

**BEFORE THE GOVERNING BOARD  
OF THE SANTA BARBARA SCHOOL DISTRICTS**

In the Matter of the Layoffs of:

OAH Case No.: L2007030814

MARISSA ALLINGHAM, and other  
Certificated Employees of the Santa Barbara  
School Districts,

Respondents.

**PROPOSED DECISION**

The hearing in the above-captioned matter was held on May 1, 2007, at Santa Barbara, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by Mary L. Dowell and Michael C. Blacher, Liebert, Cassidy, Whitmore. Respondents were represented by Robert Bartosh and Alexis Ridenour, Hathaway, Perrett, Webster, Powers, Chrisman & Guitierrez.

Oral and documentary evidence was received at the hearing, the case was argued, and the matter submitted for decision on the hearing date. The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders, as follow.

**FACTUAL FINDINGS**

1. Complainant J. Brian Sarvis filed the accusations<sup>1</sup> in this proceeding in his official capacity as Superintendent of the Santa Barbara School Districts (District)<sup>2</sup>.

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<sup>1</sup> The term "accusation" refers to a type of pleading utilized under the Administrative Procedure Act, Government Code sections 11500 and 11503. As noted during the hearing, it should be made clear that the Respondents are not "accused" in the every-day sense of that word; they have done nothing wrong. Instead, it might be said they are accused of not having enough seniority to retain their positions with the District in the face of a resolution to reduce positions.

<sup>2</sup> The Districts are technically two school districts, an elementary district and a high school district. They are operated under a joint administration and board.

2. The following persons are certificated employees of the District, and are hereafter referred to as Respondents:

Marissa Allingham, Elaine Araujo, Kelly Ary, Jeffrey Ashton, Suzanne Bagg, John Baily, Danielle Bean, Anais Burke, Patty Jo Carmean, Clanci Carney, Amy Christensen, James Claffey, Ashley Cornelius, Suzanne Cowden, Marcelo Cruz, Claire De, Heeckeren D'Anthes, Erin Decker, Vicky Derscheid, Russell Doty, Patrick Estes, Krista Finlay, Beth Fuste, Hozby Galindo, Michael Gerken, Allyson Giampietro, Patricia Hague, Sara Harbision, Nellie Hill, Veronica Johnson, Brian Kettler, Emily La Brecque (Cuttrell), Elizabeth Lane, Rebecca Lane, Valerie Lent, Mark Leonas, Mary Lindenstien, Dana Liss, Bruce Lofthus, Lucy Lombardi, Heather Marshall, Robert G. Martin, Veronica Martinez, Victoria McAlevey, Adrienne McClurg, Nicole McKee, Christine McLain, Katherine McLean, Tamra Merritt, Madeline Mikhail, Evan Moore, Matt Moran, Marian Musmecci, Christine Nelson, Luke Ohrn, Valerie Palmer, Susan Petty, Jennifer Hewitt, Genevieve Quinn, Jessica Rapp, Biha Raygoza, Kristen Sanft, Kurt Schultz, Pavel Shabunin, Alexander Sheldon, Jennifer Slump, William Sunkel, Jeremy Vaa, Matt Whitney, Richard Wigle, William Woodard, Lindsay Woodard, Joseph Zamora.

3. (A) On March 13, 2007, the Governing Board (Board) of the District adopted resolution number 06/07-25, entitled "Resolution to Decrease the Number of Certificated Employees Due to a Reduction in Particular Kinds of Services" (Reduction Resolution). The purpose of the Reduction Resolution was to reduce and discontinue particular kinds of certificated services no later than the beginning of the 2007-2008 school year. Specifically, the resolution requires the reductions of 89.0 "FTE"—Full Time Equivalents—by reducing classroom teaching in the elementary school grades and the junior high school and high school grades.

(B) The FTE's that the Board determined to reduce are described in the Reduction Resolution, as follows:

Social Studies, 10 FTE	Art, 3 FTE	Science, 9 FTE
Math, 20 FTE	Foreign Language, 4 FTE	CORE, 1 FTE
English, 27 FTE	Health, 1 FTE	ELD, 2 FTE
Elementary, 9 FTE	PE, 3 FTE	

(C) Since the Reduction Resolution was adopted, the Board determined that it would not have to layoff teachers to meet the reduced FTE for elementary grades, because attrition and other factors had reduced staff in the elementary schools by 9 FTE. The reduction in force will instead fall only in the middle and high schools managed by the District, and will amount to 80 FTE.

4. On March 13, 2007, the Board adopted resolution number 06/07-26, entitled "Resolution to Approve Competency Criteria and Tie Breaker Criteria" (Tie-breaking

Resolution). The tie breaking criteria were based on criteria used in many prior years. The competency criteria were also based on criteria used by the District in prior years, but it was modified to take into account requirements that will be imposed on the District by the No Child Left Behind law. The District did not abuse its discretion in the adoption of the tie breaking and competency criteria.

5. On March 13, 2006, the Superintendent of the District recommended to the Board that the District give Respondents, and each of them, notice pursuant to Education Code sections 44949 and 44955<sup>3</sup> that Respondents' services would not be required for the following school year (2007-2008). Between March 14 and March 15, 2007, each Respondent was given such written notice that pursuant to sections 44949 and 44955, their services would not be required in the 2007-2008 school year.

6. (A) Sixty-six of the Respondents identified in Factual Finding 2 requested a hearing to determine if there is cause for not reemploying them for the 2007-2008 school year. Those requests for hearing were timely filed, or the Board waived objection to any late filing of a request for hearing. Between March 13 and April 9, 2007, the Board rescinded layoff notices to six teachers: Marcelo Cruz, Beth Fuste, Veronica Johnson, Elizabeth Lane, Valerie Lent, and Tamra Merritt.

(B) The following persons requested a hearing and their layoff notice was not rescinded prior to the service of an Accusation.

Marissa Allingham, Elaine Araujo, Kelly Ary, Suzanne Bagg, John Baily, Danielle Bean, Anais Burke, Patty Jo Carmean, Clanci Carney, Amy Christensen, James Claffey, Suzanne Cowden, Claire De, Heeckeren D'Anthes, Vicky Derscheid, Russell Doty, Patrick Estes, Krista Finlay, Hozby Galindo, Michael Gerken, Allyson Giampietro, Patricia Hague, Sara Harbision, Nellie Hill, Brian Kettler, Emily La Brecque (Cuttrell), Rebecca Lane, Mark Leonas, Mary Lindenstein, Dana Liss, Bruce Lofthus, Lucy Lombardi, Heather Marshall, Robert G. Martin, Veronica Martinez, Victoria McAlevey, Adrienne McClurg, Nicole McKee, Christine McLain, Katherine McLean, Madeline Mikhail, Evan Moore, Matt Moran, Marian Musmecci, Christine Nelson, Luke Ohrn, Susan Petty, Jennifer Hewitt, Genevieve Quinn, Jessica Rapp, Biha Raygoza, Kristen Sanft, Kurt Schultz, Pavel Shabunin, Alexander Sheldon, Jennifer Slump, William Sunkel, Jeremy Vaa, Matt Whitney, Richard Wigle, William Woodard, Lindsay Woodard, Joseph Zamora.

7. Thereafter, on April 9, 2007, an Accusation was served upon each of the Respondents who had requested a hearing, i.e., those persons identified in Factual Finding 6(B), above. The Accusation was accompanied by a letter notice which stated that failure to

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<sup>3</sup> All further statutory references are to the Education Code unless otherwise noted.



deliver a Notice of Defense to the Board within five days of service of the Accusation would constitute a waiver of the right to a hearing, and that the Board might then proceed against the Respondents without a hearing.

8. (A) The majority of those who requested a hearing filed a Notice of Defense, although the District deems some of the notices to be untimely. A number of Respondents who did not file Notices of Defense were persons as to whom the reduction in force was rescinded, such as Marcelo Cruz, identified in Factual Finding 6.

(B) Complainant has asserted that the Notices of Defense were due by April 13, 2007, a Friday. As discussed in the Legal Conclusions, below, that is not accurate. However, the majority of Respondents delivered their Notices of Defense by April 13, 2007. Twenty of the Respondents submitted their Notices of Defense after April 13, 2007.

(C) As set forth below, the Notices of Defense were actually due by April 16, 2007, and those Respondents who filed a Notice of Defense by that date will be deemed to have timely filed a Notice of Defense. However, the following Respondents filed a Notice of Defense after April 16, 2007, and will be deemed to have waived their right to a hearing:

Elaine Araujo, John Baily, Patty Jo Carmean, Russell Doty, Allyson Giampietro, Patricia Hague, Robert G. Martin, Adrienne McClurg, Nicole McKee, Madeline Mikhail, Genevieve Quinn, Bilha Raygoza, Kristen Sanft, Alexander Sheldon, William Sunkel, Matt Whitney.

9. On the day of the hearing, the Complainant dismissed the Accusations against the following Respondents, due to lower class size ratios for ninth grade math and English classes:

Marisa Allingham, Kelly Ary, Jeff Ashton, Vicky Derscheid, Mike Gerken, Nellie Hill, Mary Lindenstone, Bruce Lofthus, Victoria McAlevey, Katherine McClean, Maggie Mikhail, Susan Petty, Jenn Slempe, and Bill Sunkel.

10. Prior to March 13, 2007, the District entered into a new collective bargaining agreement with the union that represents its teachers. As part of that agreement, class size ratios were changed. For example, in the high schools, the ratio shall shift from 32 students per class, and per teacher, to 35 students per class. The change in class size ratio will cut the number of classes, and therefore cut down the number of teachers needed.

11. Additionally, the District has experienced a slight decline in enrollment, and is cognizant of the fact that its feeder elementary schools have seen a decline in enrollment in recent years. For the upcoming year, the decline in enrollment is projected at 1 percent loss in students, or approximately 100 fewer students.

12. The services which the District seeks to discontinue or reduce are particular kinds of services that may be reduced or discontinued under section 44955.

13. The decision by the Board to reduce or discontinue services was neither arbitrary nor capricious, but rather was a proper exercise of the District's discretion given the decline in enrollment, the change in class size, financial and other factors considered by the Board, and the manner in which the decision to reduce or discontinue services was reached. The record establishes that District management attempted to estimate the future staffing needs in the manner it had used in recent years, and in a reasoned manner.

14. The reduction and discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Board.

15. In the course of the reduction in force process, the District created a seniority list. That seniority list took into account a number of factors, including first date of paid service, credential types, and various tie-breaking criteria that were developed by the District and adopted by it on March 13, 2007. (See Factual Finding 4.) As to tie-breaking, in many cases the District was obligated to resort to the last criteria, a lottery, which was conducted under the eyes of teacher union representatives, and with their assistance in the drawing of names or numbers at random. The tie-breaking criteria were appropriately applied to the teachers listed on the final seniority list.

16. (A) The District reviewed its records and the seniority list to determine which employees might "bump" other employees, because they held credentials in another area and were entitled to displace a more junior employee. No employees were found eligible to bump another employee.

(B) The District determined that certain junior teachers possessed superior skills, training, or capabilities which more senior teachers did not possess, which would allow the more junior teachers to be retained or "skipped." Those teachers were identified on a list and they were not made Respondents in this case.

(C) During the hearing, no Respondents were able to show that they could bump or skip another teacher.

17. An issue was raised as to the proper seniority date for Respondent Luke Orhn, who is shown as having a date of August 22, 2005. That teacher has worked for the District prior to August 2005, but had been on a limited term contract. He was made a probationary teacher in 2006, and so was credited with a prior year of service as a temporary teacher, as the Code allows.

18. No certificated employee junior to any Respondent was retained by the District to render a service for which a Respondent was certificated and qualified to render.



## LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to Code sections 44949 and 44955, based on Factual Findings 1 through 8.

2. (A) A District may reduce a particular kind of services (PKS) 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.) The Court of Appeal has made clear that a PKS reduction does not have to lead to less classrooms or classes; laying off some teachers amounts to a proper reduction. (*Zalec v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 853-854. See also *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 631, 637 [Reduction of classroom teaching can be a reduction of a PKS; as long as there is a change in the method of teaching or in a particular kind of service in teaching a particular subject any amount in excess of the statutory minimum may be reduced]; *California Teachers Assn. v. Board of Trustees* (1982) 132 Cal.App.3d 32.)

(B) The services to be discontinued are particular kinds of services within the meaning of 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 services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949. This Conclusion is based on Factual Findings 3 through 5 and 10 through 14, and the foregoing authorities.

3. (A) A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated 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.) At the same time, junior teachers may be given retention priority over senior teachers—may "skip" that senior employee—if the junior teacher possesses superior skills or capabilities not possessed by their more senior colleagues. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Governing Bd. of Santa Clara Unified School Dist.* (1981) 116 Cal.App.3d 831.)

(B) No Respondent established that they had the right to bump a junior employee or to skip a senior employee, based on the foregoing rules, and Factual Findings 16(A) through (C).

4. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render, based on Factual Finding 18.

5. (A) While not critical to the outcome of the proceeding, it should be noted that the District improperly calculated the date that Respondents' Notices of Defense were due. Here the Accusations were served on April 9, 2007. The District deemed April 13 to be the due date, in light of the provision of section 44949, subdivision (c)(1), which provides that a respondent "shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation, . . ."

(B) The Code also provides, at section 9, that "the time in which any act provided by this code is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded."

(C) Here the first day to do the act—to respond to the accusation with a notice of defense—was April 9, the day the accusation was served. That day being excluded, the Respondents had until April 14, 2007, to file a response. However, notice must be taken of the fact that April 14, 2007, was a Saturday, and hence the last day to file a notice of defense carried over until Monday, April 16, 2007. Therefore, only some of the parties deemed late with their notices of defense had in fact defaulted; those actually waiving their right to a hearing are identified in Factual Finding 8(C).

6. (A) As to the issue raised by Respondent Orhn regarding his proper seniority date<sup>4</sup>, such claims are controlled by section 44845, which states that "Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position."

(B) Mr. Orhn moved into the probationary class in August 2006, but was afforded one extra year of probationary status by the fact that he had continually taught in a temporary status for the year prior to August 2006. He was entitled to tack or add that one year of temporary duty to his probationary status, based on Section 44917, third paragraph, but he was not entitled to more than the one year of credit. This Conclusion is based on Factual Finding 17.

7. Based on all the foregoing, the District may reduce its services by 80 FTE, and may give notice to Respondents occupying such positions that their services will not be required for the 2007-2008 school year.

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<sup>4</sup> Respondent Russell Doty also raised an objection to his seniority date, but he has waived his right to a hearing. See Factual Finding 8(C), and Legal Conclusion 5.

**ORDER**

1. The Accusations are sustained.

2. Notice shall be given to employees occupying 80 full-time equivalent certificated positions that their services will not be required for the 2007-2008 school year because of the reduction and discontinuance of particular kinds of services. The persons who may receive such notices are identified in Factual Finding 2, with the exception of those persons identified in Factual Findings 6(A) and 9.

3. Notice shall be given to Respondents in inverse order of seniority based on the final seniority list established by the District in this proceeding, attached hereto as Attachment number 1.

May 7, 2007

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Joseph D. Montoya  
Administrative Law Judge  
Office of Administrative Hearings