

**BEFORE THE
GOVERNING BOARD
WALNUT VALLEY UNIFIED SCHOOL DISTRICT**

In the Matter of the Accusation Against:

Kasumi Hoad, Darren Hoff, Michael
James, Anna Landi, Leslie Schroerlucke,
Suzanne Sieker, Brandy Thomas, and Lisa
Van Dine,

Respondents;

and

Evelyn Galligani, Janna Beth Lindenberg,
Marie Thornberry, Erica Bell, Alvin
Graham, Tom Inqlima, Susan Liu, Jana
Long, Kary Marie Penzes, Gretchen
Thompson, Amy Underwood, and Michelle
Yim,

Precautionary Respondents.

OAH No. L2004030443

PROPOSED DECISION

Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter at the Walnut Valley Unified School District Board Room, in Walnut, California, on April 29, 2004.

Clifford D. Weiler, Esq., Atkinson, Andelson, Loya, Rudd & Romo, represented Complainant.

Paul Crost, Esq., Reich, Adell, Crost & Cvitan, represented Respondents, except Precautionary Respondents Thornberry, Liu, Penzes and Underwood, who either failed to file a Notice of Defense or withdrew their Requests for Hearing, as described below.

Oral and documentary evidence was received, and argument made. The record was left open for the parties to submit briefs supplementing their oral arguments. Respondents' brief was received on April 30, 2004, and marked as exhibit A; Complainant's brief was received on May 3, 2004, and marked as exhibit 21. The record was thereafter closed and the case submitted for decision on May 3, 2004.

SUMMARY OF DECISION

The Governing Board of the Walnut Valley Union School District ("District") determined to reduce or discontinue particular kinds of services provided by teachers and other certificated employees for budgetary reasons, totaling 57.05 full-time equivalent positions. 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, "bumping," "skipping," and breaking ties between employees with the same first dates of paid service. The tie-breaking process was objective and in good faith. The selection process was in accordance with the requirements of the Education Code.

One Respondent is entitled to a seniority date one day earlier and thus is not subject to lay off because not enough more senior employees can bump her. The Precautionary Respondents are temporary employees not entitled to hearing rights in this case and the Accusation against them is therefore properly dismissed. The disposition of the remaining parties is as requested by Complainant.

FACTUAL FINDINGS

Parties & Jurisdiction

1. Complainant Bryan Cole is the Administrative Director - Human Resources, and Designee of the District Superintendent for purposes of this lay off process, who made and filed the Accusation in his official capacity as such.
2. Respondents were at all times mentioned certificated District employees.
3. On or before March 9, 2004, Complainant, as Designee of the Superintendent, recommended to the Governing Board of the District ("Board") that notice be given to Respondents, Precautionary Respondents, and other employees, that their services will not be required for the next school year, pursuant to Education Code sections 44949 and 44955.
4. On March 9, 2004, the Board adopted Resolution No. 04-24, which proposed a lay off of 79.25 Full-Time Equivalent (FTE) certificated employees, beginning not later than the commencement of the 2004-2005 school year.¹ The Superintendent was directed to give notices to certificated employees that their services would not be required next school year.

¹ The Board later decreased to 57.05 the number of FTE positions to be reduced. See Factual Finding 15 below.

5A. On or before March 15, 2004, and after notification to the Board, certificated employees, including Respondents and Precautionary 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 for the next school year.

5B. The Precautionary Respondents were given notifications relating to this layoff proceeding, as a precaution, in order that each be permitted to participate and exercise arguable rights to this hearing process, although Complainant asserted then (and now) that such individuals do not possess any such rights to this hearing process because they were temporary certificated employees. Each of the Precautionary Respondents was also released and non-re-elected, pursuant to separate Board Resolutions, based upon their category as temporary employees.

6. Pursuant to Education Code section 44949, Respondents and Precautionary Respondents, in writing, requested a hearing to contest whether there was cause for not reemploying them next school year.

7. After adoption of Resolution No. 04-24, but before the Accusation was filed, the Board considered all known assured attrition.

8. Respondents and Precautionary Respondents timely and properly filed Notices of Defenses, which requested the instant hearing, except Precautionary Respondent Marie Thornberry, who by failing to file a Notice of Defenses, waived her right to contest the Accusation. Complainant moved to dismiss the Accusation against her due to that default.

9. Subsequently, Respondent Thomas withdrew her Request for Hearing, and did not appear at the hearing. Complainant moved to dismiss the Accusation against her due to that default.

10. Subsequently, Precautionary Respondents Liu, Penzes, and Underwood also withdrew their Requests for Hearing, and they did not appear at the hearing. Complainant moved to dismiss the Accusation against them due to their defaults.

11. At the hearing, Complainant moved to dismiss the Accusation against Precautionary Respondent Galligani, because Complainant no longer wants to treat her as a Precautionary Respondent to whom notice of these lay off proceedings is necessary, as opposed to the other Precautionary Respondents. Complainant's counsel stated on the record that because she was also given notice of her non-re-election as a temporary employee, such action did not necessarily mean she would be retained for the next school year.

12. At the hearing, Complainant, without objection, withdrew the Accusations against Respondents Schroerlucke and Van Dine, because the District decided to retain their services for the next school year.

The District's Lay Off Decisions

13. Board Resolution No. 04-24 specifically provided for the reduction or elimination of the following particular kinds of services:

<u>Particular Kinds of Service</u>	<u>Full-Time Equivalent Positions (FTE)</u>
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Elementary School Services:

Kindergarten through 5th classroom teaching services	18.0
ELS (Elementary Learning Specialist) teaching services	6.5
Elementary Music, itinerant, grades 1 through 5	3.0
Elementary Physical Education, itinerant, grades 1 through 5	3.0

Middle School Services (Grades 6 through 8):

Social Studies Teaching Services	3.0
Language Arts/English Teaching Services	3.0
Science Teaching Services	2.0
Math Teaching Services	2.0
English as a Second Language (ESL) Teaching Services	0.20
Academic Enrichment Teaching Services	0.20
Physical Education Teaching Services	5.0
Photography Teaching Services	0.80
Publishing Teaching Services	0.20
Art Teaching Services	1.0
PALS (Peer Assistance Leadership) Teaching Services	0.20
Leadership Teaching Services	0.20
Life Skills Teaching Services	0.40
Spanish Teaching Services	0.40
On My Own Teaching Services	0.20
Journalism Teaching Services	0.20
Yearbook Teaching Services	0.60
Computer Teaching Services	0.20
Technology Coordinator Services	1.0
Technology Teaching Services	0.40
Film Appreciation	0.20

High School (Grades 9-12):

Social Studies Teaching Services	3.0
Language Arts/English Teaching Services	3.0
Science Teaching Services	2.0
Math Teaching Services	2.0
Physical Education Teaching Services	3.0

High School (Grades 9-12): (continued)

Auto Shop Teaching Services	1.0
STAR (Success Through Alternate Resources) Teaching Services	1.0
Spanish Teaching Services	0.60
ASB Director Services	0.80
Walnut High School (0.4)	
Diamond Bar High School (0.4)	
Athletic Director Services	0.40
Walnut High School (0.2)	
Diamond Bar High School (0.2)	
IB (International Baccalaureate) Coordinator Services	0.80
Walnut High School (0.4)	
Diamond Bar High School (0.4)	
Technology Coordinator Services	0.20
ELD (English Language Development) Teaching Services	0.20
Psychology Teaching Services	0.60
Life Skills Teaching Services	0.20
Clothing 1 Teaching Services	0.20
Renaissance Teaching Services (student recognition program)	0.20
Primary Language Lab Teaching Services	0.40
Drama Teaching Services	0.40
Choir Teaching Services	0.40
Technology Lab Teaching Services	0.40
Video Productions Teaching Services	0.20
Business Teaching Services	0.40

Independent Study Program:

Teaching Services K-12	3.4
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Educational Services:

Reading Clinic Teaching Services	1.0
Reading Specialist Teaching Services	0.75
Pre-Intern Coordinator	0.80

TOTAL Full Time Equivalent Positions **79.25 FTE**

14. Board Resolution No. 04-24 also 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 established by the District, and the process in which it was implemented, were based on the needs of the District and its students, within the meaning of Education Code section 44955(b), and were not arbitrary or capricious.

15. On April 28, 2004, the evening before the hearing of this matter, the Board adopted Resolution No. 04-27, which decreased the scope of the particular kinds of services ("PKS") and respective FTE positions to be reduced in prior Board Resolution No. 04-24. That modification was based on further information received by the District, such as receipt of more resignations, retirements, and requests for leaves, which allowed further consideration of educational and staffing priorities for next school year. The modifications are stated below, with the adjusted PKS and FTE positions reflected by cross-outs, as follows:

Particular Kinds of Service

Full-Time Equivalent Positions (FTE)

Elementary School Services:

Kindergarten through 5th classroom teaching services	18.0
ELS (Elementary Learning Specialist) teaching services	6.5
Elementary Music, itinerant, grades 1 through 5	3.0
Elementary Physical Education, itinerant, grades 1 through 5	3.0

Middle School Services (Grades 6 through 8):

Social Studies Teaching Services	3.0	2.0
Language Arts/English Teaching Services	3.0	2.0
Science Teaching Services	2.0	
Math Teaching Services	2.0	1.0
English as a Second Language (ESL) Teaching Services	0.20	
Academic Enrichment Teaching Services	0.20	
Physical Education Teaching Services	5.0	
Photography Teaching Services	0.80	
Publishing Teaching Services	0.20	
Art Teaching Services	1.0	
PALS (Peer Assistance Leadership) Teaching Services	0.20	
Leadership Teaching Services	0.20	
Life Skills Teaching Services	0.40	
Spanish Teaching Services	0.40	
On My Own Teaching Services	0.20	
Journalism Teaching Services	0.20	
Yearbook Teaching Services	0.60	.20
Computer Teaching Services	0.20	
Technology Coordinator Services	1.0	
Technology Teaching Services	0.40	
Film Appreciation	0.20	

High School (Grades 9-12):

Social Studies Teaching Services	3.0	1.0
Language Arts/English Teaching Services	3.0	
Science Teaching Services	2.0	
Math Teaching Services	2.0	
Physical Education Teaching Services	3.0	
Auto Shop Teaching Services	1.0	
STAR (Success Through Alternate Resources) Teaching Services	1.0	
Spanish Teaching Services	0.60	
ASB Director Services	0.80	
Walnut High School (0.4)		
Diamond Bar High School (0.4)		
Athletic Director Services	0.40	
Walnut High School (0.2)		
Diamond Bar High School (0.2)		
IB (International Baccalaureate) Coordinator Services	0.80	
Walnut High School (0.4)		
Diamond Bar High School (0.4)		
Technology Coordinator Services	0.20	
ELD (English Language Development) Teaching Services	0.20	
Psychology Teaching Services	0.60	
Life Skills Teaching Services	0.20	
Clothing 1 Teaching Services	0.20	
Renaissance Teaching Services (student recognition program)	0.20	
Primary Language Lab Teaching Services	0.40	
Drama Teaching Services	0.40	
Choir Teaching Services	0.40	.20
Technology Lab Teaching Services	0.40	.20
Video Productions Teaching Services	0.20	
Business Teaching Services	0.40	

Independent Study Program:

Teaching Services K-12	3.4
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Educational Services:

Reading Clinic Teaching Services	1.0
Reading Specialist Teaching Services	0.75
Pre-Intern Coordinator	0.80

TOTAL Full Time Equivalent Positions	79.25 FTE	57.05 FTE
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16. The District maintains a Seniority List containing employees' seniority dates, current assignments and locations, advanced degrees, credentials, and authorizations. To assure the accuracy of seniority dates and other data, certificated employees were notified in writing of the District's records regarding their first dates of paid service and credentials in February of 2003, and they were requested to either confirm or challenge the accuracy of that information.

17. The District used that Seniority List to develop a proposed lay off 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 "skip" over other more senior employees. In determining who would be subject to lay off 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. Considering the findings and conclusions herein, no permanent or probationary certificated employee with less seniority will be retained to render a service that the Respondents are certificated and competent to render.

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

20. 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.

The Precautionary Respondents

21. Each Precautionary Respondent signed a temporary employment contract and served as a temporary certificated employee at all times mentioned. Their contracts clearly state "You are a temporary employee", and within the portion for acceptance of the offer, state "I accept the above offer of temporary employment ...". The contracts each cite only to specific provisions of the Education Code governing temporary employees. No evidence indicated there was any confusion or failure on their part to understand they were serving the District as limited-term, temporary employees, not accruing seniority as permanent employees. Complainant testified the District tries to match hired temporary employees to positions left open by teachers on leave or otherwise unavailable to teach that particular school year. No evidence indicated any temporary contract was in violation of the Education Code.

22. Precautionary Respondent Tom Inglima signed his temporary contract with the District under an emergency permit to teach. He teaches Physical Education. During service under his contract, he completed his coursework for a regular credential and the District was provided a C19 letter from his university so indicating. The District raised his pay when so notified, to give him the benefit of the fact he had completed his coursework. No evidence indicated the Los Angeles County Office of Education or the District had been notified that

his credentialing status had yet changed. No evidence indicated Mr. Inglima was told, or believed, that his temporary employee status with the District changed. The fact Mr. Inglima received the C-19 letter and pay raise therefore did not change his temporary status.

23. Precautionary Respondent Alvin Graham had a regular teaching credential when he signed his temporary employment contract (Preliminary Single Subject Physical Education). He teaches PE (60%) and Success Through Alternate Resources "STAR" (40%). No evidence indicated that he was told anything by the District, or believed, that his regular credential changed his status as a temporary employee.

Respondent Landi

24A. Respondent Anna Landi was first employed last school year under an emergency permit and was not given credit for that year in her seniority date. She later obtained her regular credential and returned to the District this school year as a permanent employee. The District gave her a seniority date of August 27, 2002, which is one day later than other teachers, new to the District, who were given seniority dates of August 26, 2002, because they reported to school one day early for new teacher orientation. Respondent Landi contends her seniority date should also be one day earlier, since as a returning teacher she was not required to attend that new teacher orientation. The earlier seniority date would prevent her from being bumped by now less senior employees, and thus prevent her from being subject to lay off.

24B. According to Article IV of the Master Contract between the District and the teachers' union, in effect at the times in question, returning teachers have a 184-day contract, but new teachers have a 185-day contract because they are required to report one day earlier for new teacher orientation. As a returning teacher who previously completed that orientation, Respondent Landi was not required to attend the earlier day of orientation. No evidence indicated that she did.

24C. Teachers in the same pay grade, whether new or returning teachers, are paid an identical annual salary, regardless of whether they reported for orientation the prior day. Under the circumstances, it is more equitable to consider August 26, 2002, as Respondent Landi's first date of paid service, since she and any new teacher in her pay grade were paid the same amount during this school year, whether or not they reported for duty the prior day. The most reasonable view of this situation is that Respondent Landi essentially had a paid day of leave on August 26, 2002, in which her absence was excused because she had already completed the orientation.

24D. Viewing this situation otherwise would establish an unfair and irrational anomaly, where new teachers to the District are given greater seniority rights over returning teachers (who already have experience with the District) simply because the new teachers have no prior experience with the District. No fact or public policy is apparent that would support such a preference.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44944 and 44945 were met. Factual Findings 1-12.

2A. A senior teacher whose position is discontinued has the right to transfer to a continuing position that 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.

2B. Junior teachers may be given retention priority over senior teachers ("skipping") only if the junior teachers possess competence which their more senior counterparts lack. *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.

3. The District correctly concluded that the Precautionary Respondents were temporary employees not entitled to hearing rights afforded by this process.

Individuals serving as temporary employees are not entitled to the rights within Education Code section 44955. The procedures instituted by the District in hiring the Precautionary Respondents as temporary employees satisfied the requirements set forth by the California Supreme Court in *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, 918. In that case, the Supreme Court held that under Education Code Section 44916, school districts may classify new hires as temporary employees if they (1) notify the employee of his/her salary and status as a temporary employee; (2) do so in a written notice; and (3) give such notice at the time of initial employment. Since these requirements were met, the District here properly classified the Precautionary Respondents as temporary employees. Respondents presented no evidence to the contrary. Factual Findings 21-23.

The fact the Precautionary Respondents taught under regular credentials or emergency permits while serving their temporary contracts does not alter their status as temporary employees who do not have hearing rights. The law on this topic is clear. "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.

The case of *California Teachers Assn. v. Governing Bd. of Golden Valley Unified School Dist.* (2002) 98 Cal.App.4th 369 provides the Precautionary Respondents no relief. That case only affirmed a school district's ability to classify an employee teaching under an emergency permit as "probationary," and that if so classified, such an employee is entitled to the protection of not being subject to a mid-year summary termination. Rather,

only an end of the school year non-reelection of employment can terminate them. *Id.*, at 383-384. However, the court specifically limited its decision to that relief, and affirmatively stated teaching under an emergency permit did not entitle that employee to credit toward tenure, citing affirmatively to *Summerfield*. *Id.*, at 377.

The Precautionary Respondents erroneously argue their temporary contracts are void and thus they should be re-classified as probationary employees instead, citing to *Fine v. Los Angeles Unified School District* (2004) 116 Cal.App.4th 1070, 1077. The *Fine* court did hold that contract terms cannot supercede statutory requirements and that an employee cannot waive rights under the Education Code by an employment contract in violation thereof. *Id.* However, there was no evidence in this case that any of the temporary contracts violated the Education Code. Complainant established that temporary employees are generally hired to fill open positions due to leaves of absence by other certificated employees. Two of the Precautionary Respondents were hired to teach P.E. These appear to be valid reasons to classify a new hire as a temporary employee. No evidence was presented showing any of the Precautionary Respondents were hired in a way violating the Education Code, or that their classification as temporary employees was improper or in violation of that law. Under these circumstances, their temporary employee contracts control and establish they are not entitled to re-classification as probationary employees. Factual Findings 21-23.

4. Under the Education Code, seniority is measured from the first date on which an employee rendered paid service. Education Code sections 44845 and 87414. According to Education Code section 45028, teachers in the same pay grade are entitled to the same annual pay. Because Respondent Landi was not required to report one day early for new teacher orientation, and yet was paid the same as teachers in her same pay grade who would have been required to report early, her first date of paid service should be viewed as the earlier day of August 26, 2002. No authority was cited indicating that the Education Code will be perverted or frustrated by this outcome. No fact or law was presented indicating new teachers to the District should be given preference in lay off cases simply because they report one day earlier for training already incurred by returning teachers. The earlier seniority date prevents her from being bumped out of a position, and thus Respondent Landi is not subject to lay off. Factual Finding 24.

5. The services identified in Board Resolution No. 04-27 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. 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 1-24.

6. 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 1-24.

7. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render. Factual Findings 1-24.

ORDERS

1. The Accusation against Respondents Leslie Schroerlucke and Lisa Van Dine is **WITHDRAWN**. Notice shall not be given to them that their services will not be required for the 2004-2005 school year.

2. The Accusation against Respondent Anna Landi is **DISMISSED**. Notice shall not be given to her that her services will not be required for the 2004-2005 school year.

3. The Accusation against Respondent Brandy Thomas is **DISMISSED** by virtue of her default and waiver of her right to contest the Accusation. Notice shall be given to her that her services will not be required for the 2004-2005 school year.

4. The Accusation against Precautionary Respondents Marie Thornberry, Susan Liu, Kary Marie Penzes, and Amy Underwood, is **DISMISSED**, by virtue of their defaults and waivers of their right to contest the Accusation.

5. The Accusation against Precautionary Respondent Evelyn Galligani is **WITHDRAWN** by virtue of the District's decision not to treat her as a Precautionary Respondent in this matter.

6. The Accusation against the remaining Precautionary Respondents is **DISMISSED**, because they are temporary employees not entitled to the rights afforded by this proceeding.

7. The Accusation against the remaining Respondents is **SUSTAINED**. Notice shall be given to those remaining Respondents that their services will not be required for the 2004-2005 school year because of the reduction and discontinuance of particular kinds of services.

8. Notice to those remaining Respondents that their services shall not be required for the next school year shall be given in inverse order of seniority.

Dated: May 5, 2004

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings