

**BEFORE THE
GOVERNING BOARD
OF THE ALHAMBRA UNIFIED SCHOOL DISTRICT**

In the Matter of the Accusation Against:

OAH Case No. 2010030589

Certificated Employees of the Alhambra
Unified School District,

Respondents.

PROPOSED DECISION

The hearing in the above-captioned matter was held on April 15, 2010, at Alhambra, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by James B. Fernow and L. Carlos Villegas, Fagen, Freidman, and Fulfrost, LLP. Jean Shin, Rothner, Seagall, Greenstone & Leheny, represented the following Respondents: Bary Abrams, Rose Barron, Lee Chen-Norman, Jennifer Canzano, Sharyn Fujimoto, Jacqueline Herrera, Sonja Holladay, Janet Hsia, Nadean Juarez, Carol Lam-Jones, Patricia Mace, Josephine Majul, Goharig Matosian, Mary Nelson, Vincent Ngo, Tina On, Margaret Padilla, Naomi Peavey, Carol Salas, Ana Santomauro, Christine Schwehr, Mary Torregrossa, Martin Vedova, and James Won.

Oral and documentary evidence was received, and argument was heard, but the record was held open until April 22, 2010, so that the parties could file written briefs. Complainant's brief is identified as Exhibit 17, and Respondents' brief is identified as Exhibit A.¹

The case was submitted for decision on April 26, 2010. The Administrative Law Judge hereby makes his factual findings, legal conclusions, and order, as follows.

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¹ The ALJ caused some uncertainty regarding the deadline, by asking for the briefs by the 22nd, but identifying the 22nd as "Friday," which was in fact the 23rd. Complainant's brief was faxed on the 23rd, just before 5:00 p.m. It was not logged in by OAH staff until the morning of the April 26. In the circumstances, it will be deemed a timely submission.

FACTUAL FINDINGS

1. Complainant Donna M. Perez filed and maintained the Accusation² in the above-captioned matter while acting in her official capacity as Superintendent of the Alhambra Unified School District (District).

2. The following persons are certificated employees of the District and are the Respondents in this case:

Barry Abrams, Rose Marie Barron, Jennifer Canzano, Lee Chen-Norman, Mary Comstock, Sharyn Fujimoto, Jacqueline Herrera, Sonja Holladay, Janet Hsia, Nadean Juarez, Carol Lam-Jones, Patricia Mace, Julia Macys, Josephine Majul, Goharig Matosian, Mary Nelson, Vincent Ngo, Qui Nguy, Tina Quyen On, Margaret Padilla, Carol Salas, Ana Santomauro, Christine Schwehr, Naomi Tambara-Peavey, Mary Torregrossa, Martin Vedova, James Won, Huimin Zhou.

3. (A) On February 16, 2010, the Governing Board of the District (Board) adopted Resolution number 09-10-14, entitled “In the Matter of the Reduction or Discontinuance of Certain 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 end of the 2009-2010 school year. Specifically, the resolution requires the reductions of 26.7 “FTE”—Full Time Equivalents—by reducing various types of services. This decision was based on financial concerns as the District faces a budget shortfall. All of the services to be reduced are within the District’s Adult Education program.

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

Adult Basic Ed/GED Prep	0.7
Adult Secondary Ed/Adult Learning Ctr.	2.0
Adult Secondary Ed/Independent Study	1.8
Adult with Disabilities	0.6
Brush Painting	0.2
Citizenship	0.8

² The term “accusation” refers to a type of pleading utilized under the Administrative Procedure Act, Government Code sections 11500 and 11503; that statutory scheme governs the hearing procedures in this case. The Respondents are not “accused” in the every-day sense of that word; they have done nothing wrong, and all appear to be dedicated professionals. It might be said that they are simply accused of not having enough seniority or other qualifications to retain their positions with the District in the face of a resolution to reduce positions.

Computer	0.2
DET Prep Distance Learning	0.2
ESL Distance Learning	1.2
ESL	13.5
Office Occupations	1.4
Older Adult	1.2
Parent Education	1.0
Spanish	0.2
Welding	0.2
Counselor	1.5
Total FTE to be reduced:	26.7

4. The services which the District seeks to discontinue or reduce are particular kinds of services that may be reduced or discontinued under Education Code section 44955.³

5. 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 uncertainty regarding the state budget and the District's financial resources.

6. 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.

7. The Board also adopted two other resolutions relevant to this matter. One resolution, number 09-10-15 set forth tie breaking criteria, to be used in the event that two or more teachers shared the same seniority date. The other resolution, number 09-10-16, set forth Kindergarten through 12th grade competency criteria. That resolution provided that to be deemed competent for assignment to teach in those grades, a teacher would have to have academic training and one semester of full-time experience within the last five years in K-12 education at the grade level to which the District would be able to assign that teacher. Further, self-contained and departmentalized programs were to be considered separate competencies.

8. (A) On or about March 1, 2010 each Respondent was given written notice that pursuant to sections 44949 and 44955 their services would not be required in the 2010-2011 school year (hereafter the preliminary notices).⁴ Thereafter, Respondents requested a hearing and then each was served with an Accusation and other documents pertaining to the hearing process. Each Respondent filed a notice of defense.

³ All further statutory references are to the Education Code.

⁴ One other teacher, James Moyer, received a preliminary notice, but he did not request a hearing, and was not served with an accusation packet.

(B) Following the service of the preliminary notices, and at the outset of the hearing, the District rescinded notices that had been served on two certificated employees, Carol Lam Jones and Jacqueline Herrera, and they are deemed dismissed from this proceeding, as is Martin Vedova, who retired after filing his notice of defense and before the hearing.

(C) All jurisdictional requirements have been met.

8. (A) 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 and the tie-breaking criteria.

(B) It was stipulated that the seniority date of Respondent Sharyn Fujimoto should be September 1, 1999, and that the seniority date of Respondent Sonja Holladay should be September 14, 1998.

9. The District has a large percentage of “English Learner” students among its students, approximately 35 per cent, and thus every elementary class has at least one English Learner student. As such, all teachers at the elementary level must have a CLAD. If a teacher does not have such a certificate, they can apply for and obtain an emergency CLAD, which is of one year duration. During that time, they must enroll in and complete the course of study for such a certificate, or pass the qualification examination, which leads to issuance of the certificate.

10. Under federal law, every teacher must be “highly qualified” within the meaning of the No Child Left Behind Act (NCLB).

11. Respondents Janet Hsia, Julia Macys, and Ana Santomauro testified on their own behalves. Although all three Respondents are very experienced teachers, none of them were able to establish that they held CLAD certificates, or were NCLB highly-qualified, as of March 15, 2010, or even the hearing date. None of those three witnesses were able to establish that they came within the Board’s competency criteria, as they have not taught in a K-12 class for one semester during the past five years. No other respondent demonstrated that they had such experience.

12. No junior certificated employee is being retained in a position that a more senior employee is certificated and competent to fill. No junior teacher established that they should have been skipped either.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to sections 44949 and 44955, based on Factual Findings 1 through 7(C).

2. (A) A District may reduce a particular kind of service (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. (*Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 853-85; 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 section 44949. This Legal Conclusion is based on Factual Findings 3 through 6 and the aforementioned statutes.

3. (A) A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or “bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) At the same time, junior teachers may be given retention priority over senior teachers—may be “skipped” in favor of 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) Respondents Comstock, Padilla, Fujimoto, Hsia, and Macys assert that they are credentialed to teach in K-12 education, and should be allowed to bump into such positions due to their seniority. The District has asserted its competency criteria, which requires some experience in teaching in the class that a respondent would bump into. Respondents assert that the District should be required to give the teachers a competency exam of the type mentioned in section 44944, subdivision (c). (Ex. A, p. 2.)

(C) The weight of authority favors the District. It rightly points out that the decision of the Court of Appeal in *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, upheld a community college’s right to define “competence” by resolution, and that the statute relied on was virtually identical to the pertinent provisions of section 44955. As in *Duax*, the competency requirement here is not drawn in too narrow a manner and must be upheld.

(B) No Respondent established that they had the right to bump a junior employee or that they should have been skipped, based on the foregoing and Factual Findings 9 through 12.

ORDER

1. Respondents Carol Lam Jones and Jacqueline Herrera are dismissed based on the rescission of the preliminary notices to them.

2. The remaining Respondents may receive final layoff notices in inverse order of seniority, those Respondents being: Barry Abrams, Rose Marie Barron, Jennifer Canzano, Lee Chen-Norman, Mary Comstock, Sharyn Fujimoto, Sonja Holladay, Janet Hsia, Nadean Juarez, Patricia Mace, Julia Macys, Josephine Majul, Goharig Matosian, Mary Nelson, Vincent Ngo, Qui Nguy, Tina Quyen On, Margaret Padilla, Carol Salas, Ana Santomauro, Christine Schwehr, Naomi Tambara-Pearey, Mary Torregrossa, James Won, and Huimin Zhou..

April ____, 2010

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings