

BEFORE THE
BOARD OF EDUCATION OF THE
GARVEY SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of:

OAH No. L2008030648

The Layoffs of 26 Full-Time Equivalent
Positions of the Certificated Employees of the
District,

Respondents.

PROPOSED DECISION

David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on May 5, 2008, at the Garvey School District, Rosemead, California.

Garcia Calderon Ruiz, by James R. Lynch, Attorney at Law, represented the Garvey School District (District) and its Superintendent, Virginia Peterson.

Rothner, Segall & Greenstone, by Emma Leheny, Attorney at Law, represented Respondent teachers. A list of Respondents is attached as Attachment A. An explanation of the notes on that list, including the Respondents who were present at the hearing, is found in Factual Finding 7, below.

Evidence was received by way of stipulation, testimony and documents. The record remained open for briefs which were received as follows: Respondents' brief, on May 6, 2008, marked for identification as Exhibit A; and District's brief, on May 8, 2008, marked for identification as Exhibit 4. The record was closed and the matter was submitted on May 8, 2008. Pursuant to stipulation of the parties and an Order (Exhibit 2), the time limits for certain acts under the Education Code have been extended.

It was subsequently discovered that some documentary evidence was incomplete. More specifically, the copy of a resolution of the Board of Education contained within Exhibit 1 was missing several pages. In a telephone conference call on May 9, 2008, both counsel agreed that a complete copy of the resolution could be received in evidence as Exhibit 5.

SUMMARY OF PROPOSED DECISION

The Board of Education for the District determined to reduce or discontinue particular kinds of services provided by certificated teachers for budgetary reasons. The decision was not related to the competency and dedication of the individuals whose services are proposed to be reduced or eliminated.

District staff carried out the Board's decision by using a selection process involving review of credentials and seniority. The selection process was in accordance with the requirements of the Education Code, except to the extent that the District's action denied due process to one Respondent. For three other employees, corrections were made to their seniority dates and classifications, resulting in changes to the layoff process. The District withdrew the Accusation as to other employees. The affected employees will have the Accusations against them dismissed. Otherwise, the Board may proceed as indicated herein.

FACTUAL FINDINGS

Jurisdiction and Parties

1. The District provides educational services for approximately 5900 students in preschool through grade eight, at twelve school sites and one child development center.
2. Virginia Peterson is the Superintendent of the District and Genaro Alarcon is the Assistant Superintendent of Human Resources of the District. Their actions were taken in those official capacities. Mr. Alarcon was responsible for implementation of the technical aspects of the layoff.
3. Before March 15, 2008, the District served on a number of certificated employees, including Respondents, a written notice (notice) that the Superintendent had recommended that notice be given to them pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year. Each notice set forth the reasons for the recommendation and noted that the Board had passed a resolution reducing the certificated staff by 26 full-time equivalent (FTE) positions.
4. Twenty four certificated employees, referred to as Respondents, submitted timely written requests for a hearing to determine if there is cause for not reemploying them for the ensuing school year.
5. In his official capacity as Assistant Superintendent of Human Resources, Mr. Alarcon made and filed Accusations against each of the Respondents. The District timely served the Respondents with an Accusation along with required accompanying documents and blank Notices of Defense.
6. Respondents timely served Notices of Defense on the District.

7a. Attachment A is incorporated by reference. The 24 names listed are Respondents who submitted timely Notices of Defense. The District stipulated that its notices and Accusations were withdrawn as to all names with the designation "+". Respondents whose names have the designation "*" appeared at the hearing. Ms. Leheny represented the 13 Respondents who did not have a "+" designation.

7b. A roll call was taken to determine the presence of any of the Respondents at the commencement of the first hearing session on May 5, 2008, at about 12:05 p.m. Respondent Kristen Cheng did not appear at that time. In its brief (Exhibit 4), the District contends that Respondent Cheng attended the second session of the hearing that began at about 2:15 p.m., however there was no indication made either on the record or to the ALJ of Respondent Cheng's attendance.

8. Respondents in this proceeding are probationary and permanent certificated employees of the District.

The Governing Board and the Lay Off Resolution

9. On March 6, 2008, the Board of Education for the District (Board) was given notice of the Superintendent's recommendation that 26 FTE employees be given notice that their services would not be required for the next school year and stating the reasons therefore.

10. Board Resolution number 07-08-23, adopted on March 6, 2008, proposed a layoff of 26 FTE certificated employees (Resolution). Specifically, the Resolution provided for the reduction or elimination of the following particular kinds of services:

<u>FTE</u>	<u>Services</u>
23	K-6 classroom teaching
1	Special Day Class teaching
1	Resource Specialist
1	Teacher on Special Assignment (Physical Education Teacher Incentive Grant)

11. The Resolution also established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. It provided that the order of termination shall be based on the needs of the District and the students in accordance with the criteria stated therein. More specifically, the tie-breaker criteria provide for points to be awarded for certain credentials, certificates, authorizations or salary steps. The more points awarded to a teacher, the higher the seniority within the shared date of first paid service. In the event of a tie after reference to all listed criteria, additional criteria applied relating to the dates that certain credentials, certificates or authorizations were received.

12. The decision to reduce services was not related to the competency and dedication of the individuals whose services are proposed to be reduced or eliminated.

The Seniority List and the Lay Offs

13. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments and credentials. The seniority list in evidence (Exhibit 3) is a partial list, only including the seniority dates affected by the Resolution.

14. By agreement of the parties on the day of the hearing, the following changes were made to the seniority list:

a. Respondent Tran Ma, number 11b on the list, had her seniority date changed from September 5, 2006, to September 26, 2005, and her classification changed from probationary to permanent. As a result, she changed position on the list from 11b to below number 23, Kristen Cheng.

b. Respondent Michelle M. Mendoza, number 13 on the list, had her seniority date changed from March 3, 2006, to September 19, 2005, and her classification changed from probationary to permanent. As a result, she changed position on the list from 13 to below number 23, Kristen Cheng.

c. Respondent Cecile Chavez, number 14 on the list, had her seniority date changed from December 1, 2005, to October 28, 2005, and her classification changed from probationary to permanent. As a result, she changed position on the list from 14 to below number 23, Kristen Cheng.

15. At the hearing, the parties stipulated to the underlying bases for the proceedings and, by agreement, limited their evidentiary presentations to the circumstances of the four Respondents noted in Factual Finding 14; i.e., Respondents Tran Ma, Michelle M. Mendoza, Cecile Chavez and Kristen Cheng. Therefore, although there was no specific evidence to support Factual Findings 16, 18 and 19 below, neither was there any contention by Respondents that such acts did not occur. Pursuant to Evidence Code section 664, it is presumed that the actions or official duties of a public entity, such as the District and Board herein, have been regularly performed. Further, based on the ALJ's experience and specialized knowledge of teacher layoff procedures, these actions are standard in such cases. Pursuant to Government Code section 11425.50, subdivision (c), the ALJ's experience and specialized knowledge may be used in evaluating the evidence.

16. The District used the seniority list to develop a proposed layoff list of the least senior employees currently assigned in the various services being reduced.

17. Respondent Michelle M. Mendoza was slated for non reemployment due to the one FTE reduction in a resource specialist position, for which she had been the most junior employee before the change in her seniority date. Mr. Alarcon stated that, if Respondent

Mendoza was retained due to the change in her seniority date, the District would look within its special education staff to identify an employee with a regular teaching credential and transfer that person so as to accomplish the FTE reduction, and that such person would be more senior to anyone on the present seniority list. This was the only instance in evidence of a less senior employee holding credentials in an area who is entitled to displace, or "bump," another employee in any FTE position slated for layoff.

18. In determining who would be laid off for each kind of service reduced, the District counted the number of reductions not covered by the known vacancies, and determined the impact on incumbent staff in inverse order of seniority.

19. The District used information from the seniority list and personnel files to apply the tie-breaker criteria of the Resolution.

20. The services identified in the Resolution are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Board's decisions to reduce or discontinue the identified services were neither arbitrary nor capricious, and were a proper exercise of its discretion. The decisions were based on the welfare of the District and its pupils.

21. The District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render, except as discussed more specifically in Factual Findings 23f and 23g, and in Legal Conclusions 6, 7, 8 and 9, below.

Respondents' Contentions

22. Respondents contend that the Accusations must be dismissed as to Respondents Tran Ma, Michelle M. Mendoza and Cecile Chavez due to the changes in their seniority dates. Respondent Kristen Cheng contends that the Accusation against her must be dismissed because the District notified her that it would not proceed against her. Further, Respondents Ma, Mendoza and Chavez contend that they must be retained because they are permanent employees while the District is retaining probationary employees who hold the same credential. Finally, Respondents Ma and Chavez contend that, if Respondent Cheng is retained, they, too, should be retained because they are more senior to Respondent Cheng.

