BEFORE THE
GOVERNING BOARD OF THE
ANAHEIM UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusations Re: The Reduction in Force of 71 Full-Time Equivalent Positions, Respondents.	OAH No. 2010030731

PROPOSED DECISION

David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 14, 2010, in Anaheim, California.

Stutz Artiano Shinoff & Holtz, by Jack M. Sleeth, Jr. and Jeanne Blumenfield, Attorneys at Law, represented the Anaheim Union High School District (District).

Schwartz, Steinsapir, Dohrmann & Sommers, by Henry M. Willis and Lucas H. Openheim, Attorneys at Law, represented the Respondent teachers on the list attached as Attachment A and marked "+", incorporated by reference and more specifically described in Factual Finding 7. Attachment A also sets forth the Respondents who appeared at the hearing, marked "*****," as well as a group of Respondents who were not represented by Mr. Willis, marked "C." (These Respondents hold positions as Counselors with the District.)

The District objected to the inclusion of Diane Kuramoto and Seddigheh Lenjavi as Respondents because, although they submitted Requests for Hearing after they received notices of termination, they did not submit Notices of Defense after the District served them with Accusations. The District did not object to their participation in the hearing if they wanted to offer evidence relating to their failure to file Notices of Defense. No evidence was submitted on that subject. The District's objection is sustained, and the defaults of Diane Kuramoto and Seddigheh Lenjavi are hereby noted.

The record remained open for the submission of briefs, as follows:

Received on April 19, 2010: District's letter brief, marked for identification as Exhibit 14; Respondents' letter brief by Mr. Willis, marked for identification as Exhibit E; email brief from Kuramoto, marked for identification as Exhibit F; email brief from Read-Bottorff, marked for identification as Exhibit G; email brief from Michea, marked for identification as Exhibit H; email brief from Chavez, marked for identification as Exhibit I; and email brief from Lenjavi, marked for identification as Exhibit J.

Several parties indicated they would submit replies, which were received on April 21 or 22, 2010, and marked for identification as follows: District's reply brief, marked for identification as Exhibit 15; Respondents' reply brief by Mr. Willis, marked for identification as Exhibit K; email reply from Michea, marked for identification as Exhibit L; email reply from Lenjavi, marked for identification as Exhibit M; and email reply from Read, marked for identification as Exhibit N.

The record was closed and the matter was submitted on April 22, 2010.

SUMMARY OF PROPOSED DECISION

The Governing Board (Board) of the District determined to reduce particular kinds of services provided by teachers and other certificated employees for budgetary reasons. The Board also determined to layoff teachers due to a decline in average daily attendance. The decision was not related to the capabilities and dedication of the individuals whose services are proposed to be reduced or eliminated.

District staff carried out the Board's decision by using a selection process involving review of seniority. The selection process was in accordance with the requirements of the Education Code, except as to the decline in average daily attendance and the decision to skip two counselors.

FACTUAL FINDINGS

Jurisdictional Facts

1. Joseph M. Farley, Ed.D., is the Superintendent of the District and his actions were taken in that official capacity. Russell Lee-Sung is the Assistant Superintendent for Human Resources of the District and his actions were taken in that official capacity. Lee-Sung is the primary person responsible for implementing the layoff.

2. Before March 15, 2010, the District personally served on each Respondent a written notice that it had been recommended that notice be given to Respondents pursuant to Education Code sections 44949 and 44955 that their services would not be required for the next school year (notice). Each notice set forth the reasons for the recommendation and noted that, due the "the state budgetary crisis," the Board had passed a resolution "to eliminate or reduce particular kinds of services for the 2010-2011 school year, pursuant to Education Code section 44955" based on the Board's determination that "it is necessary to lay off certain certificated employees due to the fiscal realities of the shortfall of state funding." (See notices in Exhibit 11.) Although a reference was made to the date of the resolution, no copy of the resolution was included with the notices.

3. The notices were properly served on Respondents. Twenty-eight certificated employees each timely requested in writing a hearing to determine if there is cause for not

reemploying them for the ensuing school year. (See list in Exhibit 11 and documents provided in Exhibit 11 for each person served.)

4. Lee-Sung made and filed Accusations against each of the Respondents. The Accusations with required accompanying documents and blank Notices of Defense were timely served on the responding employees. Each Accusation (see Exhibit 11) recited that the reasons for termination were set forth in a copy of the Board Resolution that was attached. However, the Accusations submitted in Exhibit 11 do not include this attachment.

5. Twenty-three employees who filed written Requests for a Hearing also filed a Notice of Defense. (See list in Exhibit 11 and documents provided in Exhibit 11 for each person served.)

6. No Notices of Defense were served by some Respondents, including Diane Kuramoto and Seddigheh Lenjavi. Nor was there any evidence offered by them of any attempts to serve Notices of Defense or reasons for not serving Notices of Defense.

7. Attachment A is incorporated by reference. The names listed are certificated employees on whom the District served notices and who returned a Request for Hearing, and are Respondents in this matter. Those who did not return a Notice of Defense have the designation "NNOD." Finally, all names with the designation "*" appeared at the hearing, although not necessarily for the entire hearing.

Facts Relating to Reduction in Services

8. The District provides educational services for over 30,000 students in eight junior high schools, eight high schools, a continuation school, a special education school and an adult education school.

9. Respondents in this proceeding are probationary or permanent certificated employees of the District employed as school teachers and counselors.

10. On March 3, 2010, the Board of the District was given notice of the Superintendent's recommendation that 71 FTE certificated employees be given notice that their services would not be required for the next school year and stating the reasons therefore.[1]

11. Board Resolution No. 2009/10-HR-04, adopted on March 3, 2010 (Resolution), proposed a layoff of 71 FTE certificated employees due to the reduction or elimination of the following, which were described as "particular kinds of services" (Resolution, Exhibit 1): three management positions, 41 classroom teachers, 25 counselors, one librarian and one regional nurse (GASELPA).

[1] The Superintendent's recommendation, and the Board resolution, also included other FTE positions that are not at issue in this matter, such as in management positions.

12. Tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date are established by the following: the teachers' Collective Bargaining Agreement, Article 9.12 (Exhibit 3); and the Memorandum of Understanding between the District and the Anaheim Personnel Guidance Association (Exhibit 3). In total, these documents provide that the order of termination shall be based on the needs of the District and its students in accordance with the criteria stated therein.

13. Lee-Sung established that the Resolution was required by the District's fiscal crisis and a decline in average daily attendance and the need to reduce services to balance its budget for the welfare of students. More specifically, the District presented evidence that, due to expected reductions in the next state budget, it was possible that its revenues would be reduced by approximately $8 million, following several years of larger reductions that are ongoing.

14. The Board decided to reduce teaching services in general by increasing the student to teacher ratios in its schools. In junior high schools, where the ratio had been 1 teacher to 31.5 students, the ratio would now be 1 to 32.5. In high schools, where the ratio had been 1 teacher to 32 students, the ratio would now be 1 to 33. As a result of the added students in each class, the District would need fewer teachers in general. The District determined that 34 FTEs would be reduced as a result. Lee-Sung's allocation of these FTE reductions to specific subject areas of teaching is found in Exhibit A, in the row titled "class size increase (based on increase by 1)."

15. The District decided to redirect categorical funding provided for counseling services under AB 1802 to its general fund. As a result, the District sent notices to 25 counselors.

16. The Resolution also refers to the decline in average daily attendance (ADA) as a basis for layoffs. At the time of the recommendation made to the Board, Lee-Sung used an estimate of 650 fewer students expected for the next school year (2010-2011) than for the present school year (2009-2010). As a result, 34 FTEs would be reduced. (See Exhibits A and C.) At the time of hearing, the District presented evidence that the actual decline in ADA from the 2008-2009 school year to the 2009-2010 school year was 349.45 (Exhibits 8 and 9). Based on this lower figure, Lee-Sung testified that 16 FTEs would be reduced as a result of decline in ADA.

17. Lee-Sung testified to the methodology by which he identified the 34 FTEs initially related to the decline in ADA. In summary, he calculated the decline in future enrollment as a percentage of current students (approximately 2.13 percent), and then applied the same percent reduction to most of the teaching subject areas he identified in Exhibit B. In some instances, there were so few employees teaching a subject that he could not reduce it, as a practical matter. In some instances he used numbers that were rounded off. Lee-Sung also considered attrition known to the time of hearing and testified that future attrition would

be monitored and considered. His conclusions are found in Exhibit A, in the row titled "enrollment decline (based on 650)." For example, there were six FTEs each allocated to English, Reading and Math, and five each allocated to Social Science and Science.

18. Lee-Sung also testified that it was impossible to determine the actual decline in ADA, as defined by the statute[2], because the first six months of the present school year would not be completed until early march, and he had begun his computations, and the recommendation to the Board took place long before then. As noted in factual Finding 16, once the actual ADA figures were calculated, a lower number of FTEs, 16, was attributed to the decline in ADA. However, there was no evidence of how the 16 FTEs were to be allocated, although it is assumed that the District would undertake a similar process to spread, or allocate, these reductions across the various subject areas of teaching.

19. The decision to reduce services was not related to the capabilities and dedication of the individuals whose services are proposed to be reduced or eliminated.

20. The District maintains seniority lists which contains employees' seniority dates (first date of paid service) (Exhibit 2 for teachers; Exhibit 13 for counselors). The District also maintains records of its teachers' and counselors' current assignments and credentials.

21. The District used the seniority lists to develop a proposed layoff list of the least senior employees currently assigned in the teaching and counseling positions being reduced.

22. The District determined it would skip over certain less senior employees who possess skills found necessary by the District. As set forth in more detail in Exhibits 4, 5 and 6 and the testimony, the District skipped the following employees for the following reasons:

a. Kerri Fenton has a seniority date of September 6, 2005 (#1070). She teaches physical education and has extensive education, experience and training in dance. She teaches a special dance curriculum at a high school.

b. Kelly Grove has a seniority date of September 2, 2008 (#1338). She teaches a special education class comprised of students who are blind or otherwise visually impaired. She teaches and utilizes Braille in her curriculum.

c. Tom Faranda and Julie Ornelas-Smith are credentialed counselors who have been trained to perform the specialized assessments and other tasks required for special education students, such as participation in the formation of Individualized Education Plans required by law. These are services mandated by law. They are employed under contract as temporary teachers, and the District intends to re-employ them for the next school year based on their special skills and training. Although the positions were offered to existing District

[2] Education Code section 44955 requires a comparison of the average daily attendance for the first six months of the present school year as compared to the average daily attendance for the first six months of either of the prior two school years.

employees when they were created, there were no applications from existing District employees.

23. The services identified in the Resolution are particular kinds of services that could be reduced under Education Code section 44955. The Board's decision to reduce the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion, except as set forth below. The decision was based on the welfare of the District and its students.

24. Except as permitted by law, no junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

Individual Respondents and Respondents' Contentions

25. Corey Hague, seniority date February 5, 2005 (#1047), and Rhonda Lee, seniority date September 7, 2004 (#986), are both credentialed to teach physical education and have taught dance as a component of the full physical education curriculum. Both have permanent status, have more seniority than Fenton and contend that they should be retained to teach the specialized dance classes taught by Fenton.

26. Dale Miller contended that Fenton was unsuccessful in making the argument last year that she should not be subject to layoff. Fenton responded that she had not been laid off last year.

27. Official notice is taken of the Proposed Decision in last year's layoff proceeding under Government Code section 11505, Office of Administrative Hearings case number 2009031200, in which Fenton was noticed for layoff, and not proposed to be skipped, as she is this year. In that Proposed Decision, it was determined that Fenton could be laid off. If, as she testified, she was not laid off, it is inferred that the District ultimately determined that she could be retained.

28. Dale E. Miller was assigned a seniority date of November 13, 2007 (#1293), and claims that the date should be September 4, 2007. He began work on September 4, 2007, under an emergency teaching credential in a position set forth in his personnel file as a long term substitute teacher. By reference to last year's Proposed Decision (see official notice set forth in Factual Finding 27, above), it is found that, after a credentialing issue was resolved, Miller signed a contract with the District to begin as a temporary teacher effective November 13, 2007. When he accepted a probationary position the following year, he was given credit for his prior service as a temporary teacher. There was further information that could be offered to explain his circumstances (for example, Miller was shown a document from his personnel file relating to the terms of his employment as of September 4, 2007, which was neither marked for identification nor received in evidence), such as the terms of his employment in November 2007 as well as at the outset of the 2008-2009 school year.

29. Teresa Shimogawa has a seniority date of October 23, 2006 (#1232). An offer of proof was accepted that she taught in the same classroom as of October 10, 2006, and she contends that this should be her seniority date. There was sufficient evidence to establish that Shimogawa worked as a day-to-day substitute before October 23, 2006.

30. Counselor Tisa Read-Bottorff was working as a teacher in a classroom when she was slated to begin her new assignment as a counselor in 2006. She remained in her teaching assignment for ten extra days until a replacement was found. She claims she should receive credit to her new seniority date as a counselor for this extra service to the District as a teacher.

31. Counselor Marcela Michea was hired by the District in August 2000, resigned on June 30, 2006, and was rehired on August 27, 2007. Her seniority date is August 27, 2007. When she was rehired, she was told her seniority date would be August 2000, and that date has been on the seniority list until a recent revision in March 2010. She contends that the prior date is proper.

32. Several counselors contend that the District has improperly implemented their layoffs because, among other things: their salaries differ; there are names on the list of counselors who are paid by use of funds from AB 1802 who were not initially hired with such funds; it was a bad decision to layoff counselors; and there has been attrition of one counselor. The evidence established that: the District hired several new counselors when AB 1802 funds were first made available; as funds were increased, the District added counselors to the list of those paid with AB 1802 funds so as to exhaust those funds; there has been attrition of one counselor, as well as one counselor on leave who retains rehire rights; the District presently pays more for salary and benefits for counselors on the AB 1802 list than it receives in funds under AB 1802; and that the state is permitting the District the flexibility to move AB 1802 funding into its general fund for next year. Under these circumstances, the District established an appropriate basis for the counselors to be laid off.

33. Respondents raised the following contentions, among others: that the District cannot describe "classroom teachers" as a particular kind of service under the Code; that several teachers should have seniority dates earlier than the dates assigned to them on the District's seniority list; that the District did not comply with the law when it skipped less senior teachers; that the District improperly determined that counselors should be given notices; and that the layoffs attributed to decline in ADA did not comply with the statute. The facts relating to these contentions are set forth above.

34. To the extent that a contention of any Respondent is not mentioned herein, it is rejected as not supported by the law and/or the facts.

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LEGAL CONCLUSIONS AND DISCUSSION

1. Education Code[3] section 44949, subdivision (a), states in pertinent part:

"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 . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor."

2. Section 44955 provides, in pertinent part:

"(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 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 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. . . .

"(c) . . . [S]ervices of such employees shall be shall be terminated in the reverse order in which they were employed, as determined by the board in accordance with Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices

[3] All citations are to the Education Code, except where indicated.

and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

"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. . . .

"(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."

3. All notice and jurisdictional requirements set forth in sections 44949 and 44945 were met, except as set forth below.

4. The District must be solvent to provide educational services, and cost savings are necessary to resolve its financial crisis. The Board's decision was a proper exercise of its discretion for reducing particular kinds of services. The anticipation of receiving less money from the state for the next school year is an appropriate basis for a reduction in particular kinds of services under section 44955. As stated in *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 638-639, the reduction of particular kinds of services on the basis of financial considerations is authorized under that section, and, "in fact, when adverse financial circumstances dictate a reduction in certificated staff, section 44955 is the only statutory authority available to school districts to effectuate that reduction."

5. A school 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 (*Rutherford*).) In other words, teaching in general can be reduced. (*California Teachers Assn. v. Board of Trustees (Goleta)* (1982) 132 Cal.App.3d 32 (*Goleta*).)

6. Respondents' contention that no particular kind of service has been properly identified by the Board is rejected. Respondents cite to numerous cases wherein courts have approved the practice of identifying particular types of services to be reduced or eliminated at the junior and senior high school level by the nature of the subject taught (e.g., English, math, science). (See, e.g., *Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796 (*Campbell*); *Degener v. Governing Board* (1977) 67 Cal.App.3d 689

(*Degener*).) In these instances, specific curricular offerings were identified as the particular kinds of services identified in the statute as providing a basis for layoffs.

7. Because elementary school teachers do not require the same types of teaching credentials as do teachers at secondary schools and, more importantly, because they usually teach all curricular subjects to their students, case law developed that allowed school districts to identify elementary classroom teachers as a particular kind of service that satisfies the statutory requirements. Although the initial case of *Burgess v. Board of Education* (1974) 41 Cal.App.3d 571 initially found that this was not permitted, in later cases the same court that decided *Burgess*, and other courts, declined to follow *Burgess* and approved the practice of using the general description for elementary school teachers subject to layoff. (See, e.g., *Degener, supra*; *Campbell, supra*.)

8. Neither the statutory language nor the cases approving the use of specific curricular descriptions requires such specificity. The cases relating to elementary school teacher layoffs make it clear that a reduction in particular kinds of services takes place in an elementary school setting when increasing the student teacher ratio results in the need for fewer teachers. As stated in *Goleta, supra,* quoting from *Rutherford, supra,* at 178-179:

"Appellants argue that, even if elementary classes are a particular kind of service, reducing the number of classes in order to maintain the same level of service is not the 'reduction' of services required by Education Code section 44955. This contention has been rejected. 'A board may 'reduce services' . . . by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with pupils involved. [This] determination falls within the statutory language.'"

9. Other cases have come to the same conclusion. (*Zalac v. Governing Board of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838 (*Zalac*); *Gallup v. Board of Trustees* (1996) 41 CalApp.4th 1571.) Specific positions to be eliminated do not need to be identified. As long as there is a change in the method of teaching, the layoff can proceed. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627 (*San Jose*).) The different systems of credentialing of teachers at the two different levels do not justify any different result.

10. Boards of education hold significant discretion in determining the need to reduce or discontinue particular kinds of services, which is not open to second-guessing in this proceeding. (*Rutherford, supra.*) Such policy-making decisions are not subject to arguments as to the wisdom of their enactment, their necessity, or the motivations for the decisions. (*California Teachers; Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1529.) Such decisions and action must be reasonable under the circumstances, with the understanding that "such a standard may permit a difference of opinion." (*Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831 (*Santa Clara*).) Section 44955 relates to the conditions that must be met by a school district to lay off teachers, and there is nothing in the statute to suggest that an increased ratio of students to teachers would be a reduction in a particular kind of service only at the elementary school level. As the case law approves of

such a particular kind of service at the elementary school level, it is also permissible at the secondary school level.

11. The contention of Respondents Hague and Lee that their special training, experience and skills should cause the Department to skip them in this proceeding is not supported by law. Junior teachers may be given retention priority over senior teachers if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara, supra*.) This "skipping" is a process, under section 44955, subdivision (d)(1), wherein a school district may choose to demonstrate a specific need and that an employee has the special training and experience to meet that need. However, the statute does not require a school district to do so. Rather, it is within the school district's discretion to determine if it wishes the layoff process to skip over an employee. The District adequately described the special skills and training upon which it relied. As applied here, Hague and Lee cannot force the District to skip them. Further, they have not established that the District improperly skipped Fenton. See Factual Findings 22 and 25.

12. Alternatively, Hague and Lee may argue that they have greater seniority than Fenton and are "certificated and competent" to render the same service. If so, they could not be laid off under the language of section 44955, subdivision (b), that no permanent employee may be terminated while any other employee with less seniority "is retained to render a service which said permanent employee is certificated and competent to render." This is often referred to as bumping. However, this bumping language would not apply to Hague and Lee because it is preceded by the phrase "Except as otherwise provided by statute . . . ." Further, the skipping provision in section 44955, subdivision (d)(1), is preceded by the language "Notwithstanding subdivision (b)." Therefore, the language in different portions of the statute provides generally for bumping rights for teachers, with the exception that the District may skip a teacher if the skipping requirements are met. Here, the District has met the skipping requirements as to Fenton, and bumping rights do no apply.

13. The District's proposed skip of Tom Faranda and Julie Ornelas-Smith (Factual Finding 22) must be disallowed because they are temporary employees. Temporary employees do not gain seniority because they do not perform services to the District in a probationary capacity. Under section 44955, the layoff process, and the ability to skip employees under subdivision (d)(1), is based upon seniority and the requirement that, before probationary and permanent certificated employees are implicated, the District will have notified all temporary employees that they will not be retained for the following year. As there is no statutory authority to skip temporary employees, no matter what special skills they may possess, the District may not do so.

14. Under section 44918, a substitute teacher who serves less than 75 percent of the school year is not entitled to the same rights as a full time teacher hired as a probationary employee, and that no credit toward status as a permanent teacher accrues for work as a day-to-day substitute. There was insufficient evidence that Respondents Miller or Shimogawa had sufficient service under their contracts as substitute teachers to qualify for an earlier

seniority date. Further, the evidence established that their service prior to their seniority dates was as day-to-day substitutes. Neither of these Respondents submitted sufficient evidence to affect a change in the seniority dates assigned to them by the District. See Factual Findings 27, 28 and 29. Further, as to Miller, service under his emergency credential is not included in computing the service required for him to attain permanent status. (*Smith v. Governing Board* (2004) 120 Cal.App.4th 563.)

15. Under the statutory language and the applicable case law, the District does not need to consider attrition when the layoff is based upon a reduction in a particular kind of service, but must do so when the layoff is caused by a reduction in ADA. The evidence established that the District considered attrition appropriately and will continue to do so to the conclusion of the layoff process.

16. Under Government Code section 11506, subdivision (c), the failure to file a notice of defense "shall constitute a waiver of respondent's right to a hearing . . . ." There is some potential for confusion in a layoff proceeding such as this one under the Education Code where an affected teacher has to first file a Request for Hearing and then also file a notice of defense. Nevertheless, the hearing, under section 44949, subdivision (c), is governed by the Government Code, and there is specific mention of the requirement to file a notice of defense. There was no evidence offered by Kuramoto and Lenjavi concerning their failures to file a notice of defense. The District's objection to their participation in this matter is therefore sustained.

17. Although Read-Bottorff is to be commended for her extra service as a teacher, under section 44955, seniority is based upon her actual first date of paid service. Her claim to an earlier date is rejected.

18. Michea was given incorrect information when she was rehired to the effect that her seniority date would remain as the date of her original hire by the District. Under section 44848, her circumstances require her to be assigned a new seniority date upon her return after resignation. Her claim to an earlier date is rejected.

19. Cause exists to reduce the number of certificated employees of the District due to the reduction of particular kinds of services. The District's decision to reduce the identified services was neither arbitrary nor capricious, and relates solely to the welfare of the District's schools and pupils within the meaning of section 44949. See Factual Findings 1 through 24.

The Layoffs Attributable to Decline in ADA Must be Disallowed

20. A key requirement of administrative hearings in general, and teacher layoff proceedings in particular, is proper notice. As set forth in Conclusion 1, above, section 44949 requires the preliminary notice given to each employee included in the layoff must include "the reasons" therefore.

21. The purpose of the initial termination notice provision is to notify an employee of the probability that his or her services will not be required for the ensuing year so that he or she may consider looking elsewhere for employment. Nothing in the statute relating to the termination of teachers due to a decline in daily average attendance or, in the alternative, a reduction of services (section 44955) prohibits the statement of more than one ground in putting employees on notice that their jobs are in jeopardy. (*Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, 653.) However, where the preliminary notices to teachers only specify one ground for layoff, the school district has no power to terminate teachers for any other reason not specified in the notice. (*Karbach v. Board of Education* (1974) 39 Cal.App.3d 355, interpreting the precursor to section 44955.) Conversely, if both statutory grounds are cited in the notice, the school district may proceed on both grounds, and the notice does not need to set forth any more specific information (such as the precise number of teachers to be terminated or the specific positions to be eliminated) other than the statutory reasons. (*Santa Clara, supra*; *San Jose, supra*, at 632.) The notice provision of section 44955 is jurisdictional. (*Campbel, supra,* at 807, citing *Rutherford, supra*.)

22. As set forth in more detail in Factual Finding 2, the notices the District sent to the employees made no reference to a decline in ADA as a basis for termination. This is dispositive. It is also of concern that: the Resolution did not attribute any identified FTEs to the decline in ADA; the notices did not attach a copy of the Resolution; the Accusations did not refer to either the decline in ADA or the reduction or elimination of particular kinds of services but, rather, referred to the attached Resolution; and the Accusations placed in evidence did not include the Resolution that was referenced as being attached. Under the totality of the evidence, the District did not properly notify Respondents of the terminations based upon a decline in ADA.

23. Respondent's contention that the District improperly used a number from anticipated decline in enrollment (650) that was greater than the actual decline in ADA (349.45) in determining the number of FTEs attributable to the ADA terminations is rejected. Numerous cases stand for the proposition that the process of implementing layoffs is a very flexible one and that school districts retain great flexibility in carrying out the process. (*Campbell, supra*.) In fact, school districts have been permitted to present at hearing, for the first time, evidence of the type of tie-breaking that might apply. (*Zalac, supra*; *Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127.) It is true that future enrollment is not the basis of the statutory authority for layoffs premised upon a decline in ADA. However, as argued by the District, the timing of the first six months of a school year beginning in September is such that it is virtually impossible to know the present year ADA in time to serve preliminary notices, let alone present such information to a governing board to consider for purposes of passing a resolution. While it may have been more accurate to use other estimates (such as taking the first five month's decline in ADA and extrapolating to six months), there was no abuse of the Board's broad discretion in the manner in which it determined that a decline in ADA was a proper basis for layoffs. It was not established that the District's actions were either arbitrary or capricious.

The Appropriate Remedy

24. The issue is how, if at all, to accommodate the reduction in FTEs of particular kinds of services, which were accomplished correctly, with the improper terminations for decline in ADA due to lack of notice. The District did not indicate which particular employees were noticed for layoff specifically due to decline in ADA, or specifically due to reduction or elimination of particular kinds of services, except for the counselors. However, it did identify the number and types of FTEs related to each alleged cause for layoff.

25. At the hearing, the District was able to attribute 16 FTEs for layoff due to decline in ADA. This was a reduction from the original number of 34 FTEs, due to the use at the hearing of the proper, and lower, figure of actual decline in ADA. (See Factual Findings 16, 17 and 18.) Although there was specific evidence of the subject areas of teaching from which the original 34 FTEs were attributed, there was no similar evidence relating the reduced number of 16 FTEs to specific subject areas of teaching. Therefore, there was insufficient evidence from which to fashion an order that is directed to particular employees by name, or even by subject area of teaching.

26. As noted above, the layoff process is a flexible one, and the District should be permitted to proceed with those layoffs that are supported by the law and the facts. In the same way that proposed decisions in these matters often order a school district to adjust the final layoff notices to accommodate further attrition that occurs after the administrative hearing, an order can be fashioned herein that requires the District to comply with the law. Here, there is insufficient notice relating to the 16 FTEs attributable to the alleged decline in ADA. Therefore, the District will be ordered to eliminate 16 FTEs from the original 41 classroom teachers positions identified for reduction in the Resolution, as part of its determination of which employees should receive final layoff notices.

27. Although the argument can be made that the 34 FTEs originally attributed to the decline in ADA should be ordered to be retained, the evidence does not support that result. The 34 FTEs were determined based upon use of a projected decline in future enrollment, an improper measure in a layoff based on decline in ADA. See Conclusions 20, 21 and 22 . Rather, 16 FTEs is the proper amount attributable to the decline in ADA.

28. The flexibility inherent in the layoff process, referenced in Conclusion 20, permits the District to correct the process at this point and determine, based on the information available to it at the time, those employees to whom final notices should be sent.

29. The District may provide final notices to the counselors. They were specifically identified for layoff as a result of reduced funding and the lack of notice for declines in ADA does not affect them. Their challenges to the layoff have been rejected. Further, as the proposed skipping of two temporary counselors was unrelated to the reasons for the layoff of the counselors (that is, the placement of AB 1802 funds into the general fund), the disallowance of that skipping also does not affect the basis for their layoff.

ORDER

1. The District may give notices to employees occupying the following full-time equivalent certificated positions: three management positions, 25 classroom teachers, 25 counselors, one librarian and one regional nurse (GASELPA), that their services will not be required for the 2010-2011 school year because of the reduction of particular kinds of services. Such notices may be given to the employees on Attachment A.

2. Notice shall be given in inverse order of seniority. Each respondent shall receive such a notice.

3. The Accusations against all Respondents identified by the District for layoff based upon a decline in average daily attendance are dismissed.

DATED: April 30, 2010.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings

Attachment A

Anaheim Union High School District
OAH Case No.: 2010030731

Key: ***** = Present at hearing.
+ = Represented by Henry M. Willis, Attorney at law.
C = Employed by the District as a Counselor; not Represented by Mr. Willis.
NNOD = No Notice of Defense filed.

Banda-Junior, Martin **+**
Cendejas, Arthur **NNOD +**
Chavez, Sylvia **C ***
Cortes, Brian *** +**
Fenton, Kerri *** +**
Frembling, Jennifer **NNOD C**
Hauge, Corey *** +**
Keledjian, Jamie *** +**
Kelii, Veronica *** +**
Kuramoto, Diane **NNOD C ***
Lee, Rhonda *** +**
Lee, Pei *** +**
Lenjavi, Seddigheh **NNOD C ***
Long, Garrett *** +**
Magcalas, Jose *** +**
McEvoy, Michael **NNOD +**
Michea, Marcela **C ***
Miller, Dale *** +**
Nagel, Erin *** +**
Parent, Wendy *** +**
Read-Bottorff, Tisa **C ***
Reiter, Michael *** +**
Reyes, Christine *** +**
Rigsby, David *** +**
Shimogawa, Teresa **+**
Shoup, Jr., Bryan *** +**
Widger, Annel **C ***
Worthington, Tracy *** +**