

BEFORE THE
GOVERNING BOARD
MORENO VALLEY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

The respondents listed in Appendix "A"

OAH No. 2011030912

PROPOSED DECISION

Roy W. Hewitt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Moreno Valley, California on April 14 and 18, 2011.

Melanie A. Petersen, Esq. and Kelly Anne Owens, Esq. of Fagen, Friedman & Fulfrost, LLP represented the Moreno Valley Unified School District (the District).

All of the respondents who were present at the hearing, except for Raul Galvan, were represented by Carlos R. Perez Esq. of Reich, Adell & Cvitan.

Respondent Raul Galvan represented himself.

All respondents who failed to appear for the hearing were properly noticed of the date, time and place of hearing.

The record remained open until April 29, 2011 so that the parties could submit written closing arguments. The written closing arguments were received and the matter was deemed submitted on April 29, 2011.

FACTUAL FINDINGS

1. Henry H. Voros, Assistant Superintendent, Human Resources, made and filed the Accusation, dated March 24, 2011, while acting in his official capacity as Assistant Superintendent of the District.

2. The 155 respondents listed in Appendix "A" all received Accusation packets. All 155 respondents are certificated District employees.

3. On February 22, 2011, the District's Governing Board (Board) adopted Resolution No.2010-11-38, determining that it would be necessary to reduce or discontinue particular kinds of services at the end of the current school year. The Board determined that the particular kinds of services that must be reduced for the 2011-2012 school year were the following full time equivalent (FTE) positions:

<u>Particular Kind of Service (PKS)</u>	<u>Full-Time Equivalent (FTE)</u>
Art	5.00
Avid	1.00
Business	2.00
Computer	1.00
Consumer Science	3.00
School Counselor	5.00
Dance	2.00
Drama	1.00
EL Specialist	1.00
ELD	1.60
Elementary	71.00
English/Language Arts	35.00
French	1.00
Independent Study	4.00
Industrial Technology	2.00
Math	33.00
Physical Education	2.0
Read 180	0.50
Science (Bio/Life)	1.00
Science (Earth)	4.00
Science (General)	6.00
Science (Health)	3.00
Sixth Grade	18.00
Social Science	23.00
Spanish	5.00
Work Experience	1.00
<u>Total FTE's</u>	<u>240.10</u>

The services listed above are particular kinds of services, which may be reduced or discontinued within the meaning of Education Code section 44955.

4. The Board's decision to reduce or discontinue the services listed in Finding 3, above, is neither arbitrary nor capricious; rather, it is due to substantial decreases in the operating budget, and is, therefore, a proper exercise of the Board's discretion. 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. No particular kinds of services were lowered to levels less than those levels mandated by state or federal law.

5. The District considered all positively assured attrition, including resignations, retirements and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees.

6. The District timely notified all respondents listed in Appendix "A", pursuant to California Education Code sections 44949 and 44955, of the District's intent not to reemploy them for the upcoming school year. Accordingly, respondents received written notice, on or before March 15, 2011, notifying them that the Board had recommended they not be re-employed in the upcoming, 2011-2012 school year.¹

7. All of the respondents listed in Appendix "A" were properly served with a copy of the Accusation, a blank Notice of Defense, a Notice of Hearing and other related materials.

8. All of the respondents were properly noticed of the date, time and place of the instant hearing.

9. All prehearing jurisdictional requirements have been met.

10. Respondents have been selected for notice of layoff pursuant to their seniority date, which is based on the first day of paid service of each respondent in a probationary position. Respondents were ranked for layoff in the inverse order of their seniority dates.

¹ Numerous respondents contended that they were not timely noticed (by March 15th) of their layoffs. A question concerning the date stamp on the notices arose during the hearing due to hearsay information certain respondents received that led them to believe that the date stamp of March 14, 2011, did not conform to the actual date the registered notices were presented to the post office. Testimony during the hearing, however, established that the notices were hand delivered for registered service, to the post office, on March 14, 2011. Thus, pursuant to Education Code section 44949, subdivision (d) the notice is deemed "sufficient . . . when it is deposited in the United States registered mail"

11. During the hearing the District rescinded the layoff notices concerning the following respondents: Patrice Banks; Gary E. Doubleday; Kristina Strathman; Katherine Klager; and Carole E. Young. Consequently, the Accusation shall be dismissed as to those five respondents.

RESOLUTION OF ISSUES RAISED DURING THE HEARING

12. At the outset of the hearing respondent Raul Galvan (Galvan) filed a motion to compel discovery. Galvan had been working in an administrative position with the District. Sometime prior to March 11, 2011, the “District Cabinet” made the decision to reduce the number of administrators in the District. As part of that process, Galvan was removed from his administrative position and placed back in the classroom. Then, as a certificated employee teaching in the classroom, Galvan was notified of the District’s intent to lay him off in the instant reduction in force (RIF) proceedings. Galvan disputes the District’s decision to move him from an administrative position back to the classroom. Galvan has requested information from the District concerning administrative positions and the decision making process used in determining to cut his administrative position. Galvan claims that the District has not provided him any discovery concerning the decision making process associated with his removal as an administrator. Galvan’s motion to compel discovery was denied based on lack of jurisdiction and timeliness. The decision to cut an administrative position does not fall under Education Code section 44955, which controls the instant proceedings. Consequently, Galvan must pursue discovery pursuant to writ proceedings in the superior court, not in this forum. Additionally, Galvan filed his motion to compel discovery on the date the instant hearing commenced; thus, the motion was not timely.

13. On March 11, 2011, all of the District’s university interns were sent notices of termination of services. In the termination letters the university interns were advised of the following: **“Due to your status as a university intern and pursuant to Education Code [section] 44464, you are not entitled to a hearing to contest your layoff.”** (Exh. B, emphasis in original) Counsel for respondents argued that the university interns should have been considered as probationary employees and afforded hearing rights pursuant to Education Code section 44949. Not so. Education Code section 44464 provides, in pertinent part: “. . .the rights provided by Sections 44948 and 44949 shall not be afforded to interns.” Accordingly, the university interns were properly excluded from these Education Code section 44949 proceedings.

14. The following respondents testified concerning their beliefs that they should be allowed to “bump” into positions held by less senior teachers because they hold supplemental credentials in the subject area being taught by the less senior teachers: Denise Chavez; Liliana Rosas; Rosanna Bravo; Maria Reynoso; Christine Rightnar; Alma Escobedo Rueda; Shani Cigarroa; Monica Blanchette; Maria Perez; Allison Soileau; Traci Goodrich; and Aimee Porter. The evidence, however,

established that the less senior teachers holding the positions in question are “highly qualified,” while the respondents asserting their “bumping” arguments are not². If someone who is not “highly qualified” is placed into one of the contested teaching positions then the County Office, which audits proper placements for credentialed staff, would issue the District a notice of “misassignment” and require the District to correct the situation. The supplemental credential plus 32 unit requirement is not a requirement set by the District. It is a requirement established by the County and the District has no discretion to deviate from the County mandated requirement. Consequently, the District acted properly by not “bumping” these respondents into the positions they believed they should have been allowed to “bump” into.

15. Respondents Denise Chavez, Daisy Salazar, Joshua Parsons, George Pulido, Matthew King, Brittany Pierce, Lyndsey Presnell, Frida Lamas, Sandra Haro, and Carrissa Marin questioned why they received RIF notices while other teachers with the same seniority dates did not. The evidence revealed that although these respondents shared seniority dates with certain teachers who did not receive layoff notices these respondents were selected for layoff based on the proper application of Board established tie breaking criteria/points. In each instance the retained teachers had more tie breaking points than the respondents listed herein.

16. Respondents Andrea Fingerson, Brittany Pierce, Natasha Leacock-Harris, and Tiffany Gilmore believe their seniority dates should be changed to reflect the date they first attended the “New Teacher Orientation” when they were first hired at Vista del Lago High School. (See Exh. 3) However, the orientation was not mandatory and the respondents were paid a “stipend” as opposed, for example, to a pro rata share of their regular contract salary. (See e.g., Exh. 4) Consequently the date the respondents first attended the orientation is not their first date “in paid probationary service” and does not establish/change their seniority dates. Similarly, George Pulido and Carol A. Nelson attended pre-school year trainings that were not mandatory and for which they were paid a stipend. Therefore, their seniority dates are accurate also.

17. Liliana Rosas (Rosas) believes she should be allowed to “bump” based on a supplemental English credential she received on March 4, 2011. The evidence, however, revealed that Rosas was mistaken about the date she received her credential. She received notification of the granting of her credential from the Commission on Teacher Credentialing on April 4, 2011, not March 4, 2011. Accordingly, the credential she received after March 15, 2011 was properly disregarded by the District (if the District was even aware of the credential which Rosas received after the March 15, 2011 cutoff date). It is well settled that only credentials and qualifications that

² In order to be highly qualified to teach subjects in a departmentalized middle school or high school a teacher must hold a supplemental authorization with at least 32 units of college or university classes.

exist on or before March 15th, and of which the District is made aware, need be considered. (*Degener v. Governing Board* (1977) 67 Cal.App.3d 689, 698.)

18. Tiffany Gilmore (Gilmore) began working for the District at the beginning of the 2007-2008 school year as a Probationary I English teacher. She worked for the entire school year and then was noticed of her “non-reelection.” She was given the opportunity to resign in lieu of being non-reelected. On February 12, 2008, Gilmore signed her notice of resignation indicating that her last date of service would be June 13, 2008. The Board considered June 14, 2008 as her resignation date. On July 21, 2008, Gilmore was “rehired” by the District to work at a “different site.” Gilmore re-commenced working for the District on August 11, 2008 and has worked full-time for the District ever since. Based on these facts, Gilmore contends that her seniority date should be her first date of paid service as a Probationary I English teacher, August 13, 2007, instead of her “rehire” date of August 11, 2008. The District, however, takes the position that Gilmore’s “resignation” constituted a break in service, and that therefore, her seniority date is August 11, 2008 instead of August 13, 2007. The District’s position lacks merit. Gilmore only resigned based on District personnel’s representation that a resignation would look better on her employment history than would a non-reelection. There was no actual break in Gilmore’s service. She worked the entire 2007-2008 school year and returned at the beginning of the 2008-2009 school year. Gilmore has worked for the District continuously since 2007. The fact that she was erroneously led to believe that she would not be re-elected after the 2008 school year should not create a form over substance situation. The only fair and equitable resolution is to change Gilmore’s seniority date to August 13, 2007.³ Another English teacher with the seniority date of August 13, 2007, and the same tie breaking points (12), Traci Bulanek (#1436), did not receive a RIF notice. Accordingly, it is impossible to tell whether Gilmore or Bulanek should have been laid off and, since Bulanek did not receive a RIF notice she can not now be laid off. Consequently, the Accusation is dismissed as to respondent Tiffany Gilmore.

19. Leah Alldredge (Alldredge) is listed as a Probationary 2 employee and believes she should be considered a permanent employee. Alldredge began working for the District during the 2008-2009 school year; however, she did not work 75% (138 days) of the school year. Alldredge acknowledged that she was “4.82 days short of the required 138 days” of service. Alldredge testified that three of the 4.82 days resulted from “cancer treatment” and she contends that she should be given credit for the “cancer treatment” days because denial of credit for those days would run afoul of

³ The District argued that Gilmore failed to correct her seniority date in response to an inquiry the District made to every employee concerning the accuracy of their employment history, including their seniority date. The District’s argument is unavailing given the fact that there is no evidence concerning when Gilmore came to believe that her seniority date should be changed. It was the District that led Gilmore to believe she had a break in service when, in actuality, she had not, and Gilmore should not be prejudiced by the District’s mistake.

the American's With Disabilities Act (ADA). Her contention lacks merit. Any teacher with any illness who missed the requisite days of service due to their illness would be in the same position as Alldredge. Alldredge is not being discriminated against based on her bout with cancer, she is being treated the same as any teacher who missed the requisite number of days due to illness. Furthermore, even assuming arguendo that Alldredge is correct and should be credited with the three days she missed due to cancer treatment, she still falls 1.82 days short of the 75% requirement. Consequently, Alldredge is properly classified as a Probationary 2 teacher as opposed to "permanent."

20. Four Social Science teachers, Michael Waymire (Waymire), Christopher Leon (Leon), Thomas Propofsky (Propofsky), and Dejournette Shaw (Shaw), share the same seniority dates and the same number of tie breaker points. Leon, Propofsky and Shaw received RIF notices; Waymire did not. During the hearing the District candidly admitted that a lottery should have been conducted as to these four teachers. There was no lottery and the District proposes to remedy the situation by conducting a lottery prior to May 15th. Waymire was not noticed of the potential for layoff so he can not now be laid off, however, the situation may be remedied as follows: all four names will be included in a lottery; the first name drawn is exempt from layoff; if the first name drawn is Waymire, then the remaining three shall be notified of layoff; if the first name drawn is someone other than Waymire then that teacher and Waymire shall be exempt from layoff; the name drawing will continue until Waymire's name is drawn and any names drawn before Waymire's shall be dismissed from the Accusation and their notices rescinded. If Waymire's name is the last name drawn then none of the four may be subjected to layoff.

21. Craig Givens (Givens) believes he should be allowed to bump into the teaching position held by Donna Soloman (Soloman). Givens holds a Clear Multiple Subject credential and teaches 6th grade at Badger Springs Elementary School (Math/Science core). Soloman holds a Clear Multiple Subject credential with Supplemental English and Math authorization and teaches 6th grade at Vista Heights Middle School. Vista Heights Middle School is a "Departmentalized Setting" and the testimony established that one needs a supplemental authorization to teach in a Departmentalized Setting. Soloman has the necessary authorization, while Givens does not. Therefore, Givens is not qualified to bump Soloman.

22. Jennifer Gysbers (Gysbers) teaches Drama & TV Production at Vista del Lago High School. She holds a Clear Single Subject Industrial Technician credential. Gysbers believes she should be able to bump two teachers who are teaching engineering pursuant to "Committee on Assignment" (COA) authorizations. The testimony established that the COA engineering assignments will not exist next year and the two teachers now holding the positions will transfer back to their "main credential" areas (physical science and math) to teach during the 2011-2012 school year. Gysbers lacks the credentials to teach physical science and math so, since the

positions she is credentialed to teach are being eliminated, she has no ability to bump any less senior teachers.

23. Linda Marie Nadziejko testified about her concern that not enough fifth grade teachers are being retained. Her belief is based on the fact that the “numbers don’t add up.” While everyone involved in these proceedings is concerned about the impact of the proposed layoffs, the District has broad discretion in determining the level of service cuts. The District’s determination cannot be modified unless the District reduces a service below the level required by law or the determination was fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. The evidence presented established that the District has a good faith belief that it can remain in compliance with minimum education requirements and there is no evidence to support a finding that, as a matter of law, the District’s proposed cuts are fraudulent, palpably unreasonable or arbitrary. Accordingly, the proposed cuts constitute a reasonable exercise of the Board’s discretion.

24. Marie Alice White (White) testified about her rehire concerns. The District objected to White’s testimony on the basis of relevance. That objection was sustained because rehire rights are not properly considered in this RIF action.

25. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. A district may reduce services 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.)

3. Pursuant to section 44995, 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)

The District has an obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. (*Bledsoe v. Biggs Unified School Dist.*, *supra.* at 136-137.)

4. The decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. It is within the governing authority's discretion to determine the amount by which a particular kind of service will be reduced or discontinued as long as the District does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.) A school district has wide discretion in setting its budget and a layoff decision will be upheld unless it was fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. (*California Sch. Employees Assn. v. Pasadena Unified Sch. Dist.* (1977) 71 Cal.App.3d 318, 322.)

5. The services listed in Factual Finding 3 are each determined to be a particular kind of service within the meaning of Education Code section 44955.

6. Based on the Factual Findings, considered in their entirety, cause exists to reduce the number of certified employees of the District for budgetary reasons.

7. Cause to reduce or discontinue services relates solely to the welfare of the District and its pupils within the meaning of Education Code section 44949.

8. Cause exists to give all respondents listed in Appendix "A," except for Patrice Banks, Gary E. Doubleday, Tiffany Gilmore, Kristina Strathman, Katherine Klager and Carole E. Young and any of the respondent's who must have the notices rescinded, if any, as a result of the Finding 5 lottery, that their services are not needed for the ensuing, 2011-2012, school year.

ADVISORY DETERMINATION

The following advisory determination is made:

Prior to May 15, 2011, notice shall be given to the respondents listed in Appendix "A," except for Patrice Banks, Gary E. Doubleday, Tiffany Gilmore, Kristina Strathman, Katherine Klager and Carole E. Young and any of the respondent's who must have the Accusation dismissed/notices rescinded, as a result of the Finding 5 lottery, that their services will not be required for the ensuing school year due to the budget deficit and the resulting need to reduce and/or discontinue certain services.

The Accusation is dismissed and the layoff notices are rescinded as to respondents Patrice Banks, Gary E. Doubleday, Tiffany Gilmore, Kristina Strathman, Katherine Klager and Carole E. Young and any of the respondent's who must have the Accusation dismissed as a result of the Finding 5 lottery.

DATED: May 2, 2011.

ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings

APPENDIX “A”

Rosanna M. Ackerson-Bravo	Marcella Agrusa	Leah Alldredge
Brandon Annette	Martha Aviles	Jennifer Baker
Patrice Banks	Joanna Barnett	Katelyn Beaman
Jamie Bernard	Julie Blackmon	Monica M. Blanchette
Deborah Bocanegra	Candace Bolles	Claudine Bond
Kathren Brooks	Bradley Byers	Silvano Cantu
Janice Carter	Nellie Castillo	Rebecca Chapman
Denise Chavez	Shari A. Cigarroa	Deborah Collins
Aurelio Cortez	Brett Crider	Gabriel Diaz
Gary E. Doubleday	Daniel P. Dufour	LeAnn Duong
Amanda Elkhoury	Alma Escobedo Rueda	Jacquelyn Espinoza
Erika Esqueda	Matthew Fairbanks	James Fenton
Jamie Fiedler	Andrea Fingerson	Nicole Flicking
Juan D. Flores	Judy Flores	Elizabeth Florido
Stephanie Fortini	Raul Galvan	Adrian Garcia
Sandra E. Garcia	Erica Garcia Ochoa	Tiffany Gilmore
Arthur Giovannini	Craig Givens	Horacio Gomez
Traci Goodrich	Christine Graves	Jennifer Gysbers
Jennifer Hanrahan	Sandra Haro	Nicole Harrell
Linda E. Harris	Shonia Hayes	Sujana Herrera
Norma Hines	Lois Hochenauer-Fox	Christopher F. Hooper
Timothy Howard	Michael Hunter	Mercedes Jackson
Alejandra Jauregui	Amy Johnson	Aurora Johnson
Typasha Jones	Theodore Kellam	Stephen Kim
Matthew King	Katherine Klager	Martha Krauss

Carlos Labrada	Frida Lamas	Amber Largey
Sharmayne Lawson	Natasha Leacock-Harris	Lori J. Lee
Christopher Leon	Dawnn Lindsey	Stephanie Luddington
Elsa Magana	Erin Mangold	Carissa Marin
Jonathan Martin	Liseth Martinez	Sharon Mendonsa
Almario Mendoza, Jr.	Michelle Montemayor	Sara Montti
Zarina Moreno	Yolanda Mouton	Linda Marie Nadziejko
Nadakia Neal	Carol A. Nelson	Marlies Nelson
Khola Nevels	Hieu M. Nguyen	Hung Nguyen
Julie Nikniai	Pedro Nuno	Sharon Olson
Theresa Orozco	Erik Parry	Joshua Parsons
Maria S. Perez	Lara Petersen	Melinda Petersen
Brittany Pierce	Kyle Polston	Aimee Porter
Lyndsey Presnell	Thomas Propofsky	George Pulido
Valerie Putnam	Maria Reynoso	Sherry Rice
Christine Rightnar	Gabriela Romo	Liliana Rosas
Charlene Saenz	Daisy Salazar	Juan Sanchez
Ruben Sarabia, Jr.	Deborah Saravia	Isaac Saucedo
Jeanine Schutze	Curt Sell	Dejournette Shaw
Salma Shehto	April Simon	Jennifer Smith
Allison Soileau	Khunara Sok	Janeia Sotomayor
Kristina Strathman	Cherie L.Suchan	Megan Tuntland
Joann Valencia	Michelle Vandenburg	Howard Vargo
Gabriel Vega	Russell Venegas	Sandra Vilas
Bernice Vivanco	Dat Vo	Denise West
Maria Alice White	Katherine Willers	Carole E. Young

Marissa Zarate

Chloe Zhwa