

**BEFORE THE  
GOVERNING BOARD OF THE  
WHITTIER CITY SCHOOL DISTRICT**

In the Matter of the Accusations Against:

RUTH BRAVO, PATRICIA CARDIEL,  
RACHEL CHAVEZ, MARY DISHIGRIKYAN,  
LEAH ELMANGE, JANEY HAMRICK, BRIAN  
HANSEN, JENNIFER HERNANDEZ, MARIA  
HERNANDEZ, GLORIA JIMENEZ,  
DOMANI KEM, RICHARD LARSON,  
BERNADETTE LEEPER, KATHRYN MACIAS,  
ELIZABETH MARTEL, ARLENE MARTINEZ,  
BUFFIE MEYERS, REAGAN MIKHAIL,  
CATHERINE MIYAGISHIMA, JENNIFER MUNOZ,  
RICARDO OJEDA, ROBERTA OLBRANTZ,  
MYRA OROZCO, SHARON QUIRARTE,  
ANN RAMEH, CRISTINA RAMOS,  
KRISTY ROSANDER, MONICA RUSSELL,  
GINGER SPARKS, YVONNE SPITZER,  
ALISHA ZEPEDA, MERCED RODRIGUEZ,  
JEONON MOCILAC, MELISSA HOLO,  
MANUEL CORNEJO, VIRGINIA FRANCO,  
NILDA HUERTA, and ALEXANDRIA ZIRSCHKY,

OAH No. L2008030264

Respondents.

**PROPOSED DECISION**

This matter was heard by Robert S. Eisman, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 2, 2008, in Whittier, California.

Aaron V. O'Donnell, Esq., Atkinson, Andelson, Loya, Rudd & Romo, represented Whittier City School District, whose representative was also present.

Carlos R. Perez, Esq., Reich, Adell & Cvitan, represented Ruth Bravo, Patricia Cardiel, Rachel Chavez, Mary Dishigrikyan, Leah Elmange, Janey Hamrick, Brian Hansen, Jennifer Hernandez, Maria Hernandez, Gloria Jimenez, Domani Kem, Richard Larson, Bernadette Leeper, Kathryn Macias, Elizabeth Martel, Arlene Martinez, Buffie Meyers, Reagan Mikhail, Catherine Miyagishima, Jennifer Munoz, Ricardo Ojeda, Roberta Olbrantz,

Myra Orozco, Sharon Quirarte, Ann Rameh, Cristina Ramos, Kristy Rosander, Monica Russell, Ginger Sparks, Yvonne Spitzer, Alisha Zepeda, Merced Rodriguez, Jeonon Mocilac, Melissa Holo, Manuel Cornejo, Virginia Franco, Nilda Huerta, and Alexandria Zirschky (respondents). Each respondent was present, except for Richard Larson and Roberta Olbrantz.

The matter was submitted on May 2, 2008.

### FACTUAL FINDINGS

1. Carmella Franco (complainant) is the Superintendent of the Whittier City School District (District). She made, signed, and filed the Accusation, which applies to each respondent, in her official capacity as the District's Superintendent.

2. The District, which serves the City of Whittier community, consists of 10 elementary schools (kindergarten through fifth grade) and two middle schools (sixth through eighth grade), with a current enrollment of approximately 6,700 students.

3. Respondents were certificated District employees at all times relevant in this matter.

4. The District estimates that the 2008-2009 school year will be impacted by a projected \$2.5 million budget deficit that will adversely affect particular kinds of services that the District currently renders to students. Although the reductions in services are fiscally driven, the District has also experienced reducing enrollment in varying amounts that resulted in a need for approximately 10 less teachers each school year.

5. On March 4, 2008, the Governing Board of the District adopted Resolution No. R-17 to reduce or discontinue particular kinds of certificated services, encompassing a total of 51.5 full-time equivalent (FTE) positions, no later than the beginning of the 2008-2009 school year. Due to the reductions or discontinuances of particular kinds of services, a number of certificated employees of the District, pursuant to Education Code Section 44955, would not be reemployed for the 2008-09 school year. The reduced or discontinued particular kinds of services are as follows:

- 11.0 FTE Reading Coach Services
- 3.0 FTE Math Coach Services
- 2.0 FTE Elementary Physical Education Teaching Services
- 21.0 FTE Elementary Teaching Services
- 2.0 FTE Middle School Language Arts Teaching Services
- 2.0 FTE Middle School Social Science Teaching Services
- 3.0 FTE Middle School 6th Grade Multiple Subject Classroom Teaching Services
- 1.0 FTE Middle School Physical Education Teaching Service
- 1.0 FTE Special Education Teacher on Special Assignment (TOSA)
- 1.0 FTE Severely Handicapped Special Education Teaching Service



0.5 FTE Middle School Counselor  
3.0 FTE Coordinators  
1.0 FTE Elementary Principal

The Governing Board further resolved that the District's Superintendent, or designee, be directed to give Notice of Recommendation Not to Re-employ, in accordance with the provisions of Education Code sections 44949 and 44955, to the number of certificated employees allowed pursuant to Education Code Section 44955, and be delegated authority to take all actions necessary to accomplish the purposes of Resolution No. R-17.

6. On March 4, 2008, the Governing Board of the District also adopted Resolution No. R-16, which provided, pursuant to Education Code Section 44955, a statement of the specific criteria used in determining the seniority among certificated employees with the same seniority date, i.e., the date the employee first rendered paid service to the District (Tie-Breaker Resolution). Resolution No. R-16 provides for use of the tie-breaking criteria to determine the order of termination solely on the basis of the needs of the District.

Pursuant to Resolution No. R-16, the following criteria are listed in priority order and each criterion is used only if the preceding criteria do not delineate the order of seniority/termination:

a. As between certificated employees possessing the same seniority date as defined in Education Code Section 44845, then employees possessing a clear professional, standard, or general teaching credential will be regarded as having greater seniority than those employees possessing only a preliminary credential, intern credential, provisional internship permit, short term staff permit, emergency permit, or other provisional credential.

b. Employees possessing a preliminary credential will be regarded as having greater seniority than employees possessing only an intern credential, provisional internship permit, short-term staff permit, emergency permit, or other provisional credential.

c. Employees possessing a Bilingual, Cross-cultural, Language and Academic Development (BCLAD) certification will be regarded as having greater seniority for purposes of determining seniority order than certificated employees currently possessing Cross-cultural, Language and Academic Development (CLAD) certification or SDAIE certification pursuant to Senate Bill (SB) 1969 or SB 395. Similarly, certificated employees possessing CLAD certification or Specially Designed Academic Instruction in English (SDAIE) certification pursuant to SB 1969 or SB 395 will be regarded as having greater seniority for purposes of determining seniority order than certificated employees not having certification/authorization to teach English Language Learners.

d. Employee who possesses the greater number of supplemental authorizations in addition to the employee's underlying credential will be regarded as having greater seniority than the employee possessing the lesser number of such supplemental authorizations.

e. Employees with the following subject matter authorizations, in order of preference, will be regarded as having greater seniority

- (1) Speech and Language
- (2) Resource Specialist (RSP) or Special Day Class (SDC)
- (3) Math
- (4) Sciences (including Health)

f. Employees with a Ph.D./Ed.D. from an accredited institution of higher education will be regarded as having greater seniority than employees possessing a Master's Degree from an accredited institution of higher education. Similarly, employees with a Master's Degree from an accredited institution of higher education will be regarded as having greater seniority than employees possessing a Bachelor's Degree.

g. Certificated employees will be ranked by total semester credits earned at an accredited institution of higher education after earning a Bachelor's Degree starting with the greatest number of credits to the least number of credits.

h. The employee with the earlier effective date of issuance of a clear professional, standard, or general credential authorizing a classroom teaching assignment will be regarded as having greater seniority.

i. The employee with the earlier effective date of issuance of a preliminary credential authorizing a classroom teaching assignment will be regarded as having greater seniority for purposes of determining seniority order.

j. Seniority is determined by a random drawing by lot.

7. On March 11, 2008, the Governing Board of the District adopted Resolution No. R-18, regarding non-reelection and release from employment of 40 temporary and substitute certificated employees.

Education Code Section 44954 requires the Governing Board to notify certain temporary certificated employees before the end of the school year of the District's decision to not reelect the employee for the next succeeding year. Education Code Section 44953 allows the Governing Board to dismiss substitute certificated employees at any time at the pleasure of the Board.

Resolution No. R-18 directed that prior to March 15, 2008, the Superintendent or her designee, provide notice to certain individuals presently employed as temporary or long-term substitute certificated employees within the District that the Governing Board desires to not



reelect those employees for the next succeeding school year in any certificated position within this District, that the Board has determined to release and to not reelect them for the 2008-2009 school year, and that their employment is thereby ended upon the close of the 2007-2008 school year.

8. The District identified respondents Maria Hernandez, Richard Larson, Roberta Olbrantz and Cristina Ramos as being "Temporary Categorical Employees (Precautionary)."

9. On March 12, 2008, the Superintendent's designee, Laurie Bruton, Ed.D., Assistant Superintendent, Human Resources, sent notices to certain certificated probationary and permanent employees, including respondents, by personal service and/or first class mail, informing them that pursuant to Education Code sections 44949 and 44955, "it has been recommended to the Governing Board of the District that their services will not be required for the ensuing school year (2008-2009)."

The notice set forth the reason for the layoff as being the Governing Board's decision to reduce particular kinds of certificated service not later than the commencement of the 2008-2009 school year, which required a reduction in a corresponding number of full-time equivalent positions.

The notices further advised the employees of their right to a hearing, which must be requested in writing and delivered to Dr. Bruton, no later than 4:30 p.m. on Monday, March 24, 2008. Individuals who failed to timely return the Request for Hearing form waived their right to a hearing.

10. Prior to March 12, 2008, Dr. Bruton sent notices to all certificated "precautionary" employees, including respondents, by personal service, giving them notice that the Governing Board has taken action not to reemploy them for the 2008-2009 school year.

The notices further advised the employees that the District believes they are not entitled to the rights of probationary or permanent certificated employees within the layoff process due to their temporary employee status under Education Code section 44929.25. However, the District provided them, as a precaution, the same type of notification as sent to respondents classified as probationary and permanent employees.

11. Each respondent who is a probationary, permanent, or precautionary employee filed timely requests for hearing.

12. On April 18, 2008, the District served each respondent, by registered/certified mail, with an accusation packet, consisting of a Notice of Accusation, a copy of the Accusation that was filed by the District's Superintendent, relevant sections from the Government Code pertaining to administrative adjudication, and a Notice of Hearing. As required by the Education Code, the Accusation notices informed respondents that unless a written request for a hearing, signed by the certificated employee or on that employee's



behalf, and received by the Governing Board on or before 4:30 p.m. on April 28, 2008, the Governing Board may proceed on the Accusation without a hearing. The request for a hearing was to be made by delivering or mailing a Notice of Defense, as provided in Government Code section 11506, to Dr. Bruton. The certificated employees were also informed that failure to request a hearing by filing a Notice of Defense within the specified period would constitute a waiver of the right to a hearing.

13. Each respondent who is a probationary, permanent, or precautionary employee filed a timely Notice of Defense.

14. Prior to commencing the administrative hearing, the parties so stipulated and the District withdrew the Accusation filed against respondent Rachel Chavez. During the hearing, the parties additionally agreed to the following:

a. The provisions in the employment contracts under which respondents Maria Hernandez, Richard Larson, Roberta Olbrantz, and Cristina Ramos were originally hired have not changed.

b. Although the parties disagree with respect to respondent Ann Remah's seniority date, they agree that a change in her seniority date would not affect her being identified as an employee who should receive a layoff notice.

c. The parties agree that Arlene Martinez and Virginia Franco have BCLAD authorizations that were not included in the current seniority list.

15. The proposed reduction or elimination of the 51.5 FTE positions will not reduce District services below mandated levels.

16. The District maintains a seniority list containing employees' seniority dates, credentials and authorizations, current locations and assignments and status (tenure, probationary, or intern). The information on the seniority list is maintained on a continuous basis, with provision for employees to request that corrections/updates be made. The seniority list is deemed accurate.

The seniority list, current as of March 7, 2008, was used to identify those employees subject to receiving layoff notices. The most recent update to the seniority list was completed on May 1, 2008, and corrections would continue to be made, as necessary.

17. The District used the seniority list to develop a proposed layoff and "bumping" list of the least senior employees currently assigned to positions in the particular kinds of services being reduced or discontinued. 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.



18. The Governing 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.

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

20. Respondents are not certificated and competent to render the service being performed by any employee with less seniority who is being retained, within the meaning of Education Code section 44955. As specified within section 44955, subdivision (b), except as otherwise provided by statute, the services of no permanent employee is being terminated while any probationary employee, or any other employee with less seniority, is being retained to render a service which said permanent employee is certificated and competent to render.

21. To the extent seniority ties occurred, seniority ties were broken, in accordance with the tie-breaking criteria set forth in Resolution No. R-16, adopted by the Governing Board on March 4, 2008. Tie-breaking analysis was completed for groups of employees with the same seniority dates as far back as August 15, 2004. Dr. Bruton testified that the seniority rank ordering that resulted from applying the tie-breaking criteria did not result in a change as to who should or should not have received a layoff notice.

22. The causes for terminating each respondent's employment relate solely to the welfare of the schools and the pupils thereof.

23. Respondents Maria Hernandez, Richard Larson, Roberta Olbrantz, and Cristina Ramos have been classified by the District as certificated temporary employees serving in categorically funded positions. However, these "precautionary" respondents contend that since categorical funding for the positions they now hold has not ended, they are entitled to the same rights in the layoff proceedings as probationary employees.

Each of these respondents is employed under the Class Size Reduction program Option 2 at 0.5 FTE (i.e., half-time contract). Under option 2, a school district shall provide a reduced class size for all pupils in each classroom for at least one-half of the instructional minutes offered per day in each grade level for which funding is claimed. Funding for this program is dependent on the number of classes that fit program ratios of 20 students per teacher.

24. A categorically funded program is one financed outside a district's base revenue limit with funds designated for a use specified by the particular program. The Class Size Reduction program is a categorically funded program. (Ed. Code, §§ 52120-52128.5.) Teachers in these programs are often treated by districts as temporary employees, and under Education Code section 44909, they may be terminated at the expiration of funding for the program without the protections of Education Code sections 44949 and 44955. However,

they may be terminated in this fashion only if the program has expired. If the program does not expire, these teachers cannot be dismissed without the procedural protections due permanent and probationary employees. (*Bakersfield Elementary Teachers Assn. v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260.)

25. The original contracts for each of the categorically funded temporary respondents incorporated an agreement that the District will employ each of them as "a temporary certificated employee pursuant to the Education Code" for a specific period (the current school year). The employee, in signing the contract acknowledges that the contract is for temporary employment for the length of service specified there in and that their position is "subject to end pending a drop of enrollment" (i.e., if enrollment falls below 21 students for five consecutive days, the contract shall be terminated).

Respondent Roberta Olbrantz's original start date was November 1, 2003; Maria Hernandez started on October 1, 2004; Cristina Ramos started on August 30, 2005; and Richard Larson started on October 15, 2007. The District has not established that the categorical funding for their positions will end at the end of the current school year. The impact of the anticipated budgetary shortfall on the District's categorically funded programs for the 2008-2009 school year is not known.

#### LEGAL CONCLUSIONS

1. Education Code section 44949, subdivision (a), states, in pertinent part:

(a) 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, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

2. Education Code section 44955 states, 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. . . .

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. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(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.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

3. Education Code sections 44949 and 44955 establish jurisdiction for this proceeding. The notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945 were met. (Factual Findings 1 through 25.)

4. The services identified in the Governing Board's resolution are particular kinds of services that can be reduced or discontinued pursuant to Education Code section 44955. The Governing Board's decisions to reduce or discontinue the identified services are neither arbitrary nor capricious, and are a proper exercise of its discretion. Cause for the reduction or discontinuation of particular kinds of services is related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services is necessary to address a decrease the expenditures of the District resulting from a projected budgetary shortfall affecting the 2008-2009 school year. (Factual Findings 1 through 5, 7, 18, 19, and 22.)

5. Education Code section 44909 states, in pertinent part:

The governing board of any school district may employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted under . . . categorically funded projects which are not required by federal or state statutes. The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the governing board and such agreement shall be reduced to writing. Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of the district by which he is employed are maintained and (2) such person is subsequently employed as a probationary employee in a position requiring certification qualifications. Such persons may be employed for periods which are less than a full school



year and may be terminated at the expiration of the contract or specially funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees other than Section 44918.

6. Education Code section 44918 states, in pertinent part:

(a) Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, 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.

(b) Any such employee shall be reemployed for the following school year to fill any vacant positions in the school district unless the employee has been released pursuant to subdivision (b) of Section 44954 [after serving during one school year at least 75 percent of the number of days the regular schools of the district are maintained, if the employee is notified before the end of the school year of the district's decision not to reelect the employee for the next succeeding year].

7. Cause exists to provide respondents Maria Hernandez, Richard Larson, Roberta Olbrantz, and Cristina Ramos with the rights accorded to probationary employees under Education Code sections 44949 and 44955. (Factual Findings 7 through 25.)

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 through 25.)

9. Cause exists within the meaning of Education Code Sections 44949 and 44955 for terminating the employment of Ruth Bravo, Patricia Cardiel, Mary Dishigrikyan, Leah Elmange, Janey Hamrick, Brian Hansen, Jennifer Hernandez, Maria Hernandez, Gloria Jimenez, Domani Kem, Richard Larson, Bernadette Leeper, Kathryn Macias, Elizabeth Martel, Arlene Martinez, Buffie Meyers, Reagan Mikhail, Catherine Miyagishima, Jennifer Munoz, Ricardo Ojeda, Roberta Olbrantz, Myra Orozco, Sharon Quirarte, Ann Rameh, Cristina Ramos, Kristy Rosander, Monica Russell, Ginger Sparks, Yvonne Spitzer, Alisha Zepeda, Merced Rodriguez, Jeonon Mocilac, Melissa Holo, Manuel Cornejo, Virginia Franco, Nilda Huerta, and Alexandria Zirschky for the 2008-2009 school year due to particular kinds of services that are to be reduced or discontinued for the ensuing school year, as more fully set forth in Factual Finding 5, which requires a corresponding decrease in the number of employees within this District by 51.5 full-time equivalent positions. Each Respondent is one of those employees whose employment it is therefore necessary and appropriate to terminate at the end of the current year.

## ORDER

1. Notice may be given to respondents Ruth Bravo, Patricia Cardiel, Mary Dishigrikyan, Leah Elmange, Janey Hamrick, Brian Hansen, Jennifer Hernandez, Maria Hernandez, Gloria Jimenez, Domani Kem, Richard Larson, Bernadette Leeper, Kathryn Macias, Elizabeth Martel, Arlene Martinez, Buffie Meyers, Reagan Mikhail, Catherine Miyagishima, Jennifer Munoz, Ricardo Ojeda, Roberta Olbrantz, Myra Orozco, Sharon Quirarte, Ann Rameh, Cristina Ramos, Kristy Rosander, Monica Russell, Ginger Sparks, Yvonne Spitzer, Alisha Zepeda, Merced Rodriguez, Jeonon Mocilac, Melissa Holo, Manuel Cornejo, Virginia Franco, Nilda Huerta, and Alexandria Zirschky, that their services will not be required for the 2008-2009 school year because of the reduction or discontinuance of particular kinds of services, as provided in Governing Board of Whittier City School District Resolution No. R-17.

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

DATED: May 7, 2008.

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ROBERT S. EISMAN  
Administrative Law Judge  
Office of Administrative Hearings