

BEFORE THE GOVERNING BOARD OF THE
TUSTIN UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against:

CERTIFICATED EMPLOYEES,

By

TUSTIN UNIFIED SCHOOL DISTRICT.

OAH No. 2010030084

PROPOSED DECISION

Howard W. Cohen, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, heard this matter on April 19, 2010, at Pioneer Middle School in Tustin, California.

Anthony P. De Marco, Attorney at Law, Atkinson, Andelson, Loya, Ruud & Romo, represented the Tustin Unified School District (TUSD).

Carlos R. Perez, Attorney at Law, Reich, Adell & Cvitan, represented all Respondents listed in Appendix I, with the exception noted directly below.

Respondent Elizabeth Shenton was present at the hearing and represented herself.

Oral and documentary evidence was received and the record was closed. The record was reopened on April 30, 2010, to allow the District to submit additional evidence and briefing, and to allow Respondents to reply. On May 3, 2010, the District submitted a post-hearing brief and supporting declaration with exhibits. The brief, declaration, and exhibits were collectively marked for identification and received as the District's Exhibit 13. Respondents did not submit a reply.

The record was again closed and the matter was submitted for decision on May 4, 2010.

FACTUAL FINDINGS

1. Julie Mitchell, Chief Personnel Officer of the Tustin Unified School District, filed the Accusation while acting in her official capacity as the designee of the TUSD Superintendent.

2. Respondents are certificated employees of the District.

3. On March 8, 2010, the TUSD Superintendent recommended, with regard to the ensuing school year, that the TUSD Governing Board (the Board) reduce or eliminate

particular kinds of services provided by TUSD and that certain certificated employees be notified that their services would not be required for the 2010-2011 school year.

4. On March 8, 2010, the Board, in Resolution No. 03-51-10, adopted the Superintendent's recommendation to reduce or discontinue particular kinds of services provided by TUSD, no later than the beginning of the 2010-2011 school year. Specifically, the resolution provided for the reduction or elimination of 159.4 full-time equivalent (FTE) positions in those particular kinds of services. (See Exhibit A to the Board Resolution, attached hereto as Appendix I.)

5. The resolution also included a list and description of the criteria (tie-breaking criteria) to be applied by TUSD to determine the order of layoff for those certificated employees who first rendered paid service to the Board in a probationary position on the same date.

6. On March 9, 2010, TUSD served written notice under the direction of the Board that the services of certain probationary and permanent certificated employees would not be required in the upcoming 2010-2011 school year.

7. On March 9, 2010, TUSD served written notice under the direction of the Board that the services of certain temporary certificated employees would not be required in the upcoming 2010-2011 school year.

8. One hundred forty-five certificated employees timely requested, in writing, a hearing to determine whether cause existed for not reemploying them for the ensuing school year.

9. On March 22 and March 23, 2010, TUSD's Superintendent timely served an Accusation, Notice of Defense, Notice of Hearing, and related materials on each of the 145 individuals who had timely returned hearing requests.

10. The certificated employees who were served with the Accusation and related materials were identified as Respondents. (See Appendix II attached hereto.)

11. One hundred twenty-seven individuals timely returned notices of defense.

12. Respondents included those employed by TUSD as probationary or permanent certificated employees and those employed by TUSD as temporary employees. At the hearing, TUSD explained that it intended to include its temporary employees in the hearing process, as directed by the Board, even though it asserted that temporary employees are not entitled to the protections afforded by sections 44949 and 44955.

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

14. The District maintains a seniority list that contains employees' seniority dates, current assignments, classifications, and credentials, as well as information related to tie-breaking criteria.

15. The District used the seniority list to develop a proposed layoff list. The District considered each teacher's credentials and certifications. The District determined that no teacher less senior than Respondents was being retained to render services that Respondents are certificated and competent to render.

16. The reduction or discontinuation of particular kinds of services related to the welfare of TUSD and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of TUSD, as determined by the Board.

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

18. The District skipped and retained employees, regardless of classification, teaching or working in the following services not being reduced or eliminated: speech and language pathology, special day class—moderate/severe, nursing, psychology, transition program requiring moderate/severe credentialing, adaptive physical education, and athletics. Respondents raised no issue as to these matters.

19. In cases where several Respondents shared a first date of paid service, TUSD was required to apply the tiebreaking criteria approved by the Board. The Board's resolution number 03-51-10 established tiebreaker criteria that were fair and reasonable. The District used information from its seniority list to apply the tiebreaker criteria of the Board's Resolution No. 03-51-10 fairly and appropriately.

20. Respondents Rachel Romero, Kendal Dudley, and Dana Campfield presented various claims in defense.

21. Rachel Romero, a probationary employee who appears as No. 819 on the District's seniority list, is being reduced 0.6 FTE in mathematics, 0.2 FTE by reassignment of Michelle Siteman, No. 377 on the District's seniority list, and 0.2 FTE by reassignment of Natasha Hamlin, No. 186 on the District's seniority list. Mathematics in grades 9 through 12 is a particular kind of service that the Board determined by resolution to reduce or eliminate by 3.8 FTE. Ms. Romero has a single subject mathematics credential and a CLAD credential; during the 2009-2010 school year, she taught pre-calculus and AP statistics. Ms. Romero contends that she should skip Ms. Siteman because she had increased her competency, training, and experience by taking a one-week course on AP statistics. Ms. Siteman, a permanent employee, has a single subject mathematics credential and a CLAD credential; during the 2009-2010 school year, she taught algebra 1, algebra 1/CAHSEE, and geometry. Ms. Hamlin, a permanent employee, has a single subject English credential and a CLAD credential. By resolution of the Board under authority of section 44258.3, Ms. Hamlin has taught mathematics in the District since July 1998. During the 2009-2010 school year, the District assigned Ms. Hamlin to teach algebra 1 and 2, and geometry CC/CAHSEE

math. The District testified that it had taken into account Ms. Romero's increased training and experience in the reassignment process. The District further testified that it only reassigned credentialed and competent senior employees to courses currently taught by less senior employees. The District found a teacher "competent" if the teacher had training or classroom teaching experience in the particular kind of service.

22. TUSD and Respondent Kendal Dudley stipulated that Ms. Dudley was a permanent employee of TUSD when she resigned as of June 2007. They further stipulated that when TUSD employed Ms. Dudley on February 12, 2010, she was on a temporary assignment and signed an "acceptance of offer of temporary employment" with the District. Ms. Dudley contended that, because she was re-employed by the District within 39 months of her resignation, she should have been credited with the seniority attendant upon her pre-resignation employment and been reinstated as a permanent employee.

23. Respondent Dana Campfield, No. 872 on the District's seniority list, was employed by the District on a temporary assignment teaching elective music courses in the sixth through eighth grades at Utt Middle School. Ms. Campfield contended that, for the 2009-2010 school year, the District should have offered her a position teaching high school choir, a position taken by No. 848 on the District's seniority list. No. 848 is a permanent employee with a seniority date of August 27, 2009. Respondent Campfield had been a permanent employee with a seniority date of 1998 or 1999 and was teaching high school band when the District terminated her services as part of a reduction in force at the end of the 2008-2009 school year.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met.¹

2. Cause exists to sustain TUSD's action to reduce or discontinue 159.4 full-time-equivalent positions, as set forth in TUSD's resolution number 03-51-10 for the 2010-2011 school year, under sections 44949 and 44955, as set forth in Factual Findings 1-23, and Legal Conclusions 1 and 3-12.

3. The services identified in the Board's resolution number 03-51-10 are particular kinds of services that the Board may reduce or discontinue under section 44955. The Board's decision to reduce or discontinue the identified services was not arbitrary or capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of TUSD's schools and pupils within the meaning of section 44949.

4. Section 44955, subdivision (b), provides, in pertinent part:

[W]henever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school

¹ All further statutory references are to the Education Code.

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.

5. Section 44955, subdivision (c), provides, in pertinent part:

[S]ervices of such employees shall be terminated in the inverse of the order in which they were employed

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.

6. TUSD identified the certificated employees providing the particular kinds of services that the Board directed to be reduced or discontinued. 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, supra*, 64 Cal.App.3d 167, 178-179.)

7. The District considered seniority and qualifications, as set forth in Factual Findings 14 and 15, and properly made assignments and reassignments in its discretion in accordance with section 44955, subdivision (c). (See, e.g., *Brough v. Governing Bd. of the El Segundo Unified School Dist.* (1981) 118 Cal.App.3d 702, 716-717.)

8. No junior certificated employee is scheduled to be retained to perform services that a more senior employee is certificated and competent to render.

9. The District properly laid off Rachel Romero.

a. The District considered seniority and qualifications, as set forth in Factual Findings 10 and 11, and properly made assignments and reassignments in its discretion in accordance with section 44955, subdivision (c). (See, e.g., *Brough v. Governing Bd. of the El Segundo Unified School Dist.* (1981) 118 Cal.App.3d 702, 716-717.)

b. With respect to the assignment of Ms. Hamlin to 0.2 FTE of Ms. Romero’s current assignment, section 44258.3 provides that a governing board may assign the holder of any credential, other than an emergency credential, to teach in any departmentalized class in grades K through 12 if it determines prior to assignment that the teacher has sufficient knowledge of the subject to be taught, and if the teacher consents to the assignment. Section 44955, subdivision (c), expands upon the term

“qualifications” by allowing a board to assign or reassign a senior certificated employee to teach a subject he or she has not previously taught and for which he or she does not have a teaching credential, under certain conditions. This statutory language supports the District’s discretionary conclusion that Ms. Hamlin, a senior certificated employee being reassigned to teach a subject she has previously taught and of which the Board has found her to have adequate knowledge, possesses “qualifications” under section 44955, subdivision (c).

10. The District properly laid off Kendal Dudley.

a. Ms. Dudley’s argument as to seniority lacks merit. Section 44931 provides that when a permanent certificated employee resigns and “is reemployed within 39 months after his or her last day of paid service, the governing board of the district shall, disregarding the break in service, classify him or her as, and restore to him or her all of the rights, benefits and burdens of, a permanent employee, *except as otherwise provided in this code.*” (Italics added.) Section 44848 provides otherwise as to seniority rights. If a certificated employee resigns and is later reemployed, her date of employment “shall be deemed to be the date on which [s]he first accepted reemployment . . .” (§ 44848.) In this case, that date is February 12, 2010. (See *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 641 (break in service not disregarded for purposes of seniority rights).)

b. The District properly classified Ms. Dudley as a temporary employee. Section 44920 permits the District, under conditions discussed below, to “employ as a teacher . . . any person holding appropriate certification documents, and may classify such person as a temporary employee.” (§ 44920.) Section 44920 requires that the temporary position be for a duration of at least one full semester during a school year, “unless the date of rendering first paid service begins during the second semester and prior to March 15th . . .” (§ 44920.) Section 44920 also requires that the temporary employment be based on the need for an additional certificated employee because, among other reasons, an employee has been granted a leave of absence. The District and Ms. Dudley entered a contract for temporary employment from February 6 to June 15, 2010, to replace a certificated employee on leave of absence. The conditions for classifying Ms. Dudley as a temporary employee under section 44920 have, therefore, been satisfied. (See *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2007) 145 Cal.App.4th 1260, 1281-1283 (*Bakersfield*).) “Classification . . . determines an employee’s rights in the context of a layoff.” (*California Teachers Assn. v. Vallejo City Unified School Dist.* (2007) 179 Cal.App.4th 135, 145 (*Vallejo*).) As a temporary employee under section 44920, Respondent Dudley’s rights are determined by the terms of her temporary employment contract, not by her prior permanent status. (*Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 826.)

11. The District properly laid off Dana Campfield.

a. The District chose to use federal stimulus money received under the American Recovery and Reinvestment Act of 2009, a one-time funding source for the

2009-2010 school year, to offer the middle school elective courses that Ms. Campfield currently teaches. The position for which the District employed Ms. Campfield for the 2009-2010 school year is, therefore, a “categorically funded project,” one of the limited statutory grounds for properly classifying Ms. Campfield as a temporary employee. (§ 44909; see *Zalac v. Governing Bd. of the Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 844-848.) “Classification determines an employee’s rights in the context of a layoff.” (*Vallejo, supra*, 179 Cal.App.4th 135, 145.) As a temporary employee, Respondent Campfield’s rights are determined by the terms of her temporary employment contract, not by her prior permanent status. (*Balen v. Peralta Junior College Dist., supra*, 11 Cal.3d 821, 826.)

b. Because Respondent Campfield was, as of June 2009, a permanent employee whose services the District terminated last year under section 44955, she retains a preferred right to reemployment. (§ 44956, subd. (a)(1).) Whether Respondent Campfield had a right last summer to be rehired to fill a permanent position for the 2009-2010 school year, instead of the temporary position she accepted, does not come within the jurisdiction of the ALJ to decide at this hearing.

12. “[T]emporary employees, unlike permanent and probationary employees, may be dismissed at the pleasure of the board and need be given only a more limited form of notice before the end of the school year, and no hearing.” (*Bakersfield, supra*, 145 Cal.App.4th 1260, 1273; see also *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 917-918.) The *Bakersfield* court also noted, however, that “certificated teachers assigned to a categorically funded program may be laid off without the procedural formalities due a permanent and probationary employee *only* if the program has expired. (*Bakersfield, supra*, 145 Cal.App.4th at p. 1287.) Here, all Respondents, including those assigned to categorically funded programs, though temporary employees, were entitled to participate in the instant hearing. Based on the evidence presented, TUSD may take action with respect to its temporary employees, as it requests.

ORDER

The Accusation served on those Respondents identified by testimony as providing the particular kinds of services that the Board directed to be reduced or discontinued, amounting to 159.4 full-time-equivalent positions, is sustained.

Notice shall be given to Respondents, as required by law, that their services will be terminated at the close of the 2009-2010 academic year. Notice shall be given in inverse order of seniority.

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Notice shall be given to those Respondents identified as temporary employees, except those assigned to teach or work in a service not being reduced or eliminated, that their services will be terminated at the close of the 2009-2010 academic year.

Dated: May ___, 2010

Howard W. Cohen
Administrative Law Judge
Office of Administrative Hearings

APPENDIX I

TUSTIN UNIFIED SCHOOL DISTRICT	
EXHIBIT A	
REDUCTION OR ELIMINATION OF PARTICULAR CERTIFICATED SERVICES	
TYPE OF PROGRAM	FTE
Administrative Positions	6.6
<i>Assistant Principal</i>	4.6
<i>Coordinator</i>	1.0
<i>Elementary Principal</i>	1.0
Counseling Services (K-12)	6.0
Elementary Classroom Teaching (K-5)	43.0
CORE Teaching Services (6-8)	17.8
<i>CORE (Levels 6, 7, 8)</i>	17.0
<i>Social Science</i>	0.8
English Teaching Services (9-12)	5.2
<i>CAHSEE English</i>	1.4
<i>English (Levels 1, 2, 3, 4, ELD)</i>	3.8
Mathematics (6-8)	8.2
<i>Math 6</i>	2.0
<i>Prealgebra</i>	2.6
<i>Geometry</i>	0.4
<i>Algebra (Levels Alg 1, Alg 1AB, Essentials)</i>	3.2
Mathematics (9-12)	3.8
<i>Algebra (Levels Alg 1, Alg 1A, Alg 1B, Alg 1AB, Alg 2)</i>	1.4
<i>CAHSEE Mathematics</i>	1.0
<i>Geometry</i>	0.4
<i>Calculus BC</i>	0.2
<i>AP Calculus AB</i>	0.2
<i>Pre-Calculus</i>	0.6
Social Sciences Teaching Services (9-12)	5.4
<i>AP American Government</i>	0.2
<i>AP Euro History</i>	0.2
<i>AP US History</i>	0.6
<i>AP World History</i>	0.4

<i>AP Psychology</i>	0.4
<i>AP Art History</i>	0.2
<i>Geography</i>	0.4
<i>Psychology</i>	0.2
<i>American Government</i>	0.4
<i>Economics</i>	0.6
<i>US History / US Hist Geog</i>	0.6
<i>World History</i>	1.2
Science (6-8)	4.2
<i>Earth Science</i>	2.2
<i>Life Science</i>	1.0
<i>Physical Science</i>	1.0
Science (9-12)	7.0
<i>Biology</i>	0.6
<i>Chemistry</i>	2.2
<i>Chemistry AP</i>	0.2
<i>Earth Science</i>	1.0
<i>Forensic Science</i>	0.8
<i>Life Science</i>	1.4
<i>Marine Science</i>	0.2
<i>Physics</i>	0.2
<i>Physical Science</i>	0.4
World Languages (6-12)	6.6
<i>Latin</i>	0.8
<i>French</i>	0.8
<i>Spanish</i>	5.0
Middle School Elective Courses (6-8)	10.2
<i>Art</i>	0.6
<i>AVID / Exploratory AVID</i>	1.2
<i>Computers</i>	0.2
<i>Culinary Arts</i>	0.2
<i>Dance</i>	0.2
<i>Drama / Exploratory Drama</i>	0.4
<i>Exploratory Foreign Language</i>	0.2

<i>Exploratory Health</i>	0.2
<i>Home Economics / Exploratory Home Economics</i>	1.6
<i>Instrumental Music</i>	0.6
<i>Leadership</i>	0.6
<i>Reading / Strategic Reading / Exploratory Reading</i>	1.4
<i>Study Center/Directed Studies</i>	1.8
<i>Video Production</i>	0.2
<i>Vocal Music</i>	0.2
<i>Woodshop / Exploratory Wood</i>	0.4
<i>Yearbook</i>	0.2
High School Elective Courses (9-12)	5.2
<i>Art</i>	0.2
<i>Auto / Auto ROP</i>	0.6
<i>Activities Director</i>	0.4
<i>Athletics</i>	0.2
<i>AVID</i>	0.2
<i>Graphic Arts</i>	0.2
<i>Guitar</i>	0.2
<i>Instrumental Music</i>	0.8
<i>Journalism</i>	0.2
<i>Leadership</i>	0.2
<i>Media Art/Tech</i>	0.2
<i>Music Tech / Music Tech ROP</i>	0.4
<i>Research Applications</i>	0.6
<i>Stagecraft</i>	0.2
<i>Vocal Music</i>	0.4
<i>Yearbook</i>	0.2
Physical Education (6-12)	3.2
Special Education	14.8
Special Education (RSP)	9.8
Special Education (SDC M/M)	5.0
Teacher on Special Assignment	12.2
TOTAL	159.4

APPENDIX II

LIST OF RESPONDENTS

LAST	FIRST
AGUILAR	DANIELLE
ALVARADO	AMY
ANTHONY JR	DONALD
ANTONELLI	DONNA
BADRAUN	TRICIA
BALA	MELISSA
BARR	VANESSA
BAUER	SHERI
BILLINGS	TAWNY
BLANKENSHIP	KRISTY
BORJIAN	AFSANEH
CAMPFIELD	DANA
CANTRELL	LUZ
CARDER	MEGHAN
CARDOZA	BERTHA
CHAPPAS	DANIELLE
CHITTENDEN	KYLE
CHRISTY	JACQUELYN
CONNALLY	SEAN
COOK	JEREMY
COPE	VICTORIA
CRAWFORD	BRITTNEY
CRAWFORD	LYNNE
CRUZ	TIFFANY
DAVID-RAMIREZ	TIFFANY
DECLARK	NATALIE
DIBLEY	JEANINE
DONAVAN	MEGAN
DUDLEY	KENDAL
EHRHARD	NANETTE
EIDENMULLER	ERIK
FALCONE	KIMBERLY
FALKIN	JASON
FANO	KRISTY
FICK	SARAH
FOOTE	STEVEN
FOSSMO	JENNY
FRIENDT	NICHOLAS
GALLAGHER	SEAN
GALLUCCI	LISA
GAMMEL	CARRIE
GREXTON	SARA
HALILI	REYMOND
HALL-GONZALEZ	RENEE
HEILIG	KAREN
HELPERN	JOSHUA
HENRY	KATRYN

HEPINGER	EDWARD
HEPINGER	NICOLE MARIE
HOCKERSMITH	ALISON
HOFFMANN	MICHAEL
HONIG	PINCHAS
JACOBS	MELISSA
JEZOWSKI	GEOFFREY
JOHNSON	AIMEE
JOHNSON	KRISTA
JONES	ROLAND
JUDD	JULIE
KENT	TRACEY
KERR	GARRETT
KICK	JODY
KIMES DAVIS	KERI
KULL	ANN
LA HODNY	KATIE
LAVALLE	KEVIN
LEACH	JULIE
LIEN	CATHERINE
LIPPERT	LEE-ANN
LOEWENSTEIN	ALLISON
LOWE	KRIS
MANAHAN	ERYN
MANN	ERIN
MANN	ROSANNE
MCDONALD	LINDSEY
MCKENZIE	SALLY
MEAD	ERIN
MEEKHOF	MELANI
MEYERS	AMY
MINER	ROBERT
MORGAN	KELLY
MORROW	JENNIFER
MULLIGAN	DEBBIE
MYUNG	JOHN
NEUFELD	DIANA
PARSONS	LINDA
PIEPLOW	REBECCA
PILON	TRICIA
PLUNKETT	MELANIE
PORTER	EMILY
PRIMEAUX	HEIDI
PYSHER	CORINNE
RAPP	LISA
ROMERO	RACHEL
ROPER	KATHRYN
RUBIO	BRYAN
RYAN	LISA
SALAZAR	BECKY
SAMARIN	ZACHARIAH
SANCHEZ	CHERYL
SANCHEZ	KALIKA

SANCHEZ	MICHELLE
SECODA	JOSEPH
SHENTON	ELIZABETH
SHORT	COURTNEY
SOLIS	GREGORY
SPENCER	STACI
STALLER	DEVRA
STUCK	NANCY
THOMAS	ERIN
TOLLIVER	HEATHER
TORRES	MARIA
VALDEZ	GRACIELA
VAN HEERDE	JASON
VANDAL	JONATHAN
VEST	MARK
WAGSTAFF	KRISTIN
WAIBEL	DAVID
WAISANEN	EMILY
WALDRAM JR	DAVID
WARD	MONICA
WARDLAW	JOY
WATSON	KIRSTEN
WHITFIELD	KAYLEE
WISE	PIPER
ZAVALA	ANNA
ZAZUETA-MONHEIT	LUCILLE