

**BEFORE THE
GOVERNING BOARD OF THE
MURRIETA VALLEY UNIFIED SCHOOL DISTRICT**

In the Matter of the Accusations Against:

**The Certificated Employees Listed in
Attachment A,**

Respondents.

OAH No. L2008030393

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 29, 2008, in Murrieta. The record was closed and the matter was submitted for decision at the conclusion of the hearing.

Mark W. Thompson, Esq., and Todd M. Robbins, Esq., Atkinson, Andelson, Loya, Rudd & Romo, represented the Murrieta Valley Unified School District (District).

Jon Y. Vanderpool, Esq., Tosdal, Smith, Steiner & Wax, represented Respondents Sandra Alba, Kelly Booker, Denise Ciauri, Donna Jarvie, Kathryn Kring, Kelly McLellan, Laura Schrock, Jeremy Walker and Leah Washington, each of whom was present except for Ms. Washington. No appearance was made by or on behalf of the other Respondents.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Patrick Kelley, the District's Assistant Superintendent, Human Resources, made and filed the Accusations in his official capacity and as the designee of the District's Superintendent, Dr. Stan Scheer (Superintendent).
2. Respondents were at all times mentioned certificated District employees.
3. On February 28, 2008, upon recommendation from the Superintendent, the Governing Board of the District (Board) adopted Resolution No. 07/08-25, which recommended a reduction in particular kinds of services for the 2008-2009 school year.
4. On or before March 15, 2008, the District served Respondents with written notice, pursuant to Education Code section 44944, that the Superintendent had recommended to the Board that notice be given to Respondents that their services will not be required for the 2008-2009 school year.

5. Each Respondent was thereafter timely served with an Accusation for non-reemployment and other required materials.

6. In response to the Accusations, the following Respondents timely submitted a Notice of Defense and/or Request for Hearing: Alba, Amstutz, Booker, Ciauri, Cox, Curran, De La Cruz, Jarvie, Jones, Kring, LaPierre, Le, Manzella, McLain, McLellan, Nevarez, Pulatie, Rodgers, Schrock, Seto, Trease, Walker and Washington.¹

7. By failing to request a hearing and/or submit a Notice of Defense, Respondents Lou Delorca, Michelle Fritch, Matthew Tweed and Denise Weaver waived their right to a hearing in this matter, pursuant to Education Code section 44949, subdivision (b).

8. On or about April 21, 2008, the District dismissed the Accusations against the following Respondents: Amstutz, Cox, Curran, De La Cruz, Le, Manzella, McLain, Nevarez, Pulatie, Rodgers, Seto and Trease.

The District's Layoff Decision

9. Resolution No. 07/08-25 specifically provides for the reduction or elimination of the following particular kinds of services:

<u>Particular Kinds of Service (PKS)</u>	<u>Full-Time Equivalent (FTE) Positions</u>
Elementary Teacher	12
Middle School Core Teacher	5
Middle School Foundational Math Teacher	2
Middle School Science Teacher	2
Middle School Language Arts Teacher	2
Middle School Social Science Teacher	1
Middle School Physical Education Teacher	1
Pre-School SDC Teacher	1
TOTAL CERTIFICATED POSITIONS	26

10. The services identified in Resolution No. 07/08-25 are particular kinds of services as described in Education Code section 44955.

¹ No appearance was made at the hearing on or behalf of Respondents Jones or LaPierre, who are not represented in this matter by Mr. Vanderpool.

11. After adoption of Resolution No. 07/08-25, the District has continued to consider all known assured attrition.

12. Respondents do not contend that the reduction or elimination of the 26 FTE positions will reduce services below mandated levels.

13. The decision to reduce the above-described particular kinds of services was based on the District's desire to retain financial flexibility to deal with problems created by declining enrollment in some of the District's schools, as well as problems indirectly caused by the current state budget crisis. The declining enrollment problem has been caused by the recent halt in enrollment growth experienced in prior years, exacerbated by the recent mortgage crisis which has seen a decline in new residents to the area. Graduating high school classes are now larger than incoming kindergarten classes. Also, students previously in class size reduction (CSR) programs are now transitioning into non-CSR classes, meaning teacher-to-student ratios are tending to increase. Overall, the elementary and middle schools are being impacted by these problems. Therefore, no reduction of particular kinds of services is proposed for the high schools. The current state budget crisis is not directly impacting this situation, in that the District has decided to maintain its current programs, e.g. the CSR programs for grades K-3 and the 9th grade. However, the decision to retain those programs in light of the state budget crisis means the District has essentially decided to respond to that crisis by reducing the number of teachers employed to teach all the classes it will offer next school year.

14. (A) The Board adopted Resolution No. 07/08-19, which established a seven step tie-breaking process to determine the relative seniority of certificated employees who first rendered paid service on the same date. The seven steps were applied in order, one step at a time, until a tie was broken in seniority between certificated personnel.

(B) The third step resolved ties in seniority by the number of years of "credentialed teaching experience outside the District." In calculating the number of years of experience in an outside district, the District gave credit for half of one year if a teacher taught one month or more, and gave credit for one year if a teacher taught more than half of a school year. The fourth step resolved ties by the number of years of credentialed teaching within the District.

(C) The District's first six steps in the tie-breaking process were valid, fair and related to the welfare of the District and its pupils.

(D) In the event of a tie after applying the first six steps, "seniority shall be determined based upon a comparison of the most recent employee evaluations." In applying this step, two District administrators jointly reviewed the subject employees' most recent formal evaluation, and compared the standardized scores given (e.g., meeting expectations, needs improvement, unsatisfactory, etc.). If the standardized scores were too similar, the tie was broken by determining which employee's supervisor comments were superior. No distinction was drawn or adjustment made for competing employees who were reviewed by

different supervisors, even though those supervisors may have had different ways of making standardized scores or additional comments. In most cases, the standardized scores of competing employees were so similar that the tie was usually broken by the supervisors' additional comments.

(E) As for the Respondents involved in this case, the seventh step in the tie-breaking process only resolved a tie between Respondents Alba and Schrock, and a tie between Respondent McLellan and another certificated employee who is not a Respondent. As discussed in greater detail below, application of the seventh tie-breaking step does not affect the outcome of this matter as to the involved Respondents.²

15. The District maintains a Seniority List containing employees' seniority dates, current assignments and locations, credentials and authorizations. The information on the Seniority List is accurate.

16. The District used the Seniority List to develop a proposed layoff and "bumping" list of the least senior employees currently assigned in the various services being reduced. The District then determined whether the least senior employees held other credentials entitling them to "bump" other employees. In determining who would be subject to layoff for each kind of particular 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 did not use "skipping."³

Respondent Laura Schrock

17. (A) Respondent Laura Schrock is an elementary classroom teacher for the District. She contends that she was not given credit for teaching experience with another district, and for that reason, the tie-breaking criteria was erroneously applied to her, which caused her to be lower on the seniority list than she should be.

(B) Respondent Schrock previously worked for another district as a long-term substitute teacher in a third grade class under an emergency credential from November 2004 through June 2005, filling in for a teacher on maternity leave. Her employment with the other district was not under a contract.

² For that reason, no express finding is made whether the seventh step of the tie-breaking process is valid, fair or relates to the welfare of the District and its pupils.

³ "Skipping" is the process by which a district deviates from the order of seniority when it demonstrates a specific need for personnel to teach a specific course or course of study and that an employee who is retained has special training and experience necessary to teach that course or course of study which others with more seniority do not possess. (Ed. Code, § 44955, subd. (d)(1).)

(C) Respondent Schrock began working for the District in August 2005 as a day-to-day substitute teacher. She was later assigned to be a long-term substitute teacher in one classroom from November 2005 through the end of the school year in June 2006, filling in for a teacher on leave. When Respondent Schrock came to work for the District, she provided information regarding her outside teaching experience for purposes of verification. The District did not thereafter inform her that the outside experience could not be verified.⁴ She was thereafter assigned to teach her own elementary school classroom for the 2006-2007 school year.

(D) In this matter, the District gave Respondent Schrock the correct seniority date of August 10, 2006, which put her in a tie with 54 other teachers with the same seniority date. She was ranked 35th out of 55 based on the District's application of the tie-breaking criteria. However, in applying the third tie-breaking step, the District did not credit Respondent Schrock with any years of experience teaching in an outside district. In applying the third step, the District counted only outside teaching experience pursuant to a contract of employment with the other district. The District counted contract experience because such employment was usually verifiable with the outside district. However, in the District's experience, substitute teaching in another district is not verifiable, because other districts tend to not keep sufficient documentation verifying the particulars of that employment.

(E) The District erred in its application of the third tie-breaking step to Respondent Schrock. Based on the way in which the District calculated years of such experience, Respondent Schrock should have been given credit for one year of service teaching in an outside district, based on her seven months of teaching for another district during the 2004-2005 school year. There is nothing in the Board's Resolution establishing the tie-breaking process that qualifies outside teaching experience to count only when rendered under a contract with the other district. Respondent Schrock's prior experience with the other district therefore literally meets the definition of the third tie-breaking step. Giving Respondent Schrock credit for her outside teaching experience relates to the welfare of the District and its pupils, in that her service as a long-term substitute assigned to the same classroom for seven months was similar to the type of valuable experience a teacher within the District would have gained as a probationary or permanent certificated employee.

(F) The proper application of the third tie-breaking step to Respondent Schrock results in her moving up in rank for those with her seniority date to a position after Respondent Carla Trease (number 25) but ahead of Respondent Julie Pulatie (number 26). The Accusation against Respondent Pulatie has been dismissed because her credentialing allows her to teach a vacant middle school language arts class position next year, which will be her assignment (see exhibit 11.) It was not established that Respondent Schrock is credentialed and competent to render Respondent Pulatie's assignment next school year or any other service that will be performed next school year by a junior employee.

⁴ In March 2008, Respondent Schrock sent an e-mail to the District which again related her teaching experience outside the District. The District did not respond.

(G) The District's application of the seventh tie-breaking step to resolve the tie between Respondent Schrock and Respondent Sandra Alba does not affect the outcome of this matter as to either Respondent.

Respondent Kelly Booker

18. (A) Respondent Kelly Booker is an elementary classroom teacher for the District. She contends that she was given an erroneously low seniority date.

(B) Respondent Booker began working for the District in January 2006 as a long-term substitute teacher for a kindergarten classroom. In the spring of 2006, on a specific date not established, Respondent Booker accepted a temporary contract to teach an overflow elementary classroom for the District. She was therefore classified as a temporary employee. An overflow classroom (also known as a growth classroom) is one developed to accommodate new students who cannot be placed in existing classrooms. Respondent Booker taught the overflow classroom for the remainder of the school year. She was essentially the teacher of record for that classroom, in that she interacted with parents, did report cards, handled all aspects of classroom activity and was herself allowed to utilize substitutes when she had to be absent from class.

(C) Respondent Booker was later assigned to teach a regular elementary classroom for the 2006-2007 school year. The District classified her as a probationary employee and has assigned her a seniority date of August 10, 2006, which placed her in a tie with 54 other certificated employees.

(D) The District's seniority date for Respondent Booker is in error, because she should have been classified as a probationary employee in the spring of 2006 when she was assigned to teach the overflow classroom.⁵

⁵ The Education Code authorizes a school district to hire and classify its employees, but also imposes limitations on its decision-making power. The Education Code establishes four possible classifications for certificated employees: permanent; probationary; temporary; and substitute. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916-917.) "The classification of 'probationary' is the default classification. School districts classify all teachers as probationary who are not otherwise required by the code to be classified as permanent, temporary, or substitute." (*Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1280.) "If a certificated employee occupies a position the [Education] Code defines as temporary, he or she is a temporary employee; if it is not a position that requires temporary classification (or permanent or substitute), he or she is a probationary employee. (§ 44915.) The Code grants school districts no discretion to deviate from this statutory classification scheme." (*Vasquez v. Happy Valley Union School Dist.* (2008) 159 Cal.App.4th 969, 983.) In this case, the various Education Code sections pertaining to the classification of temporary teachers (including sections 44917-44920) do not meet Respondent Booker's situation. Therefore, pursuant to Education Code section 44915, the default classification of probationary

(E) Although the specific first date of her service teaching the overflow classroom was not established, any seniority date during the spring months of 2006 would give Respondent Booker greater seniority over the other 54 employees with the seniority date of August 10, 2006, with whom she was tied, including Respondents Amstutz, Curran, Manzella and Trease. Those other Respondents are being retained for the next school year as elementary classroom teachers and have had the Accusations against them dismissed.⁶ Therefore, if Respondent Booker is not retained for the following school year, it cannot be concluded that no permanent certificated employee with less seniority will be retained to render a service that she is certificated and competent to render.

Respondent Kelly McLellan

19. (A) Respondent Kelly McLellan is a full-time elementary classroom teacher for the District. Although her position is scheduled to be eliminated, her credentialing allows her to bump into a 50 percent high school assignment held by Michelle Fritch. Therefore, the District proposes to reduce Respondent McLellan's position from a full-time elementary classroom assignment to a 50 percent high school assignment. Respondent McLellan contends that the seventh tie-breaking step is invalid and was unfairly applied to her, and that she is qualified and competent to teach the position being assigned next school year to the teacher that is one position above her on the seniority list.

(B) Respondent McLellan has a seniority date of August 10, 2006, shared with 54 others. After applying all seven steps of the tie-breaking process, Respondent McLellan is ranked 30th, one spot below Jaime Mc Connell, who is ranked 29th. Respondent McLellan's and Mr. Mc Connell's ranks were determined by the seventh tie-breaking step, in that Mr. Mc Connell's most recent formal evaluation was deemed superior to Respondent McLellan's. Respondent McLellan is ranked lower than Respondent Julie Pulati, who is ranked 28th, due to application of the fourth tie-breaking step, in that Ms. Pulati had one more year of teaching experience within the District.

(C) Mr. Mc Connell is a middle school mathematics teacher, an assignment he will retain next year. Respondent McLellan did not establish that she is certificated and competent to render Mr. Mc Connell's position next school year. Even accepting Respondent McLellan's contention that the seventh tie-breaking step is invalid, and that such is a basis for ranking her ahead of Mr. Mc Connell, Respondent McLellan would still rank in seniority behind number 28, Ms. Pulatie, based on the fourth tie-breaking step. It was not established that there is any certificated employee with less seniority being retained for the

employee was applicable to her when she was assigned to teach the overflow classroom in the spring of 2006.

⁶ Pursuant to exhibit 11, Respondents Curran, Manzella and Trease are being assigned to vacant elementary classroom positions next school year. Respondent Amstutz is also an elementary classroom teacher; there is no evidence indicating that he will be given a different assignment next school year.

next school year to render a service that Respondent McLellan is certificated and competent to render. Therefore, the District's application of the seventh tie-breaking step to resolve the tie between Respondent McLellan and Mr. Mc Connell does not affect the outcome of this matter as to either individual.

Overall Findings

20. The Board's decision to reduce or discontinue the above-described particular kinds of services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

21. The cause for reducing and/or eliminating the above-described particular kinds of services relates solely to the welfare of the schools in the District and its pupils.

22. Considering the factual findings and legal conclusions regarding Respondent Booker, no permanent certificated employee with less seniority will be retained to render a service that the Respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements of Education Code sections 44944 and 44945 were met. (Factual Findings 1-8.)

2. The party asserting a claim or making charges in an administrative hearing generally has the burden of proof. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155.) For example, in administrative hearings dealing with personnel matters, the burden of proof is ordinarily on the agency prosecuting the charges. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113.) In personnel matters concerning the dismissal of a teacher for cause, the burden of proof is similarly on the discharging district. (*Gardner v. Commission on Prof. Competence* (1985) 164 Cal.App.3d 1035.) As no other law or statute requires otherwise, the standard of proof in this case requires proof to a preponderance of the evidence. (Evid. Code, § 115.) Thus, in this case, the District has the burden of establishing by a preponderance of the evidence that cause exists to reduce the number of certificated employees given notice of this proceeding.

3. In this case, the District met its burden of establishing by a preponderance of the evidence that its proposed reduction in particular kinds of services is appropriate pursuant to Education Code section 44955. As stated in *San Jose Teachers Assn. 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." Such a decision may be overruled if proven to be arbitrary or capricious, but a motivation to maintain flexibility in light of financial uncertainty is neither. (*Campbell Elementary Teachers Association, Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 808.) (Factual Findings 1-13.)

4. The services identified in Board Resolution No. 07/08-25 are particular kinds of services that can be reduced or discontinued pursuant to Education Code 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. Services will not be reduced below mandated levels. Cause for the reduction or discontinuation of those particular services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949. (Factual Findings 1-22.)

5. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. (Factual Findings 1-22.)

6. It was established by a preponderance of the evidence that an error in the seniority date given to Respondent Booker results in her having greater seniority than that initially assigned to her by the District. As a result of the District deciding to retain more junior certificated employees to perform services that Respondent Booker is certificated and competent to perform, the Accusation against Respondent Booker should be dismissed. (Factual Findings 1-22.)

7. Considering Legal Conclusion 6, no junior certificated employee is scheduled to be retained to perform services that a more senior employee is certificated and competent to render. (Factual Findings 1-22, Legal Conclusion 6.)

ORDER

1. The Accusations are dismissed against Respondents Amstutz, Cox, Curran, De La Cruz, Le, Manzella, McLain, Nevarez, Pulatie, Rodgers, Seto, and Trease. These Respondents shall not be given notice that their services are not required for the 2008-2009 school year.

2. The Accusation is dismissed against Respondent Booker. She shall not be given notice that her services are not required for the 2008-2009 school year.

3. The Accusations are sustained against the remaining Respondents. Notice shall be given to those Respondents that their services will not be required for the 2008-2009 school year, and such notice shall be given in inverse order of seniority.

Dated: May 5, 2008

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT A

ALBA, SANDRA
AMSTUTZ, RODNEY
BOOKER, KELLY
CIAURI, DENISE
COX, CARRIE
CURRAN, CASEY
DE LA CRUZ, LORI
DELORCA, LOU
FRITCH, MICHELLE (50%)
JARVIE, DONNA
JONES, CARISSA
KRING, KATHERINE
LAPIERRE, KRISTINE
LE, TAMARA
MANZELLA, LISA
MCLAIN, DINA (50%)
MCLELLAN, KELLY
NEVAREZ, LESLIE
PULATIE, JULIE
RODGERS, MICHELLE
SCHROCK, LAURA
SETO, KEVIN
TREASE, CARLA
TWEED, MATTHEW
WALKER, JEREMY
WASHINGTON, LEAH
WEAVER, DENISE