to retain him, though he could not teach an elementary school class, yet be forced to layoff either Ms. White or Israelson, who are both rated as "highly qualified" and thus would be able to teach elementary classes next year. This is exactly the type of situation that falls within the "skipping" provision of Education Code section 44955, subdivision (d)(1).

5C. Because Respondents Fuentes and Sarmiento are properly subject to layoff, the precaution of noticing Respondents White and Israelson no longer exists and the Accusations against them should be dismissed. (Factual Findings 1-24.)

6A. According to Education Code section 44917, when a person is employed for one complete school year as a temporary employee, and reemployed the following school year as a probationary employee, "the previous year's employment as a temporary employee shall be deemed one year's employment as a probationary employee for purposes of acquiring permanent status." Likewise, according to Education Code section 44918, if a substitute or temporary employee serves during one school year for at least 75% of the total number of school days within that year, that employee "shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year." The fact that neither of these two Education Code sections refers to seniority for purposes of layoff proceedings does not mean that they cannot be applied to determining a teacher's seniority for such purposes. In fact, many, if not most, of

the pertinent Education Code provisions regarding employment classification are silent on their applicability to the layoff provisions. The District's citation to Education Code section 44914 does not appear to be applicable. That provision seems to apply to other situations, e.g. where a substitute teacher becomes probationary in the same school year. In any event, the use of the word "shall" in both sections 44917 and 44918 suggest the operation of those statutes is mandatory, as opposed to the discretionary wording of section 44914.

6B. However, service by a person under a provisional credential shall not be included in computing the service required as a prerequisite to attainment of or eligibility to classification as a permanent employee. (Ed. Code, § 44911.) "Time spent teaching under an emergency teaching credential may not be counted in computing an employee's progress toward permanent status, unless the employee is credentialed in another state and demonstrates adequate basic skills proficiency pending successful completion of the . . . CBEST." (*Summerfield v. Windsor Unified School Dist.* (2002) 95 Cal.App.4th 1026, 1028.) A teacher has the burden of recording her credentials with her local county office of education and presenting the same to her employing school district. It is the date that she files her credential with the employing school district that controls for purposes of layoff decisions. (*Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796, 814.) Moreover, a school district's initial classification of a provisionally credentialed employee, i.e. one teaching under an emergency credential, need not be retroactively changed when that teacher later obtains a full credential. (*Fine v. Los Angeles Unified School District* (2004) 116 Cal.App.4th 1070, 1078.)

6C. In this case, Respondents Foster, Miller and Simental-Gutierrez should not have their seniority dates modified to a date earlier than September 4, 2002. Education Code sections 44917 and 44918 might have applied to them, in that they were substitute employees who worked 75% or more of the 2001-2002 school year and became probationary employees the following school year. Their assignments in the 2001-2002 school year were relatively long-term and in many cases turned into permanent assignments. However, it was not established that they worked during the 2001-2002 school year under anything other than a provisional credential, and Ms. Miller testified that she in fact worked under an emergency permit that year. These Respondents would not be entitled to credit toward tenure if they worked during the 2001-2002 school year under a provisional credential, so they similarly would not be entitled to the additional year of service available under sections 44917 or 44918. Without proof that the District had received these Respondents' full credentials during the 2001-2002 school year, it was not established that the District had erroneously classified them as other than probationary employees in the 2001-2002 school year or that their seniority date should have been earlier than September 4, 2002. These Respondents are subject to layoff. (Factual Findings 1-34.)

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7. The services identified in Board Resolution No. 05-06-09 are particular kinds of services that can 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. Services will not be reduced below mandated levels. Cause for the reduction or discontinuation of those particular services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949. (Factual Findings 1-34.)

8. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. (Factual Findings 1-34.)


9. No junior certificated employee is scheduled to be retained to perform services that a more senior employee is certificated and competent to render. (Factual Findings 1-34.)

ORDERS

1. The Accusations against Respondents KIMBERLY ISRAELSON and LINDSEY WHITE are dismissed. Neither Respondent shall be given notice that their services are not required for the next school year.

2. The Accusations are SUSTAINED as against the remaining Respondents. Notice SHALL be given to those Respondents that their services will not be required for the 2006-2007 school year, and such notice SHALL be given in inverse order of seniority.

Dated: May 4, 2006


ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings