

BEFORE THE
GOVERNING BOARD OF THE
LA HABRA CITY SCHOOL DISTRICT
STATE OF CALIFORNIA

In The Matter of The Accusation Against:

CHERYL ALLEN,
SUMMER CERVANTES,
SHERRY ENRIQUEZ,
LYNN GASPARELLA,
ROSS GOULD,
RACHEL GUERRERO,
NANCY HATSUSHI,
ROCHELLE LYON,
CHARISSE OKAMOTO, and
JAY SUPPLE

OAH No. L2008030859

Respondents.

PROPOSED DECISION

Robert S. Eisman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 22, 2008, at the offices of the La Habra City School District in La Habra, California.

Barbara J. Ginsberg, Attorney at Law, represented the La Habra City School District (the District).

Carlos R. Perez, Attorney at Law, represented Cheryl Allen, Summer Cervantes, Sherry Enriquez, Lynn Gasparella, Ross Gould, Rachel Guerrero, Nancy Hatsushi, Rochelle Lyon, Charisse Okamoto, and Jay Supple (collectively, respondents) who were present at the hearing. Lynn Gasparella was subsequently found to have waived her right to be a party in this proceeding due to her failure to file a Notice of Defense.

The matter was submitted on April 22, 2006.

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FACTUAL FINDINGS

1. The District serves the local community by providing elementary school education for students in kindergarten through third grade at four schools and for students in third grade through fifth grade at three schools. The District also provides middle school education for students in sixth grade through eighth grade at two schools.

Richard A. Hermann, Ed.D., is the Superintendent of the District. Susan Belenardo is the Assistant Superintendent.

2. On March 13, 2006, the Superintendent of the District made a recommendation to the Governing Board of the District (Governing Board) that certain full-time equivalent (FTE)¹ certificated employees be notified that their services would not be required for the ensuing school year and stating the reasons for that recommendation, in accordance with Education Code section 44949 and 44955

3. On March 13, 2008, in open session, the Governing Board adopted, signed, and approved the Resolution of the Governing Board of the La Habra City School District Regarding Layoff of Certificated Employees Due to a Reduction or Discontinuance of Particular Kinds of Services, which provided for services to be reduced or discontinued as follows:

a. Reduce:

- (1) 1.0 FTE Middle School Physical Education
- (2) 5.0 FTE Middle School CORE²
- (3) 4.0 FTE Middle School Electives
- (4) 10.0 FTE K-6 Classroom teachers

¹ A full-time equivalent (FTE) is a way to normalize personnel numbers based on staffing ratios. In general, six class sections equates to one full-time employee position. Thus, if that staffing ratio is applied to a planned reduction of 15 instructional sections, then the result would be the need to reduce 2.5 FTE, i.e., three full-time employees.

² CORE pertains to class sections in which a single teacher who holds multiple credentials provides instruction to discrete groups of students in multiple subjects, e.g., when a teacher provides a group of students with an instructional section in English followed by a section in Reading. The term "CORE" is distinguished from reference to "core subjects" such as science and English.

b. Discontinue:

- (1) 1.0 FTE Middle School Staff Specialist
- (2) 1.0 FTE Middle School P.A.S.S.³ position

4. The need for layoffs was the result of the following factors that would impact the District's budget for the 2008-2009 school year, as follows:

a. A significant budget shortfall was projected due to the California Governor's proposed across-the-board budget reductions of 10 percent.

b. Reductions in student enrollment were expected to continue, based on trend projections, which historically have been very accurate.

5. In order to prepare to meet the challenges of reduced funding and student enrollment, the District restructured the schedules of its two middle schools, which resulted in a reduction in the number of class sections and re-evaluated staffing needs at the elementary school level, which resulted in further personnel reductions. The planned changes would not compromise the educational programs of the District's students.

6. On March 14, 2008, by personal delivery, the District served affected certificated employees, including Cheryl Allen, Sherry Enriquez, Lynn Gasparella, Ross Gould, Rachel Guerrero, Nancy Hatsushi, Rochelle Lyon, Charisse Okamoto, and Jay Supple, and two other certificated employees, with written notice, pursuant to Education Code sections 44949 and 44955, that "it was determined at the Board meeting of March 13, 2008, that notice be given to you that your services will not be required for the ensuing 2008-2009 school year." The notice set forth the reasons for the layoff.

The notices further advised the employees of their right to a hearing, provided that such a request was delivered in writing and was actually be received in the District's Human Resources Office no later than 4:00 p.m. on March 24, 2008. Failure to request a hearing would constitute waiver of the right to a hearing.

7. Respondents Cheryl Allen, Sherry Enriquez, Lynn Gasparella, Ross Gould, Rachel Guerrero, Nancy Hatsushi, Rochelle Lyon, Charisse Okamoto, and Jay Supple, each filed a timely Request for Hearing (i.e., nine of the 11 permanent and probationary employees who received layoff notices).

8. On March 14, 2008, by personal delivery, the District served each of 15 temporary employees, including respondent Summer Cervantes, with a Precautionary Layoff Notice. The notice sent to respondent Cervantes informed her that the District's records reflect she is presently serving as a temporary employee and that her employment will end at

³ P.A.S.S. is a special intervention program to assist struggling students.

the conclusion of the 2007-2008 school year. The notice set forth the reasons why her employment would end at that time.

The notice further advised respondent Cervantes that, as a temporary employee, she was not entitled to layoff rights. However, the District "out of an abundance of caution" decided to provide Ms. Cervantes with a limited right to request a hearing under the provisions of Education Code Section 44955.

Respondent Cervantes could request a hearing, provided that such request was delivered in writing to the District's Human Resources Office at the District Office no later than 4:00 p.m. on March 24, 2008. The failure to request a hearing would constitute waiving the right to a hearing.

9. No evidence was presented to establish that respondent Cervantes was other than a temporary employee.

10. Respondent Cervantes filed a timely Request for Hearing.

11. Superintendent Hermann filed Accusations which were timely served on respondents as required by the Education Code, and informed them that a Notice of Defense must be filed within five days pursuant to Education Code section 44949, subdivision (a)(1).

12. Respondents Cheryl Allen⁴, Sherry Enriquez, Ross Gould, Rachel Guerrero, Nancy Hatsushi, Rochelle Lyon, Charisse Okamoto, Jay Supple, and Summer Cervantes each filed a timely Notice of Defense.

Respondent Lynn Gasparella failed to timely file a Notice of Defense and thereby waived her right to a hearing, pursuant to Government Code section 11506.

13. Assistant Superintendent Susan Belenardo testified that the Governing Board's resolution was required due to the District's fiscal crisis and projected reductions in student enrollment.

14. The District maintains a Roster of Certificated Staff that identifies employees' seniority dates (first date of paid service) and credentials. As provided in Education Code section 44845, seniority generally is measured from the first date on which the employee rendered paid service as a probationary employee. The District also maintains a Temporary

⁴ Counsel for the teachers contended that respondent Allen should be included among the employees he was representing at the hearing. Counsel for the District objected based on her contention that respondent Allen did not timely file a Notice of Defense, thereby waiving her right to participate in the hearing. After hearing respondents and a witness for the District testify regarding this issue, the Administrative Law Judge overruled the District's objection and allowed respondent Allen to participate in the hearing as a represented party.

Teacher List that identifies each temporary employee's hire date, the reason why the temporary employee was hired, and the employee's credentials.

None of the respondents represented that the information contained in either the Roster of Certificated Staff or Temporary Teacher List was incorrect or incomplete.

15. Based on the District's Roster of Certificated Staff, Middle School 2007-2008 Master Schedules, and Middle School Reduction Calculations, the following is noted:

a. Rochelle Lyon has a seniority date of November 30, 2007, and has a preliminary credential for Middle School with English Learner Authorization. She currently teaches one seventh-grade and five eighth-grade math sections at Imperial Middle School. She also has one section for preparation of lessons and instructor professional development (PREP).

b. Nancy Hatsushi has a seniority date of September 5, 2007, and has a preliminary credential for Social Science and Physical Education with English Learner Authorization. She currently teaches one seventh/eighth-grade, two seventh-grade, and four sixth-grade physical education sections at Washington Middle School.

c. Lynn Gasparella has a seniority date of August 28, 2007, and has a preliminary credential for Middle School, with supplement in English, and Cross-cultural, Language and Academic Development (CLAD) Authorization. She currently teaches two reading, two English, and two science sections, all at the seventh-grade level, at Washington Middle School.

d. Cheryl Allen has a seniority date of August 28, 2007, and has a preliminary credential for Social Science and Science (Biology), with an Emergency CLAD Certificate. She currently teaches five eighth-grade science sections and one seventh/eighth-grade technology section at Imperial Middle School. She also has one PREP section.

e. Jay Supple has a seniority date of August 29, 2006, and has a preliminary credential for Social Science and Physical Education, with CLAD Authorization. He currently teaches two seventh/eighth-grade and three sixth-grade physical education sections at Washington Middle School. He also teaches one modified physical education section.

f. Charisse Okamoto has a seniority date of August 29, 2006, with a professional clear credential for Social Science and Physical Education with CLAD Authorization. She currently teaches four seventh/eighth-grade and two seventh-grade physical education sections at Washington Middle School.

g. Rachel Guerrero has a seniority date of August 29, 2006, with a professional clear credential for Middle School with CLAD Authorization. The record does not contain further information regarding her duties in the District.

h. Ross Gould has a seniority date of August 29, 2006, and has a preliminary credential for Social Science with CLAD Authorization and English Learner Authorization. He currently teaches five social studies sections and one Avid section, all of which are at the eighth grade level at Washington Middle School.

i. Sherry Enriquez has a seniority date of August 29, 2006, and has a preliminary credential for Middle School with CLAD Authorization. She currently teaches six algebra sections (Algebra 1 A, 1 B, and Honor) at Washington Middle School.

16. The following is noted, based on the Temporary Teacher List, Middle School 2007-2008 Master Schedules, and Middle School Reduction Calculations:

Respondent Cervantes' initial hire date was August 31, 2004. She was hired to help the District participate in the categorically funded Class Size Reduction program. Ms. Cervantes is credentialed for Preliminary Middle School (supplemental English) with English Learner Authorization. She currently teaches two English, two reading, and two public speaking sections, all of which are at the seventh grade level at Imperial Middle School. She also has one PREP section.

17. Nine certificated employees have seniority dates below (i.e., more recent than) that of respondent Rochelle Lyon. However, all nine employees are credentialed in Special Education or as a Speak and Language Specialist. Since these special education services were not identified by the Governing Board as being subject to reduction or restructuring, no layoff notices were sent to any of these nine employees.

The following list contains the relevant portion of the seniority list sequence, from the respondent with the lowest seniority date (respondent Rochelle Lyon) to the respondent with highest seniority date (respondent Sherry Enriquez). The status of each certificated employee in that range is also listed (i.e., whether a layoff notice was issued or the reason why one was not issued)

<u>Seniority Date</u>	<u>Name</u>	<u>Status</u>
11/30/2007	Rochelle Lyon	Layoff Notice
09/17/2007	Jessica Edgley	Special Education
09/05/2007	Nancy Hatsushi	Layoff Notice
08/28/2007	Scott Helphand	Single Subject Math (not reduced)
08/28/2007	Jonathan Gush	Special Education
08/28/2007	Lynn Gasparella	Layoff Notice
08/28/2007	Cheryl Allen	Layoff Notice
08/29/2006	Mark Youngquist	Layoff Notice
08/29/2006	Jay Supple	Layoff Notice
08/29/2006	Sara Rottweiler	Special Education (related)
08/29/2006	Gregory Ornelas	Special Education (related)
08/29/2006	Charisse Okamoto	Layoff Notice

08/29/2006	Rachel Guerrero	Layoff Notice
08/29/2006	Ross Gould	Layoff Notice
08/29/2006	Erin Gallagher	Special Education
08/29/2006	Sherry Enriquez	Layoff Notice

The next senior certificated employee after respondent Enriquez was also given a layoff notice.

18. With respect to Middle School assignments under the District's restructuring plan, if a senior employee holds multiple credentials and is using one of the credentials to teach sections that are eliminated as a result of the restructuring, that employee would be assigned to teach classes requiring use of the other credential. As an example, a very senior certificated employee could hold credentials in both Physical Education and History, and be teaching solely physical education classes. If those physical education classes are eliminated as a result of restructuring, the District would endeavor to reassign the employee to teach History.

19. Of the 19 certificated temporary employees, 15 received precautionary layoff notices, including Summer Cervantes. The only temporary employees who did not receive notices were those holding counseling or nursing credentials.

20. The Governing Board adopted criteria for determining the order of termination among 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 following factors, each of which was assigned a numerical value:

1. Certificated personnel who did not receive a notice of layoff.
2. Certificated personnel who possess a Multiple Subject credential whose primary teaching assignment for the 2007-2008 school year is at the K-5 level and who possess a CLAD Certificate or CLAD Emphasis.
3. Certificated personnel who possess a Multiple Subject credential with a CLAD Certificate, a CLAD Emphasis, an AB 1059 English Learner Content authorization, or an SB 2042 Credential.
4. Certificated personnel who possess a Multiple Subject credential without a CLAD Certificate, CLAD Emphasis, an AB 1059 English Learner Content authorization, or an SB 2042 Credential, but who are eligible for an Emergency CLAD Certificate.
5. Certificated personnel who possess a Single Subject authorization with a CLAD Certificate, a CLAD Emphasis, an AB 1059 English Learner Content authorization, or an SB 2042 Credential.

6. Certificated personnel who possess a Single Subject authorization without a CLAD Certificate, CLAD Emphasis, an AB 1059 English Learner Content authorization, or an SB 2042 Credential, but who are eligible for an Emergency CLAD certificate.

7. If any further ties exist with respect to employees with the same first date of paid service, the tie shall be broken by using the last four digits of the certificated employee's social security number, with the higher four-digit number receiving the higher ranking.

21. In identifying the certificated employees affected by the layoff, the District's superintendent and assistant superintendent were required to use the foregoing criteria to resolve ties between employees.

22. Assistant Superintendent Belenardo and other District staff developed and used the seniority list to determine which employees were affected by Board's resolution regarding layoff of certificated employees and whether the affected individuals were entitled to "bump"⁵ other employees.

In this matter, none of the respondents who received a layoff notice were found to have bumping or skipping rights over another employee in the seniority list.

23. In determining the number of employees who would receive layoff notices, the District considered the fact that five certificated employees had applied for early retirement that would be effective in July 2008, four certificated employees resigned prior to March 13, 2008, and one certificated employee resigned after that date.

24. The District must be solvent to provide educational services, and cost savings are necessary to resolve projected District budget reductions. The District must also address projected reductions in student enrollment at all grade levels and undertake restructuring, as necessary, to insure that its schools provide, and students receive, required instruction in an effective and efficient manner. The Governing Board's decision to reduce services in light of its budget and enrollment projections does address the welfare of students, and was a proper exercise of the Governing Board's discretion. Respondents did not establish that the proposed reductions in services would violate any statutory or regulatory requirement governing the District.

⁵ Generally speaking, a senior teacher whose position is discontinued has the right to a position held by a junior teacher if the senior teacher is properly credentialed. That displacement of a junior teacher is known as "bumping." The seniority rule is not absolute, and a junior teacher with a needed credential/skill may be retained even if a more senior teacher is terminated. Such "skipping" is recognized by statute (Education Code section 44955, subdivision (d)(1)) and appellate law (*Santa Clara Federation of Teachers, Local 2393 v. Governing Board of the Santa Clara Unified School District* (1981) 116 Cal.App.3d 831).

LEGAL CONCLUSIONS

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

(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 provides, in pertinent part, that:

(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 3 through 21.)

4. The services identified in the Governing Board's resolution are particular kinds of services that could be reduced or discontinued pursuant to Education Code section 44955. The Governing Board's decisions to reduce or discontinue the identified services were neither arbitrary nor capricious, and were a proper exercise of its discretion. The reduction or discontinuation of particular kinds of services related to the welfare of the District and

its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the expenditures of the District and projected reductions in student enrollment, as determined by the Governing Board.

5. No employee with less seniority than any respondent is being retained to render a service which such respondent is certificated and competent to render.

ORDER

Notice may be given to respondents Cheryl Allen, Summer Cervantes, Sherry Enriquez, Lynn Gasparella, Ross Gould, Rachel Guerrero, Nancy Hatsushi, Rochelle Lyon, Charisse Okamoto, and Jay Supple that their services will not be required for the 2008-2009 School Year because of the reduction and discontinuance of particular kinds of services as provided in the Resolution of the Governing board of the La Habra City School District Regarding Layoff of Certificated Employees Due to a Reduction or Discontinuance of Particular Kinds of Services.

DATED: April 28, 2008.

ROBERT S. EISMAN
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
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OAH No. L2008030859

Respondents.

ORDER CORRECTING MISTAKE IN PROPOSED DECISION

On April 28, 2008, Administrative Law Judge Robert S. Eisman (ALJ) of the Office of Administrative Hearings issued the Proposed Decision in the above-captioned case. The ALJ and La Habra City School District subsequently noticed that there were errors in the Proposed Decision that needed to be corrected.

On May 1, 2008, the ALJ discovered typographical errors in the Proposed Decision at the last sentence on page 1 and at line 1 of paragraph 2 on page 2. In both instances, "2006" should be changed to "2008".

On May 5, 2008, the Office of Administrative Hearings received a facsimile message from Barbara J. Ginsberg, Esq., Parker & Covert LLP, Attorneys for La Habra City School District, which made reference to a typographical error in the Proposed Decision at page 2, paragraph 3.a.(1), wherein "1.0 FTE Middle School Physical Education" should be changed to "3.0 FTE Middle School Physical Education". The requested change is supported by the evidence in this matter.

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WHEREFORE, GOOD CAUSE appearing, the following Order is issued:

1. The corrections are authorized by law.
2. The Proposed Decision is hereby corrected as follows:
 - a. In the last sentence on page 1, "2006" is changed to "2008".
 - b. In the Factual Findings at page 2, paragraph 2, line 1, "2006" is changed to "2008".
 - c. In the Factual Findings at page 2, paragraph 3.a.(1), "1.0" is changed to "3.0".
3. A "Corrected Proposed Decision" incorporating the foregoing changes is attached to this Order.
4. This order is made a part of the record in this case.

IT IS SO ORDERED.

DATED: May 5, 2008.

ROBERT S. EISMAN
Administrative Law Judge
Office of Administrative Hearings