

BEFORE THE  
BOARD OF EDUCATION OF THE  
SOUTH WHITTIER SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusations Against:  
  
Certain Certificated Employees of  
the South Whittier School District,  
  
Respondents.

OAH No. 2010030756

**PROPOSED DECISION**

Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 27, 2010, at the South Whittier School District in Whittier, California.

Atkinson, Andelson, Loya, Ruud & Romo, by Aaron V. O'Donnell, Attorney at Law, represented the School District.

The respondents in this proceeding are certificated employees Violet Avelar-Romo, Jean Beers, Nancy Boster, Sonya Brannan, Christina Carmona, Sheril Carrasco-Tolentino, Alexis Clark, Joanne Espinosa, Juliawati Friedman, Ann Geib, Amrita Hills, Noelle Heusser, April Jensen, Patricia Lopez, Susana Medellin, Keith MacInnes, Eva Marie Perez, Kelly Rawley, Maria Ubada-Kim, and Patricia Underwood (collectively, Respondents).

Reich, Adell & Cvitan, by Kent Morizawa, Attorney at Law, represented all Respondents except for Sonya Brannan. Ms. Brannan filed a request for hearing and notice of defense, but was not present at the hearing. All other Respondents were present at the hearing except for Kelly Rawley.

Evidence was received by stipulation, documents, and testimony. The matter was submitted on April 27, 2010.

**FACTUAL FINDINGS**

1. Erich Kwek is the Superintendent of the South Whittier School District (District). Cecilia Laidemitt, Associate Superintendent, Administrative Services and

Personnel Management, and her staff were responsible for implementation of the technical aspects of the layoff.

2. Respondents in this proceeding are certificated employees of the District.

3. On February 23, 2010, the Governing Board of the District adopted Resolution No. 9-10-06, which proposed a layoff of 26.0 full-time equivalent (FTE) certificated employees. Specifically, the Resolution provided for the reduction or elimination of the following particular kinds of services (PKS):

<u>Service</u>	<u>FTE Reduction</u>
Elementary School Principal	1.0
Middle School SDC/LH	1.0
Middle School English/Language Arts	3.5
Middle School Science	0.5
Middle School History/Social Science	2.0
Middle School Math	2.0
Middle School Physical Education	1.0
K-6 Classroom Teaching	<u>15.0</u>
TOTAL	26.0

4. On March 9, 2010, the Superintendent notified the Governing Board that he recommended that notices be provided to 27 employees. The Superintendent recommended that seven of those employees, who are temporary or long-term substitute employees, should be given notices as a matter of precaution. In addition, the Superintendent recommended that three additional employees (April Jensen, Keith MacInnes, and Joanne Espinosa) should be given notices as a matter of precaution.

5. On or before March 15, 2010, the District served on 30 employees a written notice that it had been recommended that notice be given to them pursuant to Education Code sections 44949 and 44955 that their services would not be required for the 2010-2011 school year. Each written notice set forth the reasons for the recommendation. Notice of layoff was served personally on most employees and, on others, by certified mail-return receipt requested and regular mail.

6. Of the 30 employees, seven of them are temporary or long-term substitute certificated employees who were sent the written notice as a matter of precaution. These seven temporary employees have been notified that they are released from employment with the District at the end of the 2009-2010 school year. Although temporary employees are not generally entitled to due process rights under Education Code section 44949 and 44955, the District provided precautionary layoff notices to the seven temporary employees to allow them an opportunity to assert hearing or seniority rights, if any, they might claim to possess. Respondent Christina Carmona is the only temporary employee who submitted a written request for hearing. The six other temporary or long-term substitute certificated employees

who were provided a precautionary layoff notice have waived their right, if any, to request a hearing or participate in this proceeding. (Ed. Code, § 44949, subd. (b).)

7. Sixteen employees who were served with a preliminary layoff notice timely requested, in writing, a hearing to determine if there is cause for not reemploying them for the 2010-2011 school year. The three employees who received precautionary layoff notices (Jensen, MacInnes, and Espinosa) also timely submitted a written request for hearing. Four employees who were served with a preliminary layoff notice -- Jennifer Aguire, Victoria Avila, David Crabtree, and Melvin Lazenby -- did not submit a written request for hearing. Consequently, they have waived their right to a hearing and cannot contest the recommendation of their non-reemployment by the District. (Ed. Code, § 44949, subd. (b).)

8. Thus, in this proceeding, Respondents are the sixteen employees who requested a hearing; the three employees who received precautionary layoff notices who requested a hearing, and temporary employee Christina Carmona, who requested a hearing.

9. The Superintendent made and filed Accusations against each of the Respondents. The Accusations with required accompanying documents and blank Notices of Defense were timely served on Respondents. Notices of Defense were timely filed by 13 of the Respondents. The District did not object to the Respondents who did not file a Notice of Defense from participating in this proceeding.

10. Board Resolution 9-10-07, adopted on February 23, 2010, 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 its students in accordance with the nature and type of credentials and authorizations.

11. The District maintains a seniority list which contains employees' seniority dates (first date of paid service), current assignments and locations, advanced degrees, credentials, and authorizations.

12. The District properly considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of layoff notices to be delivered to employees by March 15, 2010.

13. The District properly created its seniority list by determining the first date of paid service of each credentialed employee and properly utilized reasonable "tie-breaker" criteria when necessary. For each PKS identified in Resolution No. 9-10-06, the District looked at all employees within the PKS and went through the seniority list in reverse seniority order, starting with the least senior employee, until enough employees were identified corresponding to the PKS reduction. The District used tie-breaker criteria adopted by the Governing Board to break ties between employees having the same seniority date.

14. The District examined the seniority list to determine whether any junior employee was performing a service that a senior employee was certificated and competent to render and, if so, allowed the senior employee to "bump" into the junior employee's position. The District "skipped" the five employees assigned as TOSA-ELD Specialist Coaches and one employee assigned as a TOSA-Reading Specialist.<sup>1</sup> (Ed. Code, § 44955, subd. (d).) The TOSA employees are Camden Oden (seniority list #158), Michael Long (#144), Tiffany Baides (#139), Kathleen Kivi (#133), Sarah Payne (#78), and Kayleen Merrill (#9). The TOSA coaches provide training and support for the District's classroom teachers. The District needs the services of the TOSA coaches to continue in the next school year, in order to comply with its obligations under NCLB as a "Program Improvement" district.

15. Respondent Patricia Lopez (#149) is a seventh and eighth grade English/Language Arts teacher. Her seniority date is January 6, 2003, which she does not dispute. Respondent Lopez contends that she can perform the duties of a TOSA-ELD Specialist Coach currently performed by a less senior teacher, Camden Oden (#158). Before his assignment as a TOSA coach, Oden taught English/Language Arts in middle school. All of the District's TOSA-ELD Specialist Coaches received intensive, specialized training during the 2009-2010 school year. Respondent Lopez has not had the TOSA training, but she has experience in training and providing support for incoming classroom teachers, primarily as a trainer in the Beginning Teacher Support and Assessment (BTSA) program. At the hearing, the District withdrew the Accusation against Respondent Lopez. Her employment with the District is not at issue in this layoff proceeding.

16. The District provided precautionary layoff notices to Respondents Jensen, MacInnes, and Espinosa, in case other senior employees noticed for layoff might claim rights to "bump" them from their current assignments. The District determined there are no employees eligible to "bump" these three Respondents. Consequently, the District has withdrawn the Accusations against Respondents Jensen, MacInnes, and Espinosa. Their employment with the District is not at issue in this layoff proceeding.

17. No issue was raised by Respondent Christina Carmona that her classification by the District as a temporary employee was improper.

### LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met.

2. The services identified in Resolution No. 9-10-06 are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor

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<sup>1</sup> TOSA stands for teacher on special assignment. The TOSA positions are categorically funded positions. As far as the District knows, categorical funds are in place for the next school year.

capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

3. 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.)

4. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. The District identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued.

5. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

6. 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.) Under Education Code section 44955, subdivision (d)(1), 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. (*Santa Clara Federation of Teachers, Local 2393 v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.)

#### ORDER

1. Notice may be given to employees occupying 26.0 full-time equivalent certificated positions that their services will not be required for the 2010-2011 school year because of the reduction and discontinuance of particular kinds of services, except as set forth below.

2. Notice shall be given in inverse order of seniority.

3. Notice may not be given to Respondents April Jensen, Keith MacInnes, Joanne Espinosa, and Patricia Lopez, as the Accusations against them have been withdrawn.

Dated: May \_\_\_, 2010

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ERLINDA G. SHRENGER  
Administrative Law Judge  
Office of Administrative Hearings