23. In support of the contention of Respondent Cheng, the following evidence was submitted.

a. The Board met on May 1, 2008, and voted not to reduce the Class Size Reduction program at the third grade level. As a result, the number of employees to be laid off was reduced.

b. Based on this action, on Friday, May 2, 2008, Mr. Alarcon verbally notified twelve Respondents that they were no longer included in the layoff proceedings. These are the eleven Respondents indicated on Attachment A with "+", and Respondent Cheng.

c. The District revised its seniority list to indicate that the Accusations were withdrawn as to these twelve Respondents.

d. On the morning of the hearing, Monday, May 5, 2008, counsel for the District and for Respondents met for many hours to confer on relevant matters, including consideration of the underlying information that resulted in the changes made to the seniority list set forth in Factual Finding 14. When the District realized that these changes resulted in three Respondents being moved on the list to now be more senior to Respondent Cheng and that Respondent Cheng was now the most junior employee for whom withdrawal of the Accusation had been considered, it determined to reverse its decision to withdraw the Accusation against her.

e. Mr. Alarcon telephoned Respondent Cheng in the morning of the hearing, May 5, 2008, and notified her of this decision and tell her that she was again subject to being laid off and could attend the hearing that day.

f. Sandra Luz Armenta, number 19 on the seniority list with a date of September 7, 2004, is a probationary employee of the District, holds the same credential in special education as Respondent Mendoza, and was not noticed for layoff.

g. Respondents Ma and Chavez possess multiple subject credentials. Robert Richardson, number 5 on the seniority list, is a probationary employee of the District, holds a multiple subject credential, and was not noticed for layoff. Mr. Richardson also holds a supplemental authorization in introductory English and uses that authorization in his present assignment teaching Language Arts at a middle school. Kate Tran, tied at number 11 on the seniority list, is a probationary employee of the District, holds a multiple subject credential, and was not noticed for layoff. Ms. Tran also holds a supplemental authorization in math and uses that authorization in her present assignment teaching math at a middle school.

LEGAL CONCLUSIONS AND DISCUSSION

1. Education Code¹ section 44944, subdivision (a), states in pertinent part:

"No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor."

¹ All citations are to the Education Code, unless noted otherwise.

2. Section 44955 provides, in pertinent part:

“(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

“(b) Whenever . . . a particular kind of service 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 district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section 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 district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. 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 44949, 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. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement. . . .

“(c) . . . [S]ervices of such employees shall be shall be terminated in the reverse order in which they were employed, as determined by the board in accordance with Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

“The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. . . .

“(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

“(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the

certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.”

3. Sections 44949 and 44955 establish jurisdiction for this proceeding. The notice and jurisdictional requirements set forth in sections 44944 and 44945 were met. (Factual Findings 3 through 8.)

4. A school district may reduce services within the meaning of section 44955, subdivision (b), “either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may ‘reduce services’ by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.” (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

5. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. Cause for the reduction or discontinuation of services relates solely to the welfare of the District’s schools and pupils within the meaning of section 44949.

6a. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or “bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.)

6b. The District may retain more junior employees, even if probationary, over more senior employees who are permanent, even if they share the same credentials where, as here, the more junior employees have additional authorizations, and are using those authorizations in their assignments, as the more senior employees would be unable to teach in those assignments. Therefore, the contention of Respondents Ma and Chavez that they should bump Robert Richardson and Kate Tran, is rejected. See Factual Finding 23g.

7. The three instances where seniority dates have been corrected will have an affect on the order of layoff. The most senior of the three, Respondent Mendoza, revised seniority date of September 19, 2005, holds a special education credential and is a permanent employee of the District. However, a probationary employee with the same credential, Sandra Luz Armenta (number 19 on the seniority list with a date of September 7, 2004) was not noticed for layoff. Under section 44955, subdivision (b), as applied here, no permanent teacher (Mendoza) may be terminated while any probationary employee (Armenta) is retained to render a service which said permanent employee (Mendoza) is certificated and

competent to render. Therefore, Respondent Mendoza must be retained, and the Accusation against her will be dismissed. See Factual Findings 13, 14, 16, 17, 21 and 23f.

8a. Respondent Cheng presents an unusual situation. While Respondents argue that the District cannot now proceed against her because it rescinded its Accusation against her, the District presents a stronger argument that, in the context of the statutes applicable to these proceedings found in the Education Code and the Government Code, something more is needed than an oral communication, such as that made by Mr. Alarcon to Ms. Cheng, to enforce a withdrawal of the Accusation against her. (See the briefs, Exhibits 4 and A.)

8b. A larger issue, not addressed by the parties' briefs, is to what extent the District's actions resulted in a denial of due process to Ms. Cheng. Unfortunately, the District's argument that she was present for the second session of the hearing is not born out by the record. The ALJ has no way of knowing if any of the people present during the second session was Ms. Cheng, as the roll call was only taken during the first session and no mention of Ms. Cheng's presence was made during the second session. Therefore, the record reflects, in brief, that Ms. Cheng received a notice and an Accusation, was notified by Mr. Alarcon on Friday, May 2, 2008, that the Accusation was being withdrawn, and was then notified by Mr. Alarcon on Monday, May 5, 2008, the date of the hearing, that the Accusation was not being withdrawn. See Factual Findings 3, 4, 5, 6, 7, 22 and 23.

8c. Notice and an opportunity to be heard are the bedrocks of due process, found in the Administrative Adjudication Bill of Rights at Government Code section 11425.10, subdivision (a)(1), and cases too numerous to list. An essential ingredient of the right to be heard is the opportunity to present a defense, including presenting evidence, giving testimony under oath and confronting and cross-examining witnesses. (Cal. Administrative Hearing Practice (Cont.Ed.Bar 2nd ed. 2007) §1.71, pp.50, 51.) On the present record, these rights have not been properly afforded to Ms. Cheng and it is concluded that she has suffered a significant denial of due process. The District's argument that Respondent Cheng did not prove any prejudice is beside the point. The appropriate action, so as to be fully protective of Ms. Cheng's due process rights, is to dismiss the Accusation against her.

9a. As a result of the retention of Respondent Cheng, who is more junior to Respondents Ma and Chavez under the now-revised seniority list, Respondent Ma must also be retained. By virtue of the requirement to retain Respondent Cheng, the District must lower – by one – the number of FTE positions to be eliminated in the category of K-6 classroom teaching as identified in the Resolution. And it must retain the most senior K-6 classroom teacher who could be laid off, were it not for the District's failure to provide due process to Respondent Cheng.

9b. The language of subdivision (b) of section 44955 of the Code might be read as requiring that – if the District were to retain Respondent Cheng as a teacher – it would be required to retain all Respondents who are K-6 classroom teachers and who are permanent employees with more seniority than that of Respondent Cheng (which would be Respondents Ma and Chavez). That subdivision says, in part: “[T]he services of no permanent employee

may be terminated . . . while any . . . other employee with less seniority is retained to render a service which said permanent employee is certificated and competent to render.” In *Alexander v. Board of Trustees of the Delano Joint Union High School District* (1983) 139 Cal.App.3d 567, the court spoke of a similar circumstance in terms of which teachers had and which had not suffered prejudicial error. The *Alexander* court said: “Because at least some of the persons skipped should have received the notices, a corresponding number of the most senior of the employees who were not reemployed must have been improperly given notices. The trial court must determine which of the Teachers suffered prejudicial error in this case.” (*Id.* at p. 576.) By a parity of reasoning, if the District retains Respondent Cheng, a corresponding number of other K-6 classroom teachers must be retained. The most senior K-6 classroom teacher to receive a notice is now Respondent Ma, who will be retained.

ORDER

1. Notice may be given to employees occupying 26 full-time equivalent certificated positions that their services will not be required for the 2008-2009 school year because of the reduction and discontinuance of particular kinds of services. Such notices may be given to the following employees: Jose Cardenas, Suzana Carlos, Cynthia D. Chan, Cecile Chavez, Candice Felix, Lucina Gaeta, Gloria Guzman, Eva Lau, Jeanie Lin, Michelle Mendoza and John Montes.

2. Notice shall be given in inverse order of seniority. Each Respondent may receive such a notice.

3. The Accusations are dismissed as to the following Respondents, and no final layoff notices may be sent to them: Claudia Barajas, Thi Bui, Kristin Cheng, Tina Cuan, Jenny Duque, Sandra Seonah Lee Hong, Tran Ma, Romelia V. Morales, Tai Le Phan, Blanca Rios-Quiroz, Irma Salcedo, Tonie Lam Tran and May Yan.

DATED: May 12, 2008.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings

Attachment A to Proposed Decision
Garvey School District; OAH Case No. 2008030648
List of Respondents

+ Claudia Barajas
+ Thi Bui
 Jose Cardenas
 Suzana Carlos
* Cynthia D. Chan
* Cecile Chavez
 Kristen Cheng
+ Tina Cuan
+ Jenny Duque
 Candice Felix
* Lucina Gaeta
* Gloria Guzman
+ Sandra Seonah Lee Hong
 Eva Lau
* Jeanie Lin
* Tran Ma
* Michelle Mendoza
 John Montes
+ Romelia V. Morales
+ Tai Le Phan
+ Blanca Rios-Quiroz
+ Irma Salcedo
+ Tonie Lam Tran
+ May Yan