

BEFORE THE  
GOVERNING BOARD  
POWAY UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Reduction in Force  
Accusations Against:

JILLIAN BOYER, et al;  
Respondents Listed on Exhibit B,

Respondents.

OAH No. 2010020592

**PROPOSED DECISION**

On April 22, 2010, in San Diego, California, Alan S. Meth, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Clifford D. Weiler, Attorney at Law, represented the Poway Unified School District.

Malinda R. Dickenson, Attorney at Law, represented respondent Milena Schroeder.

Michael P. Baranic, Attorney at Law, represented respondents Jillian Boyer, Tiffany Castillo, Amber Madsen, Sarah McCracken, Craig Morrison, Casey Rozzell, Christine Smith, and Jacqueline Wight.

At the hearing, the respondents represented by Mr. Baranic withdrew their requests for hearing. No respondents who requested a hearing except Ms. Schroeder appeared at the hearing.

The matter was submitted on April 29, 2010 following the submission of closing briefs by Mr. Weiler and Ms. Dickenson.

**FACTUAL FINDINGS**

1. On or about March 31, 2010, William Chiment, Associate Superintendent, Personnel Support Services, Poway Unified School District (hereafter, "the District"), made and filed the accusations against respondents in her official capacity.

2. Respondents are certificated employees of the District.

3. Before March 15, 2010, pursuant to Education Code sections 44949 and 44955, Mr. Chiment notified the Governing Board of the District of his recommendation as designee of the Superintendent of the District that respondents be notified their services will not be required for the ensuing school year. The notification to the Governing Board set forth the reasons for the recommendation.

4. On or before March 15, 2010, each respondent was given written notice that the Superintendent had recommended that notice be given to respondents, pursuant to Education Code sections 44949 and 44955, that their services will not be required for the ensuing year. Each written notice set forth the reasons for the recommendation. The notices satisfied the requirements of sections 44949 and 44955. *San Jose Teachers Association, Inc. v. Allen* (1983) 144 Cal.App.3d 627, 632; *Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 803-04, distinguishing *Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, 360-63.

5. Each respondent timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year. Accusations were timely served on respondents, and each respondent filed a timely Notice of Defense. All pre-hearing jurisdictional requirements have been met.

6. The Governing Board of the District took action in Resolution No. 34-2010 to discontinue the following services for the 2010-11 school year:

Particular Kind of Service	Discontinuance or Reduction	Full-time Equivalents
Learning Support Services (LSS) Teacher on Special Assignment (TOSA) – Math	Reduction	.5
Categorically funded Teacher on Special Assignment (TOSA) - ASES	Discontinuance	2.00
Counselors' services program	Discontinuance	3.20
Counselor - Home School Liaison	Discontinuance	1.00
Special Education Program Psychologist	Reduction	2.00
Kindergarten through Fifth Grade classroom teaching services	Reduction	111.00
Middle school Language Arts/Social Science teaching services	Reduction	13.00
Middle school Math teaching services	Reduction	5.00
Middle school Physical Science teaching services	Reduction	2.00
Middle school Life Science teaching services	Reduction	1.60
Middle school Physical Education teaching services	Reduction	3.40
Middle school Earth Science teaching services	Reduction	1.40
Middle school AVID teaching services	Reduction	1.60
Middle school English Language Development teaching services	Reduction	1.60
Middle school Wheel elective teaching services	Reduction	3.20
Middle school Band/Orchestra teaching services	Reduction	.80
Middle school Choir teaching services	Reduction	.20
Middle school Spanish teaching services	Reduction	1.40
Middle school Drama teaching services	Reduction	.60

Particular Kind of Service	Discontinuance or Reduction	Full-time Equivalents
Middle school Art teaching services	Reduction	.80
Middle school Journalism teaching services	Reduction	.80
Middle school Industrial Technology teaching services	Reduction	.83
Middle school Yearbook teaching services	Reduction	.60
High school English teaching services	Reduction	14.60
High school Math teaching services	Reduction	13.60
High school Social Science teaching services	Reduction	8.20
High school Spanish teaching services	Reduction	6.20
High school French teaching services	Reduction	2.00
High school German teaching services	Reduction	1.20
High school Filipino teaching services	Reduction	1.42
High school Business teaching services	Reduction	1.00
High school Life Science teaching services	Reduction	4.60
High school Physical Science teaching services	Reduction	7.20
High school Physical Education/Health (ENS) teaching services	Reduction	3.20
High school Physical Education teaching services	Reduction	3.60
High school Health teaching services	Reduction	1.20
High school Choir teaching services	Reduction	1.20
High school Drama/Theatre teaching services	Reduction	1.60
High school Band/Orchestra teaching services	Reduction	1.40
High school Art teaching services	Reduction	.60
High school/ROP Art teaching services	Reduction	1.80
High school Consumer Family/Home Economics teaching services	Reduction	1.80
High school AVID teaching services	Reduction	1.40
High School Continuing Education teaching services	Reduction	2.00
Learning Support Services ("LSS") Assistant Director	Reduction 12 months to 11 months	.09
Assistant Principal - Categorical	Discontinuance	1.00
Categorically funded hourly impact teacher services	Discontinuance	(65.00)
<b>TOTAL FTEs</b>		<b>239.44</b>

The resolution also provided:

*For purposes of "bumping" (displacement) and reemployment rights and the determination of "competency" within the meaning of Education Code sections 44955(b), 44956(a)(1), and 44957(a) to the extent such might apply, "competency" shall be based upon all of the following conditions which will allow for bumping and reemployment:*

*(A) Possession and current filing of a preliminary or clear credential for the subject matter into which the employee would bump for the 2010-2011 school year; and*

*(B) the employee is serving in or is on leave from a teaching position other than as an hourly compensated "impact teacher", and whose job*

*performance was included within the scope of formal evaluation procedures of an applicable collective bargaining agreement, provided however that this condition sub-paragraph (B) shall not apply to restrict the bumping by or reemployment rights of any administrator or counselor who is serving in or on leave from such administrative or counseling position in this school district; the intent of this subparagraph (B) is that impact teachers do not possess the right to displace or serve as regular classroom teachers as a result of the discontinuances and reductions of certificated services; and*

*(C) if bumping for the 2010-2011 school year, and for purposes of rights to reemployment in the future, into a non-teaching position (such as a position outside the collective bargaining unit), the employee must have actively served in that particular kind of service for 50 (fifty) percent FTE (full-time equivalent) or more at least one complete school year (not cumulative) within the last three school years (2007-2008 and following).*

The services set forth above are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955. *California Teachers Association v. Board of Trustees of the Goleta Union School District* (1982) 132 Cal.App.3d 32, 34-37 and cases cited therein. See also *San Jose Teachers Association v. Allen, supra* at 635-38, in which the court specifically rejected the reasoning of *Burgess v. Board of Education* (1974) 41 Cal.App.3d 571; *Zalac v. Governing Board* (2002) 98 Cal.App.4th 838, 853-54.

Furthermore, these services may be reduced because of budgetary difficulties. *Zalac v. Governing Board, supra*, and cases cited therein. The decision to reduce or discontinue the services is neither arbitrary nor capricious but rather a proper exercise of the District's discretion.

7. No certificated employee junior to any respondent is retained to perform services which any respondent is certificated and competent to render.

8. The reduction or 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 of the District as determined by the Board of Education.

9. The Governing Board considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees.

10. The Governing Board established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. The Board provided the order of termination shall be based on the needs of the District and its students.

11. The District created a Seniority List which contains employees' seniority dates (first date of paid service), status, site, grade/subject, and credentials and authorizations. The District used the Seniority List to develop a proposed layoff and "bumping" list of the least senior employees currently assigned in the two services being reduced. The District then determined whether the least senior employees held credentials in another area and were entitled to "bump" other employees. In determining who would be laid off for each kind of 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. The District then checked the credentials of affected individuals and whether they could "bump" other employees.

12. Milena Schroeder's seniority date, according to the District, is August 13, 2008. She holds a multiple subject teaching credential. She claims a seniority date of September 1, 2003.

Ms. Schroeder began working for the District in 2000 as a temporary employee. She served as a probationary employee under a contract dated July 1, 2003, was paid in a probationary position on September 1, 2003, and continued her employment through 2005. Ms. Schroeder was on maternity leave for two years (2005-06 and 2006-07). She then resigned, but was rehired within 39 months of her resignation. She is presently working as a tenured teacher.

Ms. Schroeder was noticed for layoff in March 2009 for the 2009-10 school year. She requested a hearing and appeared at the hearing held on April 23 and 24, 2009. She raised the issue of her seniority date at that hearing. The Administrative Law Judge in his proposed decision determined August 13, 2008 was her seniority date. The Governing Board adopted the proposed decision with some corrections not relevant to this proceeding on May 11, 2009. Respondent received a final layoff notice from the District.

Ms. Schroeder did not seek judicial review of the Governing Board's final action in which the Governing Board determined her seniority date was August 13, 2008.

On or about June 9, 2009, the District re-employed Ms. Schroeder for the 2009-10 school year.

## LEGAL CONCLUSIONS

1. Jurisdiction in this matter relating to the elimination of 239.44 full-time equivalent positions exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. Education Code section 44845 provides:

*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.*

Education Code section 44848 provides in part:

*When any certificated employee shall have resigned or been dismissed for cause and shall thereafter have been reemployed by the board, his date of employment shall be deemed to be the date on which he first accepted reemployment (if reemployed before July 1, 1947) or rendered paid service (if reemployed after June 30, 1947) after his reemployment.*

Education Code section 44931 provides:

*Whenever any certificated employee of any school district who, at the time of his or her resignation, was classified as permanent, is reemployed within 39 months after his or her last day of paid service, the governing board of the district shall, disregarding the break in service, classify him or her as, and restore to him or her all of the rights, benefits and burdens of, a permanent employee, except as otherwise provided in this code. However, time spent in active military service, as defined in Section 44800, subsequent to the last day of paid service shall not count as part of the aforesaid 39-month period.*

Education Code section 44955 provides in part:

(a) *No permanent employee shall be deprived of his or her position for causes other than those specified in Section 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 Section 44948 to 44949, inclusive.*

(b) *Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, 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.*

. . .

*(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.*

3. Respondent Schroeder argues her seniority date should be September 1, 2003 rather than August 13, 2008 because she first provided paid service to the District in a probationary position on September 1, 2003, and the language of section 44955 requires a school district to use that statute in calculating a seniority date. The District calculated Ms. Schroeder's seniority date by using section 44948 because that statute specifically applies to her situation since she resigned her position, and then was reemployed. Ms. Schroeder argues that the District cannot use section 44948 to determine her seniority date because section 44955 does not direct a governing board to use it, and refers only to section 44845.

Notwithstanding the absence of a reference to section 44848 in section 44955, the Court in *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 641 did rely on section 44848 to determine a seniority date. The court reasoned:

*Appellants also contend that the district misclassified two other groups of individual employees for purposes of seniority; however, these contentions lack merit. The first group consists of five individual appellants who attained permanent status, resigned, and then were rehired within 39 months and were not given credit for purposes of seniority for their preretirement employment. If a certificated employee resigns and is thereafter re-employed, his date of employment is normally deemed by section 44848 to be the date of re-employment; however, the original date is effective if the employee's services were "terminated for lack of enrollment or discontinuance of service or are otherwise interrupted in a manner declared by law not to constitute a break in service. . ." Appellants rely on a combined reading of the latter part of section 44848 and the provisions of section 44931 which state when a permanent employee resigns and is re-employed within 39 months, the district "shall, disregarding the break in service, classify him as, and restore to him all the rights, benefits and burdens of, a permanent employee, except as otherwise provided in this code . . ." We hold that section 44931 provides that the break in service shall be "disregarded" as to individual rights, burdens and benefits, but not as to seniority rights which affect other employees. The "except as otherwise provided in this code" provision in section 44931 must be read as deferring to section 44848.*

Based on *San Jose Teachers Assn. v. Allen*, *supra*, Ms. Schroeder's argument has no judicial support.

Ms. Schroeder refers generally to a rule of statutory construction which provides that a court will not interpret away clear language of a statute in favor of an ambiguity that does not exist. *Lennane v. Franchise Tax Bd.* (1994) 9 Cal. 4<sup>th</sup> 263, 268.

There are, however, numerous rules of statutory construction, and a brief review of them would be helpful. In *Select Base Materials, Inc., v. Board of Equalization* (1959) 51 Cal. 2d 640, 645, the court summarized some of them as follows:

*The fundamental rule of statutory construction is that the court should ascertain the intent to the Legislature so as to effectuate the purpose of the law. (Citation omitted.) Moreover, 'every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.' (Citation omitted.) If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. (Citation omitted.) Such purpose will not be sacrificed to a literal construction of any part of the act. (Citation omitted.)*

Section 44955 is part of a series of statutes that deals with the difficult question of how a school district may fairly lay off teachers under certain circumstances. The legislation created a seniority system that requires the comparison of one teacher's seniority date with that of another. To that end, the Legislature enacted section 44845 to provide for a broad definition of when employment begins for layoff purposes. Section 44848 undertakes to determine when employment began in a much narrower context, that of a certificated employee who left his or her employment and then accepted reemployment. In order to properly harmonize the statutes relating to layoffs of certificated employees, and give effect to every part of the legislation on the subject, Ms. Schroeder's argument cannot be accepted. That would require that a statute specifically covering her situation be ignored, and the rules of statutory construction do not permit that. Her argument must be rejected.

4. Cause exists under Education Code sections 44949 and 44955 for the District to discontinue particular kinds of services relating to 239.44 full-time equivalent positions. The cause for the reduction or discontinuation of particular kinds of services related solely to the welfare of the schools and the pupils thereof. A preponderance of the evidence sustained the charges set forth in the Accusation. It is recommended that the Board give respondents notice before May 15, 2010, that their services will no longer be required by the District.



## ORDER

1. The Accusations served on the respondents set forth in Exhibit B, below, are sustained. Notice shall be given to each respondent before May 15, 2010 that his or her services will not be required for the 2010-11 school year pursuant to the Board of Education's resolution because of the reduction of particular kinds of services.

Notice shall be given in inverse order of seniority.

DATED: \_\_\_\_\_

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ALAN S. METH  
Administrative Law Judge  
Office of Administrative Hearings

**POWAY UNIFIED SCHOOL DISTRICT  
EXHIBIT “B” TO ACCUSATION  
First Amendment, after filing of Accusation  
[composed at 11:00 A.M. on 4-21-10]**

**RESPONDENTS (hi-lighted) WHO REQUESTED A HEARING (Ed C 44949)**

Those who initially requested a hearing but later filed NO Notice of Defense are crossed out.

Boyer, Jillian  
~~Cabral, Kriscia~~ [withdrawing]  
Castillo, Tiffany  
Draper, Valerie  
Gonzalez, Bonnie  
Halander, Scott (0.75)  
Hall, Trent  
Lazzari, Liliana  
Mac Martin, David  
Madsen, Amber  
Manteuffel, Melissa  
McCracken, Sarah [withdrawing]

Morrison, Craig  
~~Ow, David~~ [withdrawing]  
~~Peggemoeller, Jessica~~  
Ransom, Lisa  
Rodillon, Stacey  
Rozzell, Casey  
Schelhorse, Danielle  
Schroeder, Milena  
Smith, Christine [withdrawing]  
~~Smith, Laura~~ [withdrawing]  
~~Wood, Carol~~

**INDIVIDUAL WHO FILED LATE REQUEST FOR HEARING:**

Wight, Jacqueline

**PRECAUTIONARY RESPONDENTS:**

(None requested a hearing)

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**EMPLOYEES WHO WERE SERVED NOTICES AND FAILED TO FILE ANY REQUEST FOR HEARING**

“Standard” noticed employees who did not request a hearing:

Anella, Alessandro  
Battle, Carol  
Bayro, Karin  
Bell, Katherine  
Bennett, Kathy  
Biel, Anga  
Blankman, Jeffrey  
Cambra-Adamson, Christin  
Campos, Elizabeth  
Canning, Erin  
Carlin, Adam  
Caterina, Jebette  
Chan, Anne  
Corbell, Edith  
Cosgrove-Stamp, Michaelle

Cruise, Kimberly  
Cuevas-Balanon, Hilary  
Dasteel, Marie  
Davis, Mindy  
Degrandmont, Karen  
Dorward, Danielle  
Ellis, Britta  
Embrey, Julie  
Esteban, Rosalie

**“Standard” noticed employees who did not request a hearing (continued)**

Eveleth, Kelly	Nevares, Nicholas (0.20)
Fallentine, Rebecca	Okugawa, Sandra
Faucher, April	Olmsted, Helen
Filasky, Hayley	Orielly, Lauren
Finnegan, Casey	Orrell, Lindsey
Fisher, Scott	Padua, Jerilyn (Counselor)
Flores, Veronica (Counselor)	Pantaleon, Efren
Friedrick, Deborah	Pedretti, Sabriya
Gonzalez, Christina	Pei, Lillian
Hattar, Hope	Perkio, Danielle (0.83)
Haygood, Hollie	Power, Megan
Healy, Elizabeth	Pretak, Jennifer
Hong, Jin	Proffitt, Jennifer
Horne, Christina	Ramin, Diana
Hsieh, Nohelani	Raquel, Shantel
Ingram, My-Nga	Renas-Hetzel, Lori
Jones, Stacy	Rhines, Stephanie
Kim, Jane	Schultz, Andrew
Klock, Michelle (Psychologist)	Sciarratta, Mai
Koshenina, Ann	Scott, Amy
Lafferty Jr, James	Smith, Charmaine
Lawson, Charmaine	Smyth, Kori
Lemersal, Antoinette	Southwick, Cheryl
Leonard, Tanya (0.20)	Stefanick, Erin
Lindberg, Alicia	Sullivan, Alexandra
Lindner, Karen	Tse, Mabel
Lou, Xoong	Uyloan, Heidi
Louie, Jessica	Villena, Kristina
Lowry, Nikolette	Vincent, Jeremy
Lucht, Sonita	Vincent, Shelley
Ludwig, Amy	Waasted, Jacob
MacLeod, David	Walsh, Jamie
McCarty, Doreen	Weltsch, Limor
McCoy, Tristan	West, Jazmin
McGarry, Laura	Williams, David
McKee, Jordan	Wilson, Marylou
McMillan, Kathryn	Yearling, Kristen (Counselor)
Mikkelson, Anne	You, Joseph
Morshead, Jannelle	Young, Colin
Nelson, Dorit	Young, Kelly

**Precautionary noticed who did not request a hearing: Dual Immersion**

Arellano, Cynthia	Barragan, Angelica
Chavez, Ana	Dyer, Lynne
Lucey, Norma	Flores, Ledia
Ochoa, Maribel	Kitts, Maria
Perucho, Artemisa	Ozakcay, Elba
Serrano, Katherine	Sanchez, Amelia
Araujo, Blanca	

**Precautionary noticed who did not request a hearing: Impact teachers**

Albertson, Elizabeth  
Angeles, Candelaria  
Ashwell, Alisa  
Arseneau, Jacqueline  
Astamendi, Amber  
Barker, Tamra  
Bartel, Cathleen  
Bryan, Kim  
Buddin, Carol  
Burrows, Gregory  
Camarillo, Erica  
Carini, Maria  
Cella, Diane  
Chew, Tracey  
Cline, Nancy  
Coe, Jody  
Dunn, Jeralyn  
Eazer, Charlotte  
Elderson, Erik  
Feinstein, Laura  
Fitzwilliam, Catherine  
French, Jody  
Gallinetti, Christine  
Hamels, Amanda  
Herman, Stacy  
Huntsman, Jill  
Kronheimer, Danielle  
Lau, Diane  
Lococo, Breanne  
Lopez, Maureen  
Lorimer, Lynn  
Lynch, Kimberly

Magid, Barbara  
Marx, Alexandra  
Nguyen, Kimberly  
Nissim, Dana  
Oliva, Megan  
Otto, Deborah  
Ozols, Kristie  
Petersen, Linda  
Pini-Savoie, Gina  
Plascencia-Contreras, Marisa  
Pratt, Colleen  
Richley, Emily  
Rivera, Martha  
Robles, Abby  
Sauer, Connie  
Severino, Angela  
Silvestre, Maricel  
Simpson, Cynthia  
Sivan, Audrey  
Sousa, Andrea  
Steiner, Eileen  
Stokes, Karen  
Sullivan, Shannon  
Suokko, Julia  
Szoka, Karen  
Tibbs, Denise  
Tiegs, Adrienne  
Vargas, Claudia  
Vaus, Emily  
Wieseler-Lehardy, Carla  
Winegrad, Elaine  
Zanetti, Rafaela