

BEFORE THE
BOARD OF TRUSTEES OF THE
ANTIOCH UNIFIED SCHOOL DISTRICT
CONTRA COSTA COUNTY, STATE OF CALIFORNIA

In the Matter of the Accusation Against:

CERTAIN NAMED CERTIFICATED
EMPLOYEES OF THE ANTIOCH UNIFIED
SCHOOL DISTRICT REPRESENTING 175.9
FULL TIME EQUIVALENT POSITIONS

Respondents.

OAH No. 2010020460

PROPOSED DECISION

On April 21, 2010, in Antioch, Contra Costa County, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter.

Joshua A. Stevens, Esq., of Fagen Friedman and Fulfrost LLP, Attorneys at Law, 70 Washington Street, Suite 205, Oakland, California 94607-3795, represented Suzanne Pfeiffer, Human Resources Officer, Antioch Unified School District (the District).

Dale L. Brodsky, Esq., of Beeson Tayer & Bodine, Attorneys at Law, 1404 Franklin Street, Fifth Floor, Oakland, California 94612, represented Respondents whose names appear on Attachment "A," hereto.

On April 22, 2010, OAH received a letter, via telefacsimile transmission, that noted a correction for the first date of paid service to September 2, 2003, by Respondent Lori Roemer-Chrobak, who offered testimony during the course of the proceeding. The letter was marked as Exhibit "22."

On April 22, 2010, the parties were deemed to have submitted the matter and the record closed.

FACTUAL FINDINGS

Jurisdictional Matter

1. On March 26, 2010, Suzanne Pfeiffer, Human Resources Officer, Antioch Unified School District (the District), made and filed the Accusation in her official capacity with regard to the respondents to this matter.

2. On March 3, 2010, the District's Governing Board adopted Resolution No. 2009-2010-19. That resolution recites that pursuant to Education Code sections 44949 and 44955, it has become necessary for the District to reduce and/or to eliminate, as of the end of the 2010-2011 school year, particular kinds of services in the form of 175.9 full time equivalent (FTE) certificated employee positions as follows:

<i>Particular Kinds of Services</i>	<i>Number of Full Time Equivalent (FTE) Positions Eliminated</i>
Administrative	
Vice Principals	2.0
Director, Curriculum	1.0
Alternative Education Vice Principal	1.0
Teachers	
Class Size Reduction	107.0
Physical Education	7.0
Computer	10.0
Medical Terminology	0.6
Industrial Technology	1.0
Music	0.6
Academic Literacy	2.6
English Language Arts	1.0
Special Education Teachers	
Resource	4.0
Special Day Class	6.0
Adapted Physical Education	0.5
Other Certificated Employees	
Counselors	2.4
Reform Facilitator Coaches	6.0
Project Teachers	<u>23.2</u>
Total	175.9

3. On March 15, 2010, the District's Governing Board adopted Resolution No. 2009-2010-26. That resolution recites that it has become necessary for the District to reduce and/or to eliminate, as of the end of the 2010-2011 school year, particular kinds of services in the form of nine certificated FTE administrative positions.

4. Respondents to the proceeding are identified by name on the list attached hereto as Attachment "A"

5. Respondents are employees of the District, who contest the proposed certified employee lay-off action. Respondents are either probationary certificated employees or permanent (tenured) certificated employees with the District.

6. The District's Human Resources Officer's written preliminary notice, dated March 12, 2010, to each respondent stated legally sufficient reasons of the District's Board's intent to eliminate the course or service as taught or performed by the subject respondent.

7. Each Respondent timely requested in writing a hearing to determine whether or not cause exists for not reemploying each respondent for the ensuing school year.

8. District's Human Resources Officer's timely served upon each respondent the Accusation, dated March 26, 2010, and related documents. Each respondent filed timely notices of defense.

9. All pre-hearing jurisdictional requirements were met.

Stipulations

10. At the hearing of this matter, the parties stipulated to several issues. The stipulations are set out in the following Factual Findings 11 through 14.

11. More than one year ago on February 11, 2009, the District's Governing Board adopted Resolution No. 2008-2009-29, which was captioned "Determination of Seniority Among Certificated Employees ('Tie Breaker Resolution')." That resolution prescribed 11 criteria that are to be used to determine the order of termination of certificated employees who first rendered on the same date paid service to the District. In accordance with the Tie Breaker Resolution, if a tie exists after the application of criterion 1 through criterion 11, such tie would be broken by use of a lottery whereby "numbers shall be drawn with the lowest number drawn winning the tie and [with the lottery] continuing until all remaining tied individuals are ranked in order."

On March 10, 2010, the District applied the tie-breaking criteria in accordance with Resolution No. 2008-2009-29 to eight individuals, who are currently in either a Resource teacher or a Special Day Class Mild/Moderate teacher assignment and who have a seniority date of August 20, 2009. Those eight certificated employees are: David Backman; Jennifer Eichorn; David Hansen; Stacie Lucas; Michelle Ramsey-Levitt; Lana Rosing; Erin Schroeder and Tiffany Strickland. Ms. Strickland was deemed the most senior of the eight individuals and she did not receive a layoff notice after the application of the tie-breaking criteria.

12. Since the date of issuance of accusations upon respondents, the District discovered facts that require amendments to the seniority list that reflect changes to the first date of paid service to the District of certificated employees as follows:

<i>Name of Certificated Employee</i>	<i>Erroneous Date</i>	<i>Corrected First Date of Paid Service</i>
Renata Ellmore	8/27/04	8/23/04
Theresa Leonardy	8/24/04	9/29/03
Michelle Reece	8/30/05	9/02/04
Shelly Travers	8/21/08	8/28/07
Zhenus Wahidi	8/29/06	9/26/05

13. The District has rescinded the layoff notices as served on seven respondents namely: James Antonich; Kevin Bain; Saxon Buchanan Brown; F. Joseph Horacek; Patricia Howell; Steven Kestner; and Sherri Welch. By its withdrawal of the accusations, the District will retain the services of those seven individuals for the ensuing school year.

14. After cross-examination at the hearing of this matter, the parties stipulated the District's records would be changed for Respondent Kenneth Kent as previously appearing on the seniority list from August 27, 2004, to December¹ 2001. As a consequence of the change of the seniority date, the layoff notice is rescinded and the accusation is withdrawn as to Respondent Kenneth Kent. Accordingly, the District will retain the services of Respondent Kenneth Kent for the coming school year.

Respondents' Contentions

i. Respondents' Contentions, Generally

15. Respondents contend the District's layoff action is procedurally defective and improper insofar as the prospective layoff of the subject credentialed employees rests upon an incomplete, and therefore inexact, "seniority report." Respondents argue that the District's grouping of teachers only by first date of paid service to the District without any rationale scheme for the listing of names fails to provide the affected certificated employees with adequate information to assess their individual interests relative to other employees who share the same hire date. Respondents advance that the District's irregular seniority list does not fully account for seniority of the teachers affected by the proposed layoff in light of the District's retention of credentialed employees who are junior in time, or equal in time, in service to respondents.

ii. Contentions of Individual Respondents

16. Respondents, such as Ms. Jean Nichols, who are being bumped from the independent studies program's position, argue that the layoff action is improper as such teachers have invested great energy and resources to acquire unique skills to attain the level of competence now held by them. Moreover, Respondents in the group of independent teachers assert that the District should be equitably estopped from dislodging them from their

¹ At the time of the hearing, the parties had not agreed upon the precise date in December 2001 that Respondent Kenneth Kent was first hired to provide paid services as a teacher in the District.

current independent studies assignment because the District misled the teachers to pursue multiple subject credentials as opposed to allowing the teachers to earn a single subject credential in a high school oriented discipline that would have now precluded the layoff action to be executed against them. Respondent Nicholas, therefore, argues that she should be “skipped” over other teachers even though holders of single subject credentials have greater seniority than she possesses.

17. Respondents, such as Ms. Shannon Emerson, contend that the layoff action is unwise and unjust because over the years specialized training has been completed by the subject sixth-grade teachers, who are now subject to the layoff action. Respondent Emerson argues that the layoff action, which is seen as having “decimated [the] sixth-grade team,” will undo the progress that the teachers have made in improving math and English scores of the students, many of whom “live below the poverty line and some live in high crime, gang areas.” Respondents, through Ms. Emerson, argue that the proposed layoff action is in direct conflict with the mandate of the No Child Left Behind regulations and will adversely affect the school’s status as well as the District’s ability to follow the law.

18. Respondent Joel Miner contends that the Human Resources Officer erred in assigning him a position on the District’s seniority report. He argues that his proper first date of paid service to the District should have been in August 2006 because he completed more than 75 percent of the school year as a temporary employee of the District.

19. Respondent Lori Roemer-Chrobak contends that the District should have skipped her over more senior teachers because she completed most of the specialized training so as to teach courses in the alternative education program at the high school level. She argues that the District has not shown that the teachers, albeit having greater seniority than she, who are bumping her do not possess the competence to teach students in the high school and adult studies alternative education programs. Furthermore, Respondent Roemer-Chrobak avers that the Board Resolution’s directive that calls for the reduction of “107 FTE Class Size Reduction Teachers” does not properly include her as a subject for the layoff action because she is not specially assigned to a specific classroom as an alternative education teacher but rather she interacts with students in one-to-one settings.

Evidence from Respondents

20. Respondent Jean Nichols holds a teacher’s position in the Independent Study program at Prospect High School’s alternative education site. Her first day of paid service to the District is August 29, 2006. Respondent Jean Nichols possesses a multiple subject credential.

In October 2004 Respondent Nichols began as an Independent Study teacher. Her assignment causes her to devote her energies to aid “at risk” adult and teenager students who are in jeopardy of losing educational opportunities.

Although she has a professional preference to teach in the upper grades of high school and she has been aware that single subject credentials are ordinarily held by high school level teachers, when she came to the District absent an actual credential, Respondent Nichols was strongly encouraged to complete a course of teacher education that would have her earn a multiple subject credential. Respondent Nichols argued, on behalf of own herself as well as three other similarly situated teachers, that teachers were prompted to compete the HOUSSED program or the EPSS classes after the No Child Left Behind program was introduced. Respondent Nichols believes it to be “very unfair” for the District to take her from her desired teaching job at the high school level so as to teach at the fourth grade level because of her multiple subject credential, which she would not have pursued had District administrators not directed her to pursue.

But the contentions advanced by Respondent Nichols were without merit as the District’s evidence showed that the Governing Board created no skipping criteria in order to retain junior teachers now working in the high school-level Independent Study program. And Respondent Nichols did not offer evidence from an administrator, or other responsible individual, who could corroborate her claim of having been prompted by District managers to complete the multiple subject credential training program. Moreover as of the date of the hearing in this matter, Respondent Nichols was not classified as being “highly qualified” in all areas of Independent Studies to which she has been assigned to teach because she has not fulfilled all course requirements necessary for certification in that discipline.

And Respondent Nichols provided no competent evidence that the District has retained any teacher junior to her for which Ms. Nichols possesses a credential and is currently competent to teach. Nor did Respondent Nichols establish that the Human Resources Officer committed a procedural error in the initiation of the layoff action that adversely affects her teaching position with the District.

21. Respondent Shannon Emerson is a physical education teacher at Antioch Middle School. Her first day of paid service to the District is August 29, 2006. Respondent Emerson possesses a multiple subject credential.

Respondent Emerson has received special training to teach at the middle school that serves disadvantaged students. She and her colleagues,² who joined her in submitting a letter in support of her argument, were poignant in advancing that the District will lose valuable teacher assets with the proposed layoff action. And as poignantly argued by Respondent Emerson, more likely than not the District may be faced with lower test scores from students because of the loss of several teachers who have not only been devoted to teach disadvantaged students but also who have received years of specialized training to cope with the difficulties of students who populate Antioch Middle School.

² Lisa Sammon, Dana Yzurdiaga, Dane Dewitt, Karen Rosen, Lisa Kelly, Peggy Shockley, Nancy Carlaw, Wolfgang Croskey, and Wendee Weiss.

But the contentions advanced by Respondent Emerson were without merit as the District's evidence showed that the Governing Board has created no skipping criteria in order to retain junior teachers now working in the middle school level after having completed specialized training to meet the objectives of the No Child Left Behind regulations.

And Respondent Emerson provided no competent evidence that the District has retained any teacher junior to her for which Ms. Emerson possesses a credential and is currently competent to teach. Nor did Respondent Emerson establish that the Human Resources Officer committed a procedural error in the initiation of the layoff action that adversely affects her teaching position with the District.

22. Respondent Joel Miner is a sixth grade teacher in mathematics and science classrooms at Dallas Ranch Middle School. His first day of paid service to the District is August 28, 2007. Respondent Miner possesses a multiple subject credential.

Respondent Miner was not persuasive that the District is obligated to record his seniority date as dating back to August 2006, rather than the current date of August 28, 2007.

Human Resources Officer Ms. Pheiffer, as a rebuttal witness, established that the District extended a temporary teacher contract to Respondent Miner for the 2007-2008 school year. (In prior years, Respondent served as a substitute teacher and, for some years, he was an intern.) For 2008-2009, the District hired him as a probationary teacher. When the seniority list was created to determine teacher seniority for the instant layoff action, the District did grant Respondent Miner one year of service credit as a "prob zero" for a single preceding year where Respondent Miner performed services as a temporary employee over a span of more than 75 percent of the school year. Hence Respondent Miner has a correct seniority date of August 28, 2007.

And Respondent Miner provided no competent evidence that the District has retained any teacher junior to him for which Mr. Miner possesses a credential and is currently competent to teach. Nor did Respondent Miner establish that the Human Resources Officer committed a procedural error in the initiation of the layoff action that adversely affects her teaching position with the District.

23. Respondent Lori Roemer-Chrobak holds a teacher's position in the Independent Study program at Prospect High School's alternative education site. Her first day of paid service to the District is September 2, 2003. Respondent Roemer-Chrobak holds a multiple subject credential.

Respondent Roemer-Chrobak recalls that she has provided services to the students at Prospect High School since 2001. At this time, she teaches ninth grade students through adult students. Respondent Roemer-Chrobak has nearly completed a three-year course of study that has equipped her to provide alternative education and independent study courses to students who require unique teacher assistance.

But the contentions advanced by Respondent Roemer-Chrobak were without merit as the District's evidence showed that the Governing Board has created no skipping criteria in order to retain junior teachers now working at the high school level after having completed specialized training to meet the objectives of the Prospect High School alternative education program.

And Respondent Roemer-Chrobak provided no competent evidence that the District has retained any teacher junior to her for which Ms. Roemer-Chrobak possesses a credential and is currently competent to teach. Nor did Respondent Roemer-Chrobak establish that the Human Resources Officer committed a procedural error in the initiation of the layoff action that adversely affects her teaching position with the District.

Acts by the District's Human Resources Officer

24. Ms. Suzanne Pfeiffer, Human Resources Officer, for the District came to the hearing of this matter to provide credible and persuasive evidence.

Ms. Pfeiffer established the District's management rationally determined that the prospective elimination of particular kinds of services for the 2010-2011 school year will best serve the objectives and mission of the District, as well as the welfare of the students served by the District. The Human Resources Officer noted that an array of factors, including an impending financial plight for the District, serve as underpinnings for the necessity of the prospective reduction or elimination of particular kinds of services now offered by the District.

Ms. Pfeiffer demonstrated that the District's "seniority report" sets forth correct seniority dates for the respondents who will be affected by the layoff. The District has plans for a rational rehire mechanism that will properly rank teachers through its application of tie-breaking criteria. Ms. Pfeiffer showed that respondents' contentions, which advanced that the layoffs were flawed because of the current configuration of the District's seniority list, were without merit.

Ms. Pfeiffer offered evidence that a rational analysis was made for the elimination of 107 "Class Size Reduction teachers" by the District's personnel closely analyzing the credentials and existing assignments of less senior teachers who only hold multiple subject credentials as being subject to the layoff action. Also the District's personnel did not have the benefit of a Board resolution to skip junior teacher, who despite holding only a multiple subject credential also had received special training in independent study or alternative education or providing service to disadvantage students. And Ms. Pfeiffer noted that the District's Human Resources personnel calculated and estimated the prospective needs of the students as measured against prospective teacher staffing assets for the coming year.

Ms. Pfeiffer described a retirement incentive program that may affect the ultimate layoff action. The Board's retirement offer entails a plan to include 60 potential retirees. But the potential loss of participating older teachers, who are sought for inclusion in the incentive

retirement program, was not computed into the current layoff action because the deadline for older teacher to accept the offer has not occurred.

The Human Resources Officer in her official capacity was reasonable in her exercise of discretion in executing the procedures associated with the lay-offs of certificated employees required by the subject PKS resolution. The Human Resources Officer, as the Superintendent's designee, was neither arbitrary, capricious nor fraudulent in carrying out the directive of the Board's Resolution No. 2009-2010-19.

Ultimate Findings

25. No competent and credible evidence establishes that as a result of the proposed elimination of the full time equivalent positions respectively held by respondents, the District will retain any teacher who is junior to respondents to perform services for which respondents have been certificated or found to be competent to teach next school year.

26. The decision of the District's Board to eliminate or discontinue a total of 175.9 FTE positions as specified in Resolution No. 2009-2010-19, including the positions held by each respondent, was neither arbitrary nor capricious. Rather, the determination was within the proper exercise of the discretion bestowed by law upon the District.

27. The District's proposed elimination or discontinuation of the subject full time equivalent positions, including the positions respectively held by respondents, for the ensuing school year, is related to the welfare of the District and its overall student population.

28. The Board determined that it will be necessary, due to the elimination of particular kinds of services, to decrease the number of teachers before the beginning of the next academic year. The Human Resources Officer, as the Superintendent's designee, lawfully directed the notification to respondents of the elimination of the certificated positions held by each respondent.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955.

2. The District provided all notices and other requirements of Education Code sections 44949 and 44955. This conclusion of law is made by reason of the matters set forth in Factual Findings 1 through 9.

3. Evidence Code section 664 establishes a presumption that the action or official duties of a public entity, such as the District and its governing board, have been regularly performed. Respondents offer no evidence to rebut the presumption that the District has

properly performed actions related to the procedures that seek the non reemployment of respondents.

4. Judgments entered by a tribunal on the stipulation of the parties have the same effect as acts tried on the merits. (*John Siebel Associates v. Keele* (1986) 188 Cal.App.3d 560, 565.) The District stipulates to withdraw the Accusation against the certificated employees named in Factual Findings 13 and 14. The stipulations are binding on the parties.

5. Pursuant to Education Code sections 44949 and 44955 cause exists to give respondents notice of the discontinuation of full-time equivalent positions in the particular kinds of services rendered by respondents, by reason of the matters set out in Factual Findings 25, 26 and 28.

6. The discontinuation of the subject particular kinds of service provided by each respondent relates solely to the welfare of the District and its students within the meaning of Education Code sections 44949 and 44955, by reason of the matters in Factual Finding 27.

RECOMMENDED ORDER

1. The Accusations served on respondents are sustained, except that the accusations are dismissed as to Respondents James Antonich, Kevin Bain, Saxon Buchanan Brown, F. Joseph Horacek, Patricia Howell, Steven Kestner, Sherri Welch and Kenneth Kent.

2. Where preliminary layoff notices were not rescinded as determined above, final notice may be given to respondents that their respective services will not be required for the 2010-2011 school year because of the reduction or discontinuance of the particular kinds of services by the Antioch Unified School District.

DATED: April 30, 2010

PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings
State of California