

**BEFORE THE
GOVERNING BOARD OF THE
BEVERLY HILLS UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

OAH Case No. 2008030146

All Certificated Employees Listed on Exhibit
"A" to the Accusation Who Have Timely
Returned a Request for Hearing Form,

Respondents.

PROPOSED DECISION

This matter was heard on April 15, 2008, by Erlinda G. Shrenger, Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH), in Beverly Hills, California.

Aaron V. O'Donnell, Attorney at Law, represented the Beverly Hills Unified School District (District).

Lawrence B. Trygstad and Deborah Eshaghian, Attorneys at Law, represented the 35 Respondent teachers (Respondents) listed on Exhibit "A" attached to the Accusation.

Oral and documentary evidence was received and argument was heard. Respondents' Administrative Law Brief, which was presented at the hearing but not marked, was later marked as Exhibit B. The record was closed and the matter was submitted for decision on April 15, 2008.

On April 25, 2008, OAH received a letter brief sent by facsimile by Respondents' counsel, which contained further legal argument. By an Order dated April 28, 2008, the ALJ re-opened the record to allow the District to respond to Respondents' letter brief by May 2, 2008. On May 2, 2008, OAH received the District's written response. Respondents' letter brief was marked as Exhibit C, and the District's response was marked as Exhibit 18.

The record was closed and the matter was submitted for decision on May 2, 2008.

FACTUAL FINDINGS

1. Kari McVeigh made and filed the Accusation solely in her official capacity as Superintendent of the District.

2. Respondents named in Exhibit A attached to the Accusation are certificated employees of the District.

3. On February 26, 2008, the Governing Board of the District (Governing Board) adopted Resolution 2007-2008-020 (Resolution 020) determining that it was necessary to reduce or discontinue the following particular kinds of certificated services no later than the beginning of the 2008-2009 school year:

<u>Discontinued Services</u>	<u>Certificated Positions Full Time Equivalents¹</u>
Coordinator of Visual/Performing Arts Services	0.5
Adult Education ESL Coordinator Services	0.4
Reading Specialist Teaching Services (Grades K-8)	2.0
School Librarian Services (Grades K-8)	2.0
<u>Reduced Services</u>	
Elementary Classroom Teaching Services	5.0
English Teaching Services (Grades 6-8)	3.0
Science Teaching Services (Grades 6-8)	1.0
Math Teaching Services (Grades 6-8)	1.0
French Teaching Services (Grades 6-8)	1.6
Social Studies Teaching Services (Grades 6-8)	2.0
English Learner Teaching Services (Grades K-8)	1.0
Physical Education Teaching Services (Grades 9-12)	1.0
Art Teaching Services (Grades 9-12)	1.0
Social Studies Teaching Services (Grades 9-12)	2.0
Business Education Teaching Services (Grades 9-12)	1.0
TOTAL	24.5 FTE

4. On March 10, 2008, Superintendent McVeigh notified the Governing Board that she recommended that notices be provided to certificated employees corresponding to 23.5 FTE positions, and that, as a precaution, notices also be provided to certificated employees corresponding to an additional 10.8 FTE positions.

¹ A full time equivalent, or FTE, refers to that portion of a full time position represented by the particular teaching assignment.

5. On March 11, 2008, the District provided notice to Respondents that their services will not be required for the 2008-2009 school year due to the reduction or discontinuance of particular kinds of services. The District sent notices to employees corresponding to 23.5 FTE positions.² The District also sent notices, as a precaution, to employees corresponding to an additional 10.8 FTE positions.³

6. Respondents contend the precautionary notices for the 10.8 FTE positions should be dismissed because they are in excess of the 24.5 FTE reduction authorized by Resolution 020. This contention is not persuasive. The purpose of the initial notice of non-reemployment is to notify employees of the probability that their services will not be required for the ensuing school year so that they may consider looking elsewhere for employment. (*Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648, 653.) In order to ensure that all employees who potentially may be affected by a layoff receive proper notice, it is often necessary for a school district to notice more employees than will actually be laid off. Such broad noticing may be necessary when issues of seniority, bumping, etc. have not been finally determined by the statutory deadline for issuing layoff notices. In this case, there is no evidence the District will eliminate more positions than those authorized in Resolution 020. The District has indicated it would rescind the precautionary notices to the extent they are not needed to accomplish the reduction of 23.5 FTE positions.

7. (A) The following Respondents, who were present at the hearing, filed timely requests for hearing to determine if there was cause for not reemploying them for the 2008-2009 school year: Jill Coley, Jessica DeZure, David Foldvary, Jennifer Gilmour, Jeffrey Harris, Afi Kashanian, Ellen Kwon, Ryan Lisko, Jesse Meyen, Minjung Pai, Susan Pastor, Keith Rust, Jennifer Shin, Maria Stefanopoulos, David Summers, Sarah Wolff, Heather Woodring and Frances Young.

² Resolution 020 authorizes a total reduction of 24.5 FTE positions. However, the reduction in French Teaching Services was changed from 1.6 FTE to 1.0 FTE, and the 0.4 FTE reduction in Adult Education ESL Coordinator Services was no longer needed. Thus, the District sent notices to employees corresponding to 23.5 FTE positions.

³ Timothy Briggs is as an employee who was sent a precautionary notice corresponding to a reduction of 0.6 FTE. However, Briggs is not named as a Respondent in the Accusation and, therefore, is not part of this case.

Nicole Currie is identified as corresponding to a reduction of 0.6 FTE, and also as receiving a precautionary notice for a reduction of 1.0 FTE. The evidence established Currie is being bumped by a more senior employee from her 0.6 FTE position in physical education, but she is being retained for her 0.4 FTE position in the dance program pursuant to Education Code section 44955, subdivision (d). Therefore, for purposes of this decision, Currie will be considered as part of the 23.5 FTE reduction, but she will not be considered as a Respondent who received a precautionary notice.

(B) The following Respondents filed timely requests for hearing, but were not present at the hearing: Paige Adams, Danielle Behr, Ashley Bowles, Emily Buchen, Preston Joseph, Mahnaz Kheraj, Alyssa Para, Emmanuelle Rousseaux and Phillip Wagner.

(C) Respondent Bradley Harris filed his request for hearing one day late. Respondent Gena Schmidt did not file a request for hearing but was present at the hearing. The District stipulated to allow Respondents Harris and Schmidt to participate in this proceeding.

8. The following Respondents did not file a request for hearing and were not present at the hearing: Barbara Bader, Dana Berk, Rebecca Bode, Nicole Currie, Richard Tolfo, and Dina Yoseph. Consequently, these Respondents waived their right to a hearing and cannot contest the recommendation of their non-reemployment by the District. (Ed. Code, §44949, subd. (b).)

9. On April 3, 2008, the District issued the Accusation and served it on Respondents. The District received notices of defense from 25 Respondents.

10. All prehearing jurisdictional requirements have been met.

11. The services set forth in Finding 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.

12. The Governing Board took action to reduce the services set forth in Finding 3 primarily due to financial difficulties and budgetary problems. The decision to reduce or discontinue the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

13. The reduction or discontinuance of services set forth in Finding 3 is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

14. On February 26, 2008, the Governing Board, in Resolution 020, adopted criteria for determining seniority among employees who first rendered paid service in a probationary position on the same date (tie-breaking criteria). The tie-breaking criteria are reasonable as they relate to the skills and qualifications of certificated employees. The criteria themselves were not challenged by Respondents.

15. The District properly created its seniority list by determining the first date of paid service in probationary status of each certificated employee and properly utilized the

tie-breaking criteria when necessary. The parties stipulated that the District implemented Resolution 020 in the manner documented in the Certificated Seniority List, which was admitted at the hearing as Exhibit 12.⁴

16. The District properly considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to employees by March 15, 2008. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, 636.)

17. As of February 26, 2008, all temporary and substitute certificated employees were notified of their non-reelection for the next school year and were released effective the end of the current school year (2007-2008).

18. Respondent Jessica DeZure (#61) holds a preliminary single subject credential (English). The District contends her seniority date is October 1, 2006. DeZure contends she is entitled to a seniority date of August 23, 2006. DeZure was hired on August 23, 2006, as a long-term substitute for the 2006-2007 school year. At that time, DeZure contends she attended a staff meeting and programs, but no evidence was presented she was paid for attending those events. DeZure was reclassified as a temporary employee effective October 1, 2006, and worked in that classification for the remainder of the 2006-2007 school year. DeZure contends her duties and assignment did not change when she was reclassified from long-term substitute to temporary employee. For the 2007-2008 school year, DeZure is a probationary employee ("Prob 2" status).

Prior to creating the seniority list, the District sent notices to its employees, including DeZure, of their seniority date, employment status, assignment, and credentials held, and requested the employees verify the accuracy of the information on file and notify the District if they disagreed with their information on file. The District did not receive a response from DeZure contesting her October 1, 2006 seniority date. The District is presumed to have carried out its duty of correctly determining DeZure's seniority date as October 1, 2006. (Evid. Code, § 664.) DeZure did not present sufficient evidence to establish she is entitled to a seniority date of August 23, 2006. (Evid. Code, § 500.)

Alex Morefesis (#69) and Heather Lucas (#70) each have a seniority date of August 23, 2006, and hold a preliminary single subject credential (English) as well as an emergency CLAD credential. DeZure has applied for, but does not currently have, a CLAD credential. Even if DeZure had a seniority date of August 23, 2006, she would be less senior to Morefesis and Lucas based on the application of tie-breaking criteria pertaining to credentials.

⁴ For ease of reference, Respondents and other employees are identified herein by their corresponding number on the Certificated Seniority List (Exhibit 12).

19. Education Code section 44955, subdivision (b), provides in pertinent part:

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 services which said permanent employee is certificated and competent to render.

20. In Respondents' letter brief dated April 25, 2008, it is argued that Respondents Gena Schmidt (#67), Susie Pastor (#66), Minjung Pai (#65), Paige Adams (#116), Jennifer Gilmour (#114), Afarin Kashanian (#115), Ellen Kwon (#107), Sarah Wolff (#106), and Heather Woodring (#119), who each hold a multiple subject credential, must be retained by the District because they are senior to employee Jumi Yang (#96), who also holds a multiple subject credential and is being retained by the District. This argument cannot be sustained. Yang, who has a seniority date of August 23, 2006, currently teaches middle school English (0.4 FTE) and Social Studies (0.6 FTE) in a departmentalized setting. A multiple subject credential, by itself, does not allow a teacher to perform Yang's assignment. A teacher must also have authorization from a local governing board pursuant to Education Code section 44256, subdivision (b), and the teacher must consent to the assignment. Yang has the required authorization and has consented to this assignment. No evidence was presented that the nine Respondents have received local board authorization or have given their consent to teach middle school English or Social Studies in a departmentalized setting. The granting of local authorization under section 44256 is discretionary with the local governing board. It was not established that these nine Respondents are currently "certificated and competent to render" the service Yang is currently performing. (Ed. Code, § 44955, subd. (b).)

21. Randy Hurwitz (#10) is a fourth grade teacher who is classified by the District as a temporary employee and will be released at the end of the current school year. Respondents contend the District misclassified Hurwitz as a temporary employee, and should have classified her as a probationary employee as of February 1, 2008, because the teacher she was hired to replace (i.e., Laura August) resigned from the District on January 31, 2008. Respondents contend Hurwitz, as a probationary employee, would affect the relative seniority of other probationary and permanent employees and, therefore, any Respondent with more seniority than Hurwitz must be retained. Respondents' contention cannot be sustained.

The Education Code classifies teachers into four different categories: permanent, probationary, substitute, and temporary. A temporary teacher is, among other definitions, a teacher hired by the district for a semester or a complete school year to replace a regular teacher who has been granted leave for that time or is experiencing long-term illness. (Ed. Code, §44920.) The classification of "probationary" is the default classification and applies to teachers who are not otherwise required by the Education Code to be classified as permanent, temporary, or substitute. (Ed. Code, § 44915; *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1280.) The contention that status as a temporary teacher is only allowed when a teacher replaces a specific employee on leave (i.e., the temporary teacher must teach the classes that a

particular teacher on leave would have taught) was rejected in *Santa Barbara Federation of Teachers v. Santa Barbara High School Dist.* (1977) 76 Cal.App.3d 223, 233. In *Santa Barbara*, the court held that a school district is not required to match temporary employees with permanent or probationary employees on a one-to-one basis. Rather, a school district only needs to ensure that "the number of temporary teachers not exceed the total number of probationary and permanent employees on leave at any one time." (*Id.*, 76 Cal.App.3d at 232-233.)

Thus, contrary to Respondents' contention, the District was not precluded from classifying Hurwitz as a temporary employee merely because of Laura August's resignation from the District. Moreover, the evidence did not establish that Hurwitz's classification as a temporary employee was, in fact, erroneous. No evidence was presented that Hurwitz disputed her classification as a temporary employee or that established she was entitled to classification as a probationary employee. (See, Ed. Code §§ 44918 and 44920.)

22. Respondents Afarin Kashanian (#115) and Jill Coley (#110) both have a seniority date of August 24, 2005, and received precautionary notices. As it is determined that the District has properly noticed the employees corresponding to the reduction of 23.5 FTE positions, it is not necessary to address in this decision the contentions of the employees who received precautionary notices.

23. After considering all evidence and argument, it is found that no permanent or probationary employee with less seniority than Respondents is being retained to render a service for which any Respondent is certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for these proceedings exists pursuant to Education Code sections 44949 and 44955, as set forth in Findings 1 through 13.

2. Each of the services set forth in Finding 3 is a particular kind of service which may be reduced or discontinued in accordance with applicable statutes and case law. Cause exists, because of the reduction in particular kinds of services, to reduce the District's teaching positions by 23.5 FTE and to give notice to the affected teachers, pursuant to Education Code section 44955. (*Campbell v. Abbot* (1978) 76 Cal.App.3d 796; *Degener v. Governing Bd.* (1977) 67 Cal.App.3d 689.) The decision to reduce or discontinue the services is neither arbitrary nor capricious but rather a proper exercise of the District's discretion, as set forth in Findings 11-13.

3. Notice may be given to the Respondents listed on Exhibit 1 attached hereto, corresponding to a total of 23.5 FTE positions, that their services will not be required for the 2008-2009 school year. (Findings 1-23.)

4. Notice may not be given to the following Respondents who received layoff notices as a precaution: Paige Adams, Jill Coley, Jennifer Gilmour, Jeffrey Harris, Afarin Kashanian, Keith Rust, Richard Tolfo, Phillip Wagner, Heather Woodring, and Dina Yoseph. The Accusation shall be dismissed as to these Respondents. (Findings 1-23.)

ORDER

Notice may be given to the Respondents listed in Exhibit 1 attached hereto, and corresponding to a total of 23.5 FTE positions, that their services will not be required for the 2008-2009 school year.

Notice may not be given to the following Respondents who received layoff notices as a precaution: Paige Adams, Jill Coley, Jennifer Gilmour, Jeffrey Harris, Afarin Kashanian, Keith Rust, Richard Tolfo, Phillip Wagner, Heather Woodring, and Dina Yoseph. The Accusation is dismissed as to these Respondents.

DATED: May 6, 2008

ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearing

EXHIBIT "1"
TO PROPOSED DECISION
IN OAH CASE NO. 2008030146

<u>Name</u>	<u>FTE Reduction</u>
Barbara Bader	1.0
Danielle Behr	1.0
Dana Berk	0.5
Rebecca Bode	0.6
Ashley Bowles	1.0
Emily Buchen	1.0
Nicole Currie	0.6
Jessica DeZure	1.0
David Foldvary	1.0
Jennifer Gilmour	0.4
Bradley Harris	1.0
Jeffrey Harris	0.6
Preston Joseph	1.0
Mahnaz Kheraj	1.0
Ellen Kwon	1.0
Ryan Lisko	0.6
Jessie Meyen	1.0
Minjung Pai	1.0
Alyssa Para	0.2
Susie Pastor	1.0
Emmanuelle Rousseaux	1.0
Gena Schmidt	1.0
Jennifer Shin	1.0
Maria Stefanopoulos	1.0
David Summers	1.0
Sarah Wolff	1.0
Frances Young	<u>1.0</u>
TOTAL FTE	23.